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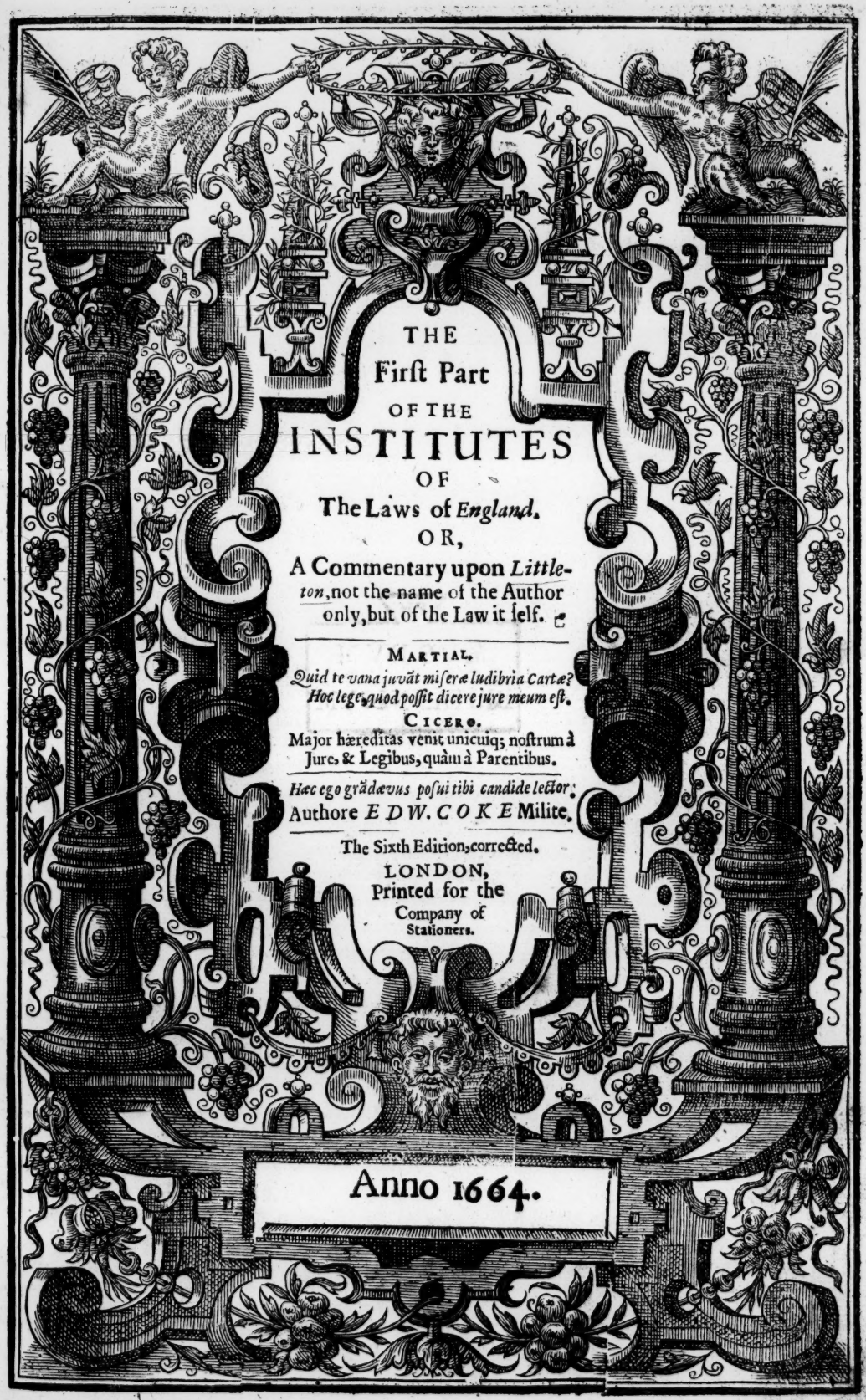

# THE First Part OF THE INSTITUTES OF The Laws of *England*.

OR,

A Commentary upon *Littleton*, not the name of the Author only, but of the Law it self.

MARTIAL.

*Quid te vana juvat miseræ ludibria Cartæ?*
*Hoc lege, quod possit dicere jure meum est.*

CICERO.

Major hæreditas venit unicuiq; nostrum à Jure, & Legibus, quàm à Parentibus.

*Hæc ego grădævus posui tibi candide lector:*
Authore *EDW. COKE* Milite.

The Sixth Edition, corrected.

LONDON,
Printed for the
Company of
Stationers.

Anno 1664.

Anno 1629
PALATIENS. PRVDENS
QVI

15 R 9

# THE First Part OF THE INSTITUTES OF The Laws of *England*.

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*Hoc lege, quod poſſit dicere jure meum eſt.*

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Anno 1664.

K

6

Ex dono Reverendi magistri Willi Babenfeld
dat Anno dni 1666

Deo soli laus et gr quando rationes debitae

FH
MVSEVM
BRITANNICVM

# *DEO,*
# *PATRIÆ,*
# *TIBI.*

## *Proœmium.*

OUr Author, a Gentleman of an ancient and fair descended Family *de Littleton*, took his name of a Town so called, as that famous chief Justice Sir *John de Markham*, and divers of our Profession, and others, have done. The name and degree of our Author.

*Thomas de Littleton*, Lord of Frankley, had issue *Elizabeth* his only child, and did bear the arms of his Ancestors, *viz.* Argent, a Cheuron between three Escalop shels Sable. The bearing hereof is very ancient and honourable, for the Senators of Rome did wear bracelets of Escalop shels about their arms, and the Knights of the Honourable Order of S. *Michael* in France, do wear a coller of Gold in the form of Escalop shels at this day. Hereof much more might be said, but it belongs unto others. His Arms. Instituted by *Lewis* the eleventh, King of France, 9 E. 4. 1469.

With this *Elizabeth* married *Thomas Westcote* Esquire, the Kings servant in Court, a Gentleman anciently descended, who bare Argent, a Bend between two Cotisses Sable, a Bordure engrayled Gules, Bezantie. *Thomas Westcote.*

But she being fair and of a noble spirit, and having large possessions and inheritance from her Ancestors *de Littleton*, and from her mother the daughter and heir of *Richard de Quatermains*, and other her Ancestors, (ready means in time to work her own desire) resolved to continue the honour of her name (as did the daughter and heir of *Charleton* with one of the sons of *Knightly*, and divers others) and therefore prudently, whilst it was in her own power, provided by *Westcotes* assent before marriage, that her issue inheritable should be called by the name of *de Littleton*. These two had issue four sons, *Thomas*, *Nicholas*, *Edmund* and *Guy*, and four daughters.

*Thomas* the eldest was our Author, who bare his fathers Christian name *Thomas*, and his mothers surname *de Littleton*, and the arms *de Littleton* also; and so doth his posterity bear both Name and Arms to this day. Our Author bare his Mothers surname.

*Camden* in his *Britannia* saith thus; *Thomas Littleton*, alias *Westcote*, the famous Lawyer, to whose Treatise of Tenures the Students of the Common Law are no less beholding, than the Civilians to *Iustinians* Institutes. *Camden.*

*Psal.* 92. 11. The just shall flourish like the Palm tree, and spread abroad like the Cedars in Libanus.

The dignity of this fair descended Family *de Littleton*, hath grown up together and spread it self abroad by matches, with many other ancient and honourable Families, to many worthy and fruitful branches, whose posterity flourish at this day, and quartereth many fair Coats, and * enjoyeth fruitful and opulent inheritances thereby. *The best kind of quartering of Arms.

He was of the Inner Temple, and read learnedly upon the Statute of *W.* 2. *De donis conditionalibus*, which we have. He was afterward called *ad ſtatum & gradum Servientis ad Legem*, and was Steward of the Court of the Marſhalſey of the Kings houſhold, and for his worthineſs was made by King *H.* 6. his Serjeant, and rode Juſtice of Aſſiſe the Northern Circuit, which places he held under King *E.* 4. until he in the ſixth year of his reign conſtituted him one of the Judges of the Court of Common Pleas, and then he rode Northamptonſhire Circuit. The ſame King in the 15. year of his reign, with the Prince, and other Nobles and Gentlemen of ancient bloud, honoured him with Knighthood of the Bath.

Kings Serjeant. *Rot. Pat.* 33 *H.* 6. *parte* 1. *M.* 16. *Mich.* 34. *H.* 6. *fol.* 3. a. Judge of the Common Pleas. *Rot. Pat* 6. *E.* 4. *Parte* 1. *M.* 15. Knight of the Bath, 15. *E.* 4.

He compiled this Book when he was Judge, after the fourteenth year of the reign of King *E.* 4. but the certain time we cannot yet attain unto, but (as we conceive) it was not long before his death, becauſe it wanted his laſt hand, for that Tenant by Elegit, Statute Merchant, & Staple, were in the table of the firſt printed Book, and yet he never wrote of them.

When he wrote this Book. 14. *E.* 4 *tit. Garranty* 5. *Litt. Sect.* 692. 729. & 730.

Our Author in compoſing this Work had great furtherance, in that he flouriſhed in the time of many famous and expert Sages of the Law. *a* Sir *Richard Newton*, *b* Sir *John Priſot*, *c* Sir *Robert Danby*, *d* Sir *Thomas Brian*, *e* Sir *Pierce Ardern*, *f* Sir *Richard Choke*, *g* *Walter Moyle*, *h* *William Paſton*, *i* *Robert Danvers*, *k* *William Aſcough*, and other Juſtices of the Court of Common Pleas: And of the Kings Bench, *l* Sir *John June*, *m* Sir *John Hody*, *n* Sir *Iohn Forteſcue*, *o* Sir *Iohn Markham*, *p* Sir *Thomas Billing*, and other excellent ment flouriſhed in his time.

The deceaſes of his Contemporaries. *a* He died 27. *H.* 6. *b* He died 39. *H.* 6. *c* Died 11 *E.* 4. *d* Died 16. *H.* 7 *e* Died 7. *E.* 4. *f* Over-lived our Author. *g* Survived him alſo. *h* Died 23. *H.* 6 *i* Survived our Author. *k* Died 33 *H* 6 *l* Died 18. *H.* 6 *m* Died 20. *H.* 6 *n* Removed 1. *E.* 4. *o* Removed 8. *E.* 4. *p* Died 21. *E.* 4.

And of worldly bleſſings I account it not the leaſt, that in the beginning of my ſtudy of the Lawes of this Realm, the Courts of Juſtice, both of Equity and of Law, were furniſhed with men of excellent Judgement, Gravity, and Wiſdome; As in the Chancery, Sir *Nicholas Bacon*, and after him Sir *Thomas Bromley*. In the Exchequer Chamber, the Lord *Burghley*, Lord high Treaſurer of England, and Sir *Walter Mildmay* Chancellor of the Exchequer. In the Kings Bench, Sir *Chriſtopher Wray*, and after him Sir *Iohn Popham*. In the Common Pleas, Sir *Iames Dyer*, and after him Sir *Edmund Anderſon*. In the Court of Exchequer, Sir *Edward Saunders*, after him Sir *Iohn Iefferey*, and after him Sir *Roger Manwood*, men famous (amongſt many others) in their ſeveral places, and flouriſhed, and were all honoured and preferred by that thrice noble and vertuous Queen *Elizabeth* of ever bleſſed memory. Of theſe reverend Judges, and others their Aſſociates, I muſt ingeniouſly confeſs, that in her reign I learned many things which in theſe Inſtitutes I have publiſhed: And of this Queen I may ſay, that as the Roſe is the queen of flowers, and ſmelleth more ſweetly when it is pluckt from the branch: ſo I may ſay and juſtifie, that ſhe by juſt deſert was the Queen of Queens, and of Kings alſo, for Religion, Piety, Magnanimity, and Juſtice; who now by remembrance thereof, ſince Almighty God gathered her to himſelf, is of greater honour and renown, than when ſhe was living in this world. You cannot queſtion what Roſe I mean; for take the Red or the White, ſhe was, not onely by Royal deſcent, and inherent Birthright, but by Roſial beauty alſo, heir to both.

Queen *Elizabeth.*

And

And though we wish by our labours (which are but *Cunabula Legis*, the cradles of the Law) Delight and Profit to all the Students of the Law, in their beginning of their study, (to whom the first part of the Institutes is intended) yet principally to my loving friends, the Students of the honourable and worthy Societies of the Inner Temple, and Cliffords Inne, and of Lions Inne also, where I was sometime Reader. And yet of them more particularly to such as have been of that famous University of Cambridge, *Alma mea mater*. And to my much honoured & beloved Allies and Friends of the Counties of Norfolk, my dear and native Country; and to Suffolk, where I passed my middle age; and of Buckinghamshire, where in my old age I live. In which Counties, we out of former Collections compiled these Institutes. But now return we again to our Author.

Inner Temple
Cliffords Inne.
Lions Inne.

He married with *Johan* one of the daughters and coheirs of *William Burley* of Broomscroft Castle in the County of Salop, a Gentleman of ancient descent, and bare the Arms of his Family, Argent, a Fess Checkie Or and Azure, upon a Lion Rampant Sable, armed Gules. And by her had three sons, Sir *William*, *Richard* the Lawyer, and *Thomas*.

His marriage.

His issue.

In his life time, he, as a loving Father and a wise man, provided matches for these three sons, in vertuous and ancient Families, that is to say, for his son Sir *William*, *Ellen* Daughter and Coheir of *Thomas Welsh* Esquire, who by her had issue *Johan* his only child, married to Sir *John Aston* of Tixall, Knight: And for the second wife of Sir *William*, *Mary* the Daughter of *William Whittington* Esquire, whose posterity in Worcestershire, flourish to this day. For *Richard Littleton* his second son, to whom he gave good possessions of inheritance, *Alice* daughter and heir of *William Winsbury* of Pilleton-Hall in the County of Stafford, Esquire, whose posterity prosper in Staffordshire to this day. And for *Thomas* his third son, to whom he gave good possessions of inheritance, *Anne* daughter and heir of *John Botreaux* Esquire, whose posterity in Shropshire continue prosperously to this day. Thus advanced he his posterity, and his posterity by imitation of his Vertues, have honoured him.

The establishment of his posterity, by the matches of his three sons, with Vertue and good Bloud.

He gave possessions of inheritance to his younger sons, for their better advancement.

He made his last Will and Testament thee 22 day of August, in the 21. year of the reign of King *Edward* the fourth, whereof he made his three sons, a Parson, a Vicar, & a servant of his Executors; & constituted Supervisor thereof, his true & faithful friend *John Alcock* Doctor of Law, of the famous University of Cambridge, then Bishop of Worcester, a man of singular Piety, Devotion, Chastity, Temperance, and holiness of life, who amongst other of his pious and Charitable works, founded Jesus College in Cambridge; a fit and a fast friend to our honourable & vertuous Judge.

His last Will.

His Executors
His Supervisor

He left this life in his great and good age, on the 23. day of the month of August, in the said 21. year of the reign of King *Edward* the fourth: For it is observed for a special blessing of Almighty God, that few or none of that profession die *Intestatus & improles*, without Will, & without Child; which last Will was proved the 8. of November following, in the Prerogative Court of Canterbury, for that he had *Bona notabilia* in divers Dioceses. But yet our Author liveth still *in ore omnium juris prudentium*.

His age.
His departure

*Littleton* is named in 1. *H.* 7. and in 21. *H.* 7. Some do hold, that it is no error

1. *H.* 7. *fol.* 27.
21. *H.* 7. *fol.* 32. *b.*

error either in the Reporter or Printer; but that it was *Richard* the ſon of our Author, who in thoſe days profeſſed the Law, and had read upon the ſtatute of *W.* 2. *quia multi per malitiam*, and * unto whom his Father dedicated his Book; And this *Richard* died at Pilleton Hall in Staffordſhire, in *9 H.* 8.

*W.* 2. *cap.* 12.
* See *Littleton Sect.* 749.

His Sepulchre

The body of our Author is honourably interred in the Cathedral Church of Worceſter, under a fair Tomb of Marble, with his ſtatue or portraiture upon it, together with his own match, and the matches of ſome of his Anceſtors, and with a memorial of his principal titles, and out of the mouth of his ſtatue proceedeth this prayer, *Fili Dei miſerere mei*, which he himſelf cauſed to be made and finiſhed in his life time, and remaineth to this day. His wife *Iohan*, Lady *Littleton*, ſurvived him, and left a great inheritance of her Father, and *Ellen* her Mother, daughter and heir of *Iohn Grendon* Eſquire, and other her Anceſtors, to Sir *William Littleton* her ſon.

When this Work was publiſhed.

This Work was not publiſhed in print, either by our Author himſelf, or *Richard* his ſon, or any other, until after the deceaſes both of our Author, and of *Richard* his ſon. For I find it not cited in any Book or Report, before Sir *Anthony Fitzherbert* cited him in his *Natura Brevium*; who publiſhed that Book of his *Natura Brevium* in 26. *H.* 8. Which Work of our Author, in reſpect of the excellency thereof, by all probability ſhould have been cited in the Reports of the Reigns of *E.* 5. *R.* 3. *H.* 7. or *H.* 8. or by *S. Iermyn* in his Book of the Doctor and Student, which he publiſhed in the three and twentieth year of *H.* 8. if in thoſe days our Authors Book had been printed. And yet you ſhall obſerve, That Time doth ever give greater authority to Works and Writings that are of great and profound learning, than at the firſt they had.

*F. N. B.* 212. *c.*

*Nota.*

When this Work was firſt imprinted.

The firſt impreſſion that I find of our Authors Book was at Roan in France by *William le Tailier* (for that it was written in French) *Ad inſtantiam Richardi Pinſon*, at the inſtance of *Richard Pinſon* the Printer of King *H.* 8. before the ſaid Book of *Natura Brevium* was publiſhed; and therefore upon theſe and other things that we have ſeen, we are of opinion, that it was firſt printed about the four and twentieth year of the Reign of King *H.* 8. ſince which time he hath been commonly cited, and (as he deſerves) more and more highly eſteemed.

His Picture.

He that is deſirous to ſee his Picture, may in the Churches of Frankley and Hales Owen, ſee the grave and reverend countenance of our Author, the outward man, but he hath left this Book, as a figure of that higher and nobler part, that is, of the excellent and rare endowments of his mind, eſpecially in the profound knowledge of the fundamental Laws of this Realm. He that diligently reads this his excellent Work, ſhall behold the child and figure of his mind, which the more often he beholds in the viſial line, and well obſerves him, the more ſhall he juſtly admire the judgement of our Author, and increaſe his own. This only is deſired, that he had written of other parts of the Law, and ſpecially of the rules of good pleading (the heart-ſtring of the Common Law) wherein he excelled: for of him might the ſaying of our Engliſh Poet be verified,

The figure of his Mind.

*Thereto he could indite and maken a thing,*
*There was no Wight could pinch at his writing.*

*Chaucer.*

So

So far from exception, as none could pinch at it. This ſkill of good pleading, he highly in this Work commended to his Son, and under his name to all other Students ſons of his Law. He was learned alſo in that Art, which is ſo neceſſary to a compleat Lawyer, I mean Logick, as you ſhall perceive by reading of theſe Inſtitutes, wherein are obſerved his Syllogiſomes, Inductions, and other Arguments; and his Definitions, Deſcriptions, Diviſions, Etymologies, Derivations, Significations, and the like. Certain it is, that when a great learned man (who is long in making) dieth, much learning dieth with him.

Good pleading.

Logick.

*Seneca.*

That which we have formerly written, that this Book is the ornament of the Common Law, and the moſt perfect and abſolute Work that ever was written in any humane Science; and in another place, that which I affirmed and took upon me to maintain againſt all oppoſites, whatſoever, that it is a Work of as abſolute perfection in his kind, and as free from error, as any Book that I have known to be written of any humane learning, ſhall to the diligent and obſerving Reader of theſe Inſtitutes be made manifeſt, and we by them (which is but a Commentary upon him) be deemed to have fully ſatisfied that, which we in former times have ſo confidently affirmed and aſſumed. His greateſt commendation, becauſe it is of greateſt profit to us, is, that by this excellent Work, which he had ſtudiouſly learned of others, he faithfully taught all the Profeſſors of the Law in ſucceeding ages. The victory is not great to overthrow his oppoſites, for there never was any learned man in the Law, that underſtood our Author, but concurred with me in his commendation: *Habet enim juſtam venerationem quicquid excellit*; For whatſoever excelleth hath juſt honour due to it. Such as in words have endeavoured to offer him diſgrace, never underſtood him, and therefore we leave them in their ignorance, and wiſh that by theſe our Labours they may know the truth and be converted. But herein we will proceed no further: For, *Stultum eſt abſurdas opiniones accuratius refellere.* It is meer folly to confute abſurd opinions with too much curioſity.

The commendation of his Work. *Lib 2. fol. 67. Epiſt. 10. li. 10.*

*Cicero.*

*Ariſtotle.*

And albeit our Author in his three Books cites not many authorities, yet he holdeth no opinion in any of them, but is proved and approved by theſe two faithful witneſſes in matter of Law, Authority and Reaſon. Certain it is, when he raiſeth any queſtion, and ſheweth the Reaſon on both ſides, the latter opinion is his own and is conſonant to Law. We have known many of his Caſes drawn in queſtion, but never could find any judgement given againſt any of them, which we cannot affirm of any other Book or Edition of our Law. In the reign of our late Sovereigne Lord King *James* of famous and ever bleſſed memory, it came in queſtion upon a demurrer in Law, whether the releaſe to one treſpaſſer ſhould be available or no to his companion, Sir *Henry Hobart* that honorable Judge, and great Sage of the Law, and thoſe reverend and learned Judges, *Warburton*, *Winch*, and *Nichols*, his companions gave judgement according to the opinion of our Author, and openly ſaid, That they owed ſo great reverence to *Littleton*, as they would not have his Caſe diſputed or queſtioned: and the like you may find in this part of the

Note.

Mich. 3. Jac. in Communi Banc. inter Cock and Honours.

the Inſtitutes. Thus much (though not ſo much as his due) have we ſpoken of him; both to ſet out his Life, becauſe he is our Authour, and for the imitation of him by others of our Profeſſion.

What is endeavoured by theſe Inſtitutes

We have in theſe Inſtitutes endeavored to open the true ſenſe of every of his particular Caſes, and the extent of every of the ſame, either in expreſs words, or by implication, and where any of them are altered by any latter Act of Parliament to obſerve the ſame, and wherein the alteration conſiſteth: certain it is, that there is never a period, nor (for the moſt part) a word, nor an &c. but affordeth excellent matter of learning. But the Module of a Preface cannot expreſs the obſervations that are made in this Work, of the deep Judgement, and notable Invention of our Author. We have by compariſon of the late and modern Impreſſions with the originall print, vindicated our Author from two injuries; Firſt, from divers corruptions in the late and modern prints, and reſtored our Author to his own: Secondly, from all additions, and encroachments upon him, that nothing might appear in his Work but his own.

The benefit of theſe Inſtitutes

Our hope is, that the young Student, who heretofore meeting at the firſt and wraſtling with as difficult terms and matter, as in many years after was at the firſt diſcouraged as many have been; may by reading theſe Inſtitutes, have the difficulty and darkneſſe both of the Matter, and of the Terms & Words of Art in the beginnings of his ſtudy facilitated & explained unto him, to the end he may proceed in his ſtudy cheerfully, and with delight; and therefore I have termed them Inſtitutes, becauſe my deſire is, they ſhould inſtitute and inſtruct the ſtudious, and guide him in a ready way to the knowledge of the Nationall Lawes of *England*.

Wherefore called Inſtitutes.

Wherefore publiſhed in Engliſh.

This part we have (and not without Preſident) publiſhed in Engliſh, for that they are an introduction to the knowledg of the national Laws of the Realm; a Work neceſſary, and yet heretofore not undertaken by any, albeit in all other Profeſſions there are the like. We have left our Author to ſpeak his own language, & have tranſlated him into Engliſh, to the end that any of the Nobility, or Gentry of this Realm, or of any other eſtate or profeſſion whatſoever, that wil be pleaſed to read him & theſe Inſtitutes, may underſtand the language, wherein they are written.

*Regula.*

I cannot conjecture, that the generall communicating of theſe Laws in the Engliſh tongue can work any inconvenience, but introduce great profit, ſeeing that *Ignorantia Juris non excuſat*, Ignorance of the Law excuſeth not. And herein I am juſtified by the wiſdome of a Parliament; the words whereof be, *That the Laws and Cuſtomes of this Realm the rather ſhould be reaſonably perceived and known, and better underſtood by the tongue uſed in this Realm. and by ſo much every man might the better govern himſelfe without offending of the Law, and the better keep, ſave, and defend his heritage and poſſeſſions. And in divers Regions and Countries, where the King, the Nobles, and other of the ſaid Realm have been, good governance and full right is done to every man, becauſe that the Lawes and Cuſtomes be learned and uſed in the Tongue of the Countrey:* as more at large by the ſaid act, and the purview thereof may appe ar : *Et neminem oportet eſſe ſapientiorem Legibus*, No man ought to be wiſer then the Law.

36. E. 3. cap. 5.

*Regula.*

And

And true it is that our Books of Reports and Statutes, in ancient times were written in ſuch French as in thoſe times was commonly ſpoken and written by the French themſelves. But this kind of French that our Author hath uſed, is moſt commonly written and read, and very rarely ſpoken, and therefore cannot be either pure, or well pronounced. Yet the change thereof (having been ſo long accuſtomed) ſhould be without any profit, but not without great danger and difficulty: For ſo many ancient Terms and words drawn from that legal French, are grown to be *Vocabula artis*, Vocables of Art, ſo apt and ſignificant to expreſs the true ſenſe of the Laws, and are ſo woven into the lawes themſelves, as it is in a manner impoſſible to change them, neither ought legal terms to be changed.

Our Authors kinde of French.

36. E. 3. ubi ſupr.

In School Divinity, and amongſt the Gloſſographers and Interpreters of the Civil and Canon Laws, in Logick, and in other liberal Sciences, you ſhall meet with a whole Army of words, which cannot defend themſelves *in Bello Grammaticali*, in the Grammatical War, and yet are more ſignificant, compendious, and effectual to expreſs the true ſenſe of the matter, than if they were expreſſed in pure Latine.

This Work we have called The firſt part of the Inſtitutes, for two cauſes: Firſt, for that our Author is the firſt Book that our Student taketh in hand. Secondly, for that there are ſome other parts of Inſtitutes not yet publiſhed, (*viz.*) The ſecond part being a Commentary upon the Statute of *Magna Charta*, *Weſtm.* 1. and other old Statutes. The third Part treateth of Criminal cauſes and Pleas of the Crown: which three parts we have by the goodneſs of Almighty God, already finiſhed. The fourth Part we have purpoſed to be of the Juriſdiction of Courts; but hereof we have onely collected ſome materials towards the raiſing of ſo great and honourable a Building. We have by the goodneſs and aſſiſtance of Almighty God brought this twelfth Work to an end: In the eleven Books of our *Reports* we have related the opinions and judgements of others; but herein we have ſet down our own.

Wherefore called the firſt part.

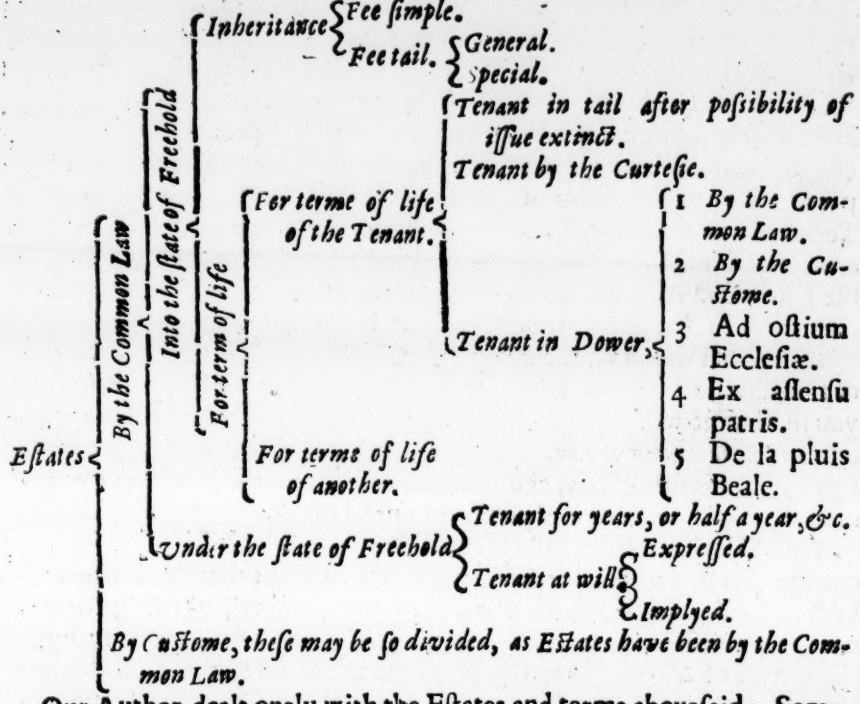
Before I entred into any of theſe Parts of our Inſtitutes, I acknowledging mine own weakneſs and want of judgement to undertake ſo great Works, directed my humble Suit and Prayer to the Author of all Goodneſs and Wiſdome, out of the Book of *Wiſdome*; *Pater & Deus miſericordiæ, da mihi ſedium tuarum aſſiſtricem ſapientiam, mitte eam de Cœlis ſanctis tuis & a ſede magnitudinis tuæ, ut mecum ſit & mecum laboret, ut ſciam quid acceptum ſit apud te*; Oh Father and God of mercy, give me wiſdome, the Aſſiſtant of thy ſeats; Oh, ſend her out of thy holy Heavens, and from the ſeat of thy Greatneſs, that ſhe may be preſent with me, and labour with me, that I may know what is pleaſing unto thee. *Amen.*

Lib. Sap. ca. 9. Verſ. 4, 10.

Our Author hath divided his whole Work into three Books: In his firſt he hath divided Eſtates in Lands and Tenements, in this manner; For *Res per diviſionem melius aperiuntur.*

Bracton.

## *A Figure of the division of Possessions.*




Our Author dealt onely with the Estates and terms aboveſaid; Somewhat We ſhall ſpeak of Eſtates by force of certain Statutes, as of Statute Merchant, Statute Staple, and *Elegit*, (whereof our Author intended to have written) and likewiſe to Executors to whom lands are deviſed for payment of debts, and the like.

*Regula. Incivile eſt, parte una perſpecta, totam re non cognita, de ea judicare.*

I ſhall deſire, that the learned Reader will not conceive any opinion againſt any part of this painful and large Volume, until he ſhall have adviſedly read over the whole, and diligently ſearched out and well conſidered of the ſeveral Authorities, Proofs, and Reaſons which we have cited and ſet down for warrant and confirmation of our opinions throughout this whole work.

Mine advice to the Student is, That before he read any part of our Commentaries upon any Section, that firſt he read again and again our Author himſelf in that *Section*, and do his beſt endeavours, firſt of himſelf, and then by conference with others, (which is the life of *Study*) to underſtand it, and then to read our Commentary thereupon, and no more at any one time, than he is able with delight to bear away, and after to meditate thereon, which is the life of reading. But of this Argument we have for the better direction of our *Student* in his *Study*, ſpoken in our Epiſtle to our firſt Book of *Reports*.

And albeit the Reader ſhall not at any one day (do what he can) reach to the meaning of our Author, or of our Commentaries, yet let him no way diſcourage himſelf, but proceed; for on ſome other day, in ſome other place, that doubt will be cleared. Our labours herein are drawn out to this great Volume, for that our Author is twice repeated, once in French, and again in Engliſh.

# ERRATA.

*The Reader is desired to take notice, That this Errata is gathered by the best corrected Copies extant; and that former Impressions may be amended by the same; there having not been an Errata printed with any Impression since the first, although sundry Faults have escaped in each: And farther observe, That* a *denotes the first, and* b *the second page of the Leaf where the Error is.*

FOlio 2 b. line 37. read *per Antiphrasin.* f.3 a.l.59.r.right Heirs. f.4 a.l.11.r.it includeth. f.5 b l.59.r.by the same name by way. f.6 b.l.6.r.be a witness. l.7.r.be no witness. l.36.r.of Law. l.51.r.Deed. f.10 b.l.27.r. made to *A.* f.11 a l.1.r.son. f.13 a.l.11.r.Vouchee. f.14 b.l.12.r. to the Heirs. f.18 b.l.17.r. title vested. f.20 a.l.12.r.within. f.22 b.l.47.r.or a Lease. f.24 b.l.34.r.heirs males. f.25 a.l.18.r.whosoever. f.30 b.l.18.r.shall not. f.31 a.l.20.r.consummation. f.32 a.l.58.r.any divorce. b.l.3.r. *avowrer*, this is a departure, and a tarrying, albeit she remaineth not continually with the *avowrer*. f.33 a.l.3.r.But in. l.5.r.but the. f.46 a l.40.r.in of the state. f.48 a.l.32.r.this is a good. f.49 a.l.11.r.in by the. f.52 a.l.36.r.not enter. f.54 a.l.6.r.shall not. f.69 a.l.36. r.*Census*. f.71 b.l.21.r.should have. f.74 a.l.*antepenult*.r.of the dead. f.76 a l.29.r.not only. f.78 b l.22.r.at eighteen. l.38.r.tender. l.55.r.posteriority. f.94 a.l.59.r.*jubeat largiri*. f.102 a.l.5.r.but of. f.114 a.l.39 r.as forfeited. f.120 a.l.51.r.otherwise. f.121 b.l.16.r.by Livery. f.122 a.l.*penult*.r.he claim. f.126 a.l.46.r.was enseint. f.130 a. l.9.r.in that case. l.33.r.*nolumus*. l.39. *dele* his. f.131 a.l.*penult*.r.in that case. b.l.14.r.as are. l.46.r.him and his. f.132 a.l.23.r.Friers. l.56.r.an assise. f.139 b.l.30.r.Covenant. f.149 a.l.11.r.common of. l.46.r.is not sufficient. b.l.9.r.and valuable. f.153 b.l.31.r.nor any. l.45.r.**case nest autter**. f.156 b.l.37.r.or default. f.157 a.l.5.r.insufficiency. f.158 a.l.29.r.Array of. f.160 a.l.33.r.this his Writ. f.161 a.l.22.r.of his distress. l.42.r.be any. f.162 b. l.35.r.shall have an action of debt against. f.164 a.l.11.r.nonage. l.32.r.and yet when. f.165 a.l.40.r.*Fines* Lord *Dacre*. b.l.7.r.Mannor. f.166 a.l.10.r.Fee simple. f.167 b.l.11.r.of the Coparcenary, and several Writs of *Præcipe* shall lie against the other Coparcener and the Feoffee. l.*ult*.r.*Judicium*. f.168 b.l.11.r.*sua sine testibus*. f.172 b. l.34.r.her right. f.173 a.l.1.r.had made. b.l.*penult*.r.entry. f.179 b.l.29.r.appropriated to. f.180 a.l.27.r.ent enfeoffe. b.l.15.r.sole. f.181 a.l.1.*dele* it. b.l.11.r.issue. f.182 b.l.6.r.distinct. f.183 b.l.7.r.dones. f.185 b.l.11.r.priority. f.187 b.l.23.r.Charter. f.192 b.l.30.r.**que clluy**. f.197 a.l.42. r.20 shillings. f.203 a. l.5. r. perception. f.209 a.l.12.r.to infeoffe. f.217 b.l.35.r. 10. Ass. 44. 43. Ass. f.221 b.l.38. & 42.r.Feoffor. f.226 b.l.58.r.special. f.238 a.l.26.r.whereof. b.l.28.r.to be. f.239 a.l.11.r.*de Abbate in Abbatem*. f.243 a.l.29.r.*Indicavit*. f.245 a.l.18. r.name of. f.260 b l.22.r.by the Law in the. f.266 a.l.21.r.propriety. f.270 a.l.18.r.For. b.l.3.r.to two. f.274 b. l.15.r.Grant. f.294 b.l.45.r.no other. f.303 a.l.47.r. ought not. f.316 a.l.28.r.waste in that case. f.317 a.l.21.r. reservant. f.320 b.l.56.r.brought by him. f.322 b.l.19.r.shall have. f.324 b l.35.r.do the rents. f.325 a. 33.r. to be done. f.328 a.l.30.r.pass thereby. f.331 a.l.22.r.no other estate. l.28.*dele* in. b.l.43.r.loseth by. f.360 b l.12.r. and albeit. l.21.r.the Freehold. f.333 b.l.52.r.if Tenant in tail had granted the Reversion to the use of another and his Heirs. If Tenant in tail maketh. f.334 a.l.24.r.had. f.338 a.l.*penult*.r. is by the. b.l.14.r.is to become. l.29.r.As if. f.339 a.l.40.r.**Sans Garranty**. f.340 b.l.34.r.is not in. f.341 b.l.42.r.entire fee.r.343 b.l.54.r.or his. l.*ult*.r.by the ordinance. f.344 b.l.1.r.had been had. f.346 a.l.*ult*.r.the Dean. f.347 a.l.32.r.to the. f.348 a.l.44. r.die seised. b.l.10.r.is his. l.22.r.descending. f.349 a.l.18.r.for life. b.l.16.r.recoveror. l.39.r.it were. f.350 a. l.21.r.but for. f.253 b.l.24.r.she. f.355 b.l.12.r.counteth. f.356 a.l.13.r.is not now. f.357 a.l.20.r.wife and the. b.l.32.r.she.f.361 b.l.3.r.thereof.l.*ult*.r.plead the matter. f.362 b.l.31.r.general and particular, a general. f.367 a.l.52.r.Ancestor ot. f.368 b.l.39.r.this crime. l.58.r.an offence. l.52.r.Disseisor. f.372 a.l.28.r.and it is. f.376 b. l.37.r.**cigne entre**. f.383 b.l.47.r.*in se*. f.385 b.l.20.r. heirs. But if he had warranted the Land to the Feoffee, the Warranty had not extended to his Heirs. f.386 a. l.21.after [*Law*] r. albeit the Ancestor was not bounden, and shall bind his Heirs also to Warranty, although. f.391 a.l.12.r.convicted of the Felony, whereby it appeareth, that the Goods may be seised as forfeit after conviction. f.392 b.l.43.r.manners.

# THE FIRST PART of the Institutes of the Lawes of *England*.

## Chap. 1. *Fee simple.* Sect. 1.

Enant in fee simple est celuy qui ad tres ou tenements a tener a luy & a ses heires a touts iours. Et est appel en Latin, Feodum simplex, quia feodum idē est quod hæreditas, & simplex idē est quod legitimū vel purum, & sic feodū simplex idem est quod hæreditas legitima vel hæreditas pura. Car si home voile purchaser terres ou Tenements en Fee simple, il covient de auer ceux parole en son purchase, A auer & tener a luy & a ses hées: Car ceux parolx (ses heires) font lestate de heritance. Car si home

Enant in Fee simple is hee which hath Lands or Tenements to hold to him and his heirs for ever. And it is called in Latine, *Foedum simplex*, for *Foedum* is the same that Inheritance is, and *Simplex* is as much to say, as lawful or pure. And so *foedum simplex* signifies a lawfull or pure inheritance. For if a man would purchase lands or tenements in fee simple, it behoveth him to have these words in his purchase; To have and to hold to him and to his Heires: for these words (his Heires) make the Estate of the Inheritance. For if a man pur-

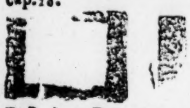
*Tenant*

In Latine Tenens is derived of the verb Teneo, and hath in the Law five significations, 1. It signifies the estate of the Land, as when the Tenant in a Præcipe of land pleads, Quod non tenet, &c. this is as much as to say, That he hath not seisin of the Freehold of the Land in question. And in this sense doth our Author take it in this place: & therefore he saith, tenant in fee simple is he which hath lands to hold to him & his heires. 2. It signifieth the Tenure or the service whereby the lands and tenements have been holden, and in this sense it is said in the Statute of Magn. Quæ clamant tenere de se per liberum servitium, &c. And in this signification he is called a Tenant or holden, because all the lands & tenements in England in the hands of subjects are holden mediately or immediately of

Vide Sect. 5.

8 H. 7. 12. 17 E. 3. 35. 24 E. 3. 65. 66. 44 E. 3. 33. 48 E. 3. 9.

Mir. des Iuſtic. c.1. ſect.3. Cuſtomes de Normandy, cap.28.



Raſt. de 16 R.2. cap.5. 14. 15. Dy.313.2. Lib.1 47. in Alton Woods caſe.

Tract.lib. cap.8.

Brit.fo.83.207.208. Fleta lib.5.cap.5:& lib.3. cap.8. Bract.lib. 4.263. Domeſday. Mir.des Iuſt.ca.2. Sect.15.17. Bract.l.2.c.5.6.7. Brit.cap.34.fol.89. Flet.lib.3. cap.2.8.& 9. & lib.5.cap.5. (a) Bract.f.163. & 207. Pl. Com.in Wall.caſ.7. H.4.46. 8 H.4.15.18 H.8.3. b.27. as. 33.18. Aſſ.3. 18 E.2.46.24 E. 3.28. 9 E.4.18. 16 H.7.4. 16 E.3. Account 56. 22. R.2. Diſc.50. 12. E.4.3. 15 E.4.8. Dy.8. El.252.253. 12 H.8.8. 4 H.7.2. The caſe of a perſon which hath a qualified fee. See in the title of Deſc. (a) Vide Sect.4. (b) Bract.l.4.f.263. Flet.l.5. c.5. Brit. fo. 205.207. (c) 2.Aſſ.p.4.12. Aſſ.38.12 E.3. tit. Hors de ſon fee. 28.28. Aſſ.41.7 H.4.30. 2 H.6.1.

Rot.par. 13 E.1.

of the King. For in the law of England we have not properly, Allodium, That is, any Subjects Land that is not holden, unleſs you will take Allodium for Ex ſolido, as it is often taken in the book of Domeſday: & tenants in Fee ſimple are there called Alodarii or Aloarii. And he is called a Tenant, becauſe he holdeth of ſome ſuperior Lord by ſome ſervice. And therefore the King in this ſenſe cannot be ſaid to be a Tenant, becauſe he hath no ſuperior but God Almighty; Prædium dominî regis eſt directum dominium, cujus nullus Author eſt niſi Deus. And as Bracton ſaith, Omnis quidem ſub eo, & ipſe ſub nullo, niſi tantum ſub Deo. The poſſeſſions of the King are called Sacra patrimonia, and Dominica Coronæ Regis. But though a Subject hath not properly Directum, yet hath he Utile dominium. Of theſe Tenants our Author ſpeaketh in his ſecond Book. Alſo Tenere ſignifieth performance, as in the Writ of Covenant, Quod teneat conventionem, that is, That he hold or perform his Covenant. And likewiſe it ſignifieth to be bound as it is ſaid in every common Obligation, teneri & firmiter obligari. Laſtly, It ſignifieth to deem or judg, as in 38 E.3.c.4. It ſhall be holden for none (that is) judged or deemed for none, & ſo we commonly ſay, it is holden in our books. And theſe ſeveral ſignifications do properly belong to our Tenant in Fee ſimple. For he hath the eſtate of the Land, he holdeth the land of ſome ſuperiour Lord, and is to perform the ſervices due, & thereunto he is bounden by doom & judgment of Law. Of the ſeveral eſtates of Land our Author treateth in his firſt book & beginneth with Fee ſimple, becauſe all other eſtates & intereſts are derived out of the ſame.

purchaſe terres per ceur paroir, I aver & tener a luy a touts jours: ou ptiels parols, A aver & tener a luy & a ſes aſſignes a touts joures: en ceur deux caſes il ny ad eſtate forſque pur terme de vie, pur ceo que il fault ceur pols (ſes heires) les queux paroir tantſolement font leſtate denheritance eu touts feoffments & Grants,

chaſe Lands by theſe words, To have and to hold to him for ever; or by theſe words, To have and to hold to him and his Aſſignes for ever: in theſe two caſes he hath but an eſtate for terme of life, for that there lack theſe words (his Heires) which words onely make an Eſtate of Inheritance in all Feoffments and Grants.

¶ *Fee ſimple*, Fee cometh of the French Fief, (i) p ædium beneficiarium, and legally ſignifieth Inheritance, as our Author himſelf hereafter expoundeth it. And Simple is added for that is deſcendible to his heirs generally, that is, ſimply, without reſtraint to the heirs of his body, or the like. Feodum eſt quod quis tenet ex quacunque cauſa, ſive ſit tenementum, ſive reddit us, &c. In Domeſday it is called Feudum. (a) Of Fee ſimple, it is commonly holden, that there be three kinds, viz. Fee ſimple abſolute, Fee ſimple conditional, & Fee ſimple qualified, or a baſe fee. But the more genuine and apt diviſion, were to divide Fee, that is, Inheritance, into three parts, viz. Simple or abſolute, Conditional, and qualified or baſe. For this word (Simple) properly excludeth both conditions and limitations, that defeat or abridg the fee. Hereby it appeareth, that Fee in our legal underſtanding ſignifieth, that the land belongs to us and our heirs, in reſpect whereof the owner is ſaid to be ſeiſed in fee and in this ſenſe the King is ſaid to be ſeiſed in fee. (b) It is alſo taken, as it is holden of another by ſervice, & that belongeth onely to the Subject; Item dicitur feodum alio modo ejus qui alium feoffat & qui tenet ab alio, ut ſi ſit qui dicat, talis tenet de me tot feoda per ſervitium militare. And Fleta ſaith, Poterit unus tenere in feodo quoad ſervitia, ſicut dominus capitalis, & non in Dominico alius in feodo & dominico, & non in ſervitio, ſicut libere tenens alicujus. (c) And therefore if a ſtranger claim a Seigniory, and diſtrein, and avow for the ſervice, the Tenant may plead, That the tenancy is extra feodum, &c. of him (that is) out of the Seigniory, or not holden of him & claimeth it, but he cannot plead Hors de ſon fee, unleſs he take the tenancy, that is, the ſtate of the Land upon him. Of fee in the firſt ſenſe our Author treateth in this firſt book; and as it is taken in the ſecond ſenſe, in his ſecond book: and of the third you ſhall read in our Author, Sect.13,643,644,645. and plentifully in our books quoted in the margent.

¶ *Terres ou Tenements*. Here is to be obſerved, That a man may have a Fee ſimple in three kinds of hereditaments, viz. Real, Perſonal, and Mixt: Real, as Lands and Tenements, whereof our Author here ſpeaketh: Perſonal, King Edward the firſt in the thirteenth year of his Reign, Conceſſit Edmundo fratri ſuo chariſſimo, quod ipſe & hæredes ſui habeant ad requiſitionem ſuam in Cancellar a noſtra & hæredum noſtrorum Juſticiarios

ciarios ad placita foreſtarum quas idem Frater noſter habet ex dono domini Regis Henrici patris noſtri ſecundum aſſiſ. foreſtæ tenend. &c. **In this caſe the grantee and his heirs had a perſonall inheritance in making of a requeſt to have Letters patents of Commiſſion to have Juſtices aſſigned to him to hear and determine of the pleas of the forreſts, and concerneth neither lands or tenements. And ſo it is if an Auntly be granted to a man and his heirs, It is a fee ſimple perſonal,** & ſic de ſimilibus. **And laſtly, hereditaments mixt both of the reality and perſonalty. As the Abbot of Whitby in the County of York having a forreſt of the gift of** William of Percey **founder of that Abby, and by the Charters of King John and of other his progenitors, King** Henry **the third did grant** Abbati & conventui de Whitbye quod ipſi & eorum ſucceſſores in perpetuum habeant viridarios ſuos proprios de libertate ſua de Whitb. eligend. de cætero in pleno com. Eborum prout moris eſt ad reſponſiones & præſentationes, faciend. de tranſgreſſionibus q as a modo fieri contiget de venatione infra metas foreſtæ ſuæ de Whitbye, quam habent ex donatione Will. de Percey, & Alaui de Percey, filii ejus, & redditione & conceſſione domini Johan. quondam regis Angliæ patris noſtri & confirmatione noſtra coram Iuſtitiariis noſtris itinerantibus ad placita foreſtæ in partibus illis & non alibi, ſicut viridarii foreſtæ noſtræ hujuſmodi reſponſiones & præſentationes facere debent, & conſueverunt. Et ſi contingat aliquos forinſecos qui non ſunt de libertate prædictorum Abbatis & conventus tranſgreſſionem facere de venatione infra metas foreſtæ prædictæ quos prædicti viridarii attachiare non poſſunt: Volumus & concedimus pro nobis & hæredibus noſtris quod hujuſmodi tranſgreſſores per Iuſtitiarios foreſtæ noſtræ ultra Trentam attachientur ad præſentationē viridariorū prædict. ad reſpondendum inde coram Juſtitiariis noſtris itinerantibus ad placita foreſtæ noſtræ in partibus illis cum ibid. ad placitandum venerint prout ſecundū aſſiſam & conſuetudinem foreſtæ fuerint faciend. **Which Charter was pleaded upon the Claim made by Abbot of Whitbye before Willoughby, Hungerford, and Hanbury, Juſtices in Eire in the forreſt of Pickering, which Eire began Anno 8 E. 3. And theſe before them were allowed. And when the King createth an Earle of ſuch a county or other place, To hold that dignity to him and his heirs, This dignity is perſonall, and alſo concerneth lands and tenements. But of this matter more ſhall be ſaid in the next Chapter, Sect. 14. & 15.**

Ro. Par. an. 47 H. 3. Itin. Pickering. 8. 8. 3. Ro. 42.

¶ *Et eſt appel en Latine feodum ſimplex, quia feod. idem eſt, quod hæreditas.* **Here Littleton himſelf teacheth the ſignification of Feodum, according to that which hath been ſaid, which only is to be applied to fee ſimple pure and abſolute. And this and all his other interpretations of words and Etymologies throughout all his three bookes (wherein the ſtudious Reader will obſerve many) are perſpicuous, and ever** per notiora & nunquam ignotum per ignotius, **and are moſt neceſſary, for** ignoratis terminis ignoratur & ars.

Bract. lib. cap. 9. fo. 263 Brit. ca. 32. & 79. For interpretation of words and Etymologies. Vid. Sect. 9, 18, 95, 116, 119, 135, 1549 164, 174918 185, 194920 4, 224926 7, 266 333 2337 424 5103 592, 645, 6893733.

¶ *Simplex idem eſt, quod legitimum vel purum*, **hereof he treateth onely in this place. And** Litt. **ſaith well, that** Simplex **idem eſt quod purum.** Simplex enim dicitur quia ſine plicis & purum dicitur, quod eſt merum & ſolum ſine additione. Simplex donatio & pura eſt ubi nulla addita eſt conditio ſive modus ſimplex enim datur quod nullo additamento datur.

Bract. lib. 2. ca. 39. fo. 92. 62. b. lib. 4. ca. 28. Fleta lib. 3. ca. 8. Bract. lib. 2. ca. 5. &c. Britt. ca. 34.

¶ *Hæreditas legitima vel hæreditas pura.* **And therefore it is well ſaid,** quod donationum alia ſimplex & pura, quæ nullo jure civili uel naturali cogente, nullo præcedente metu vel intervenīte ex mera gratuitaque libertate donantis procedit, & ubi nullo caſu velit donatur ad ſe reverti quod dedit, alia ſub modo conditione vel ob cauſam, in quibus caſibus non propriè ſit, donatio cum donatur, id ad ſe reverti velit, ſed quædam potius feodalis dimiſſio, alia abſoluta & larga, alia ſtricta & coarctata, ſicut certis hæredibus quibuſdam à ſucceſſoribus excluſis, &c. **And therefore ſeeing fee ſimple is hæreditas legitima vel pura, it plainly confirmeth the diviſion of fee is by his authority rather to be divided, as is afore ſaid, than fee ſimple. And he ſaith well in the diſjunctive** legitima vel pura, **for every fee ſimple is not** Legitimum. **For a diſſeiſor, abator, intruder, uſurper, &c. have a fee ſimple, but it is not a lawful fee. So as every man that hath a fee ſimple hath it either by right or by wrong. If by right, then he hath it either by purchaſe or deſcent. If by wrong, then either by diſſeiſin, intruſion, abatement, uſurpation, &c. In this Chapter he createth only of a lawful fee ſimple, and divideth the ſame as is afore ſaid.**

Fleta lib. 3. ca. 2.

¶ *Car ſi home purchaſe.* **Perſons capable of purchaſe are of two ſorts, perſons natural created of God as I. S I. N. &c. and perſons incorporate or politique created by the policy of man, (and therefore they are called bodies politique) and theſe be of two ſorts, viz. either ſole, or aggregate of many: again aggregate of many, either of all perſons capable, or of one perſon capable, and the reſt incapable or dead in law as in the Chapter of Diſcontinuance, Sect. 57. ſhall be ſhewed. Some men have capacity to purchaſe, but not ability to hold. Some capacity to purchaſe and ability to hold, or not to hold, at the election of them or others. Some capacity to take and to hold. Some neither capacity to take nor to hold. And ſome ſpecial diſabled to take ſome particular thing.**

Vid. Sect. 57. Who have ability to grant. Perſons capable of purchaſe.

**If an alien Chriſtian or infidel purchaſe houſes, lands, tenements, or hereditaments to him**

11 Eliz. Dier 283. 11 H. 4. 10. & 26. 7 E. 4. 29.

and his heirs, albeit he can have no heirs, yet he is of capacity to take a fee ſimple, but not to hold. For upon an office found, the king ſhall have it by his prerogative, of whomſoever the land is holden. And ſo it is if the alien doth purchaſe land and dy, the law doth caſt the free hold and inheritance upon the king. If an alien purchaſe any eſtate of free hold in houſes, lands, tenements, or hereditaments, the king upon office found ſhal have them. If an alien be made Denizen, and purchaſe lands & dy without iſſue, the lord of the fee ſhal have the eſcheat, and not the king. But as to a leaſe for years, there is a diverſity between a leaſe for years of a houſe for the habitation of a merchant ſtranger being an alien, whoſe king is in league with ours, and a leaſe for years of lands, meadows, paſtures, woods, and the like. For if he take a leaſe for years of lands, meadows, &c. upon office found, the king ſhall have it: But of a houſe for habitation he may take a leaſe for years as incident to Commercery, for without habitation he cannot merchandize or trade. But if he depart, or relinquiſh the realm, the king ſhal have the leaſe. So it is if he dy poſſeſſed thereof, neither his executors or adminiſtrators, ſhall have it, but the king: for he had it only for habitation as neceſſary to his trade or traffique, & not for the benefit of his executor or adminiſtrator. But if the alien be no merchant, then the king ſhall have the leaſe for years, albeit it were for his habitation, and ſo it is if he be an alien enemy. And all this was ſo reſolved by the Judges aſſembled together for that purpoſe in the caſe of Sir James Crofts, Paſch. 29. of the reign of Queen Elizabeth. Alſo if a man commit felony, and after purchaſe lands, and after is attainted, he had capacity to purchaſe, but not to hold it, for in that caſe the lord of the fee ſhall have the eſcheat. And if a man be attainted of felony, yet he hath capacity to purchaſe to him and to his heires, albeit he can have no heir, but he cannot hold it, for in that caſe the king ſhall have it by his prerogative, & not the lord of the fee, for a man attainted hath no capacity to purchaſe (being a man civiliter mortuus) but only for the benefit of the king, no more then the alienee hath. If any ſole Corporation or aggregate of many, either Eccleſiaſtical or temporal (for the words of the ſtatute be, Si quis religioſus vel alius) purchaſe lands or tenements in fee, they have capacity to take but not to retain (unleſs they have a ſufficient licence in that behalf) for within the year after the alienation, the next lord of the fee may enter, and if he do not, then the next immediate lord from time to time to have half a year, and for default of all the meſne Lords, then the king to have the land ſo alienes for ever, which is to be underſtood of ſuch inheritance as may be holden. But of ſuch inheritances as are not holden, as Villeins, rents charges, commons and the like, the king ſhall have them preſently by a favourable interpretation of the ſtatute. An Annuity granted to them is not mortmain, becauſe it chargeth the perſon only. Some have ſaid that it is called mortmain Manus mortua, quia poſſeſſio eorum eſt immortalis, manus pro poſſeſſione, & mortua pro immortali, and the rather for that by the laws and ſtatutes of the realm, all Eccleſiaſticall perſons are reſtrained to alien. Others ſay it is called manus mortua Antiphraſin, becauſe bodies politique and corporate never die. Others ſay that it is called Mortmain by reſemblance to the holding of a mans hand that is ready to die, for that he then holdeth he letteth not go till he be dead. Theſe and ſuch others are framed out of wit and invention: but the true cauſe of the name, and the meaning thereof, was taken from the effects, as it is expreſſed in the ſtatute it ſelf, per quod quæ ſe. vitia ex hujuſmodi feodis debentur, & quæ ad defenſionem regni ab initio proviſa fuerunt indebite ſubtrahuntur & capitales domini eſchaetas ſuas amittunt, ſo as the lands were ſaid to come to dead hands as to the Lords, for that by alienation in mortmain, they loſt wholly their eſcheats, and in effect their knights ſervices for the defence of the Realm, Wards, Marriages, Reliefs, and the like, and therefore was called a dead hand for that a dead hand yieldeth no ſervice.

I paſs over Villeins or Bondmen, who have power to purchaſe lands, but not to retein them againſt their Lords becauſe you ſhall read at large of them in their proper place in the Chapter of Villenage.

An infant or minor (whom we call any that is under the age of 21 years) hath without conſent of any other capacity to purchaſe, for it is intended for his benefit, & at his full age he may either agree thereunto & perfect it, or without any cauſe to be alledged, Waive or diſagree to the purchaſe, & ſo may his heirs after him, if he agree not thereunto after his full age.

A man of non ſane memory may without the conſent of any other, purchaſe lands, but he himſelf cannot waive it, but if he die in his madneſs, or after his memory recovered without agrament thereunto his heir may Waive and diſagree to the ſtate, without any cauſe ſhewed, and ſo of an Idiot. But if the man of non ſane memory, recovers his memory, and agree unto it, it is unavoidable.

If an Abbot purchaſe lands to him and his ſucceſſors without the conſent of his Covent, he himſelf cannot waive it, but his ſucceſſor may upon juſt cauſe ſhewed as if a greater rent were reſerved therupon than the value of the land or the like, but he cannot waive it unleſs it be upon juſt cauſe, & ſic de ſimilibus prælatus Eccleſiæ ſuæ conditionē meliorare poteſt, deteriorare nequit. And in another place he ſaith, Eſt enim Eccleſia ejuſdē conditio. is, quæ ſungitur vice mino is.

But

32 H.6.23. Pl.Com.483.

5 Mar.Br.tit.Denizen.2.2.

Paſch.29 Eliz.in Sir Iames Crofts Caſe.
49.Aſſ.pl.2.49 E.3.11.

Magna Charta. cap.36.
7 E.1. de religioſis.
W.2.13 E.1.ca.33.
15 R.2.ca.5.
23 H.8.ca.10.
39 Eliz.ca.5.
23 H.3.Aſſ.436.
29 Aſſ.p.17. Brit.f.32.
Fleta lib.1.cap.4. & 5.
19 E.2.tit.Vil.34.
29 E.3.Ibid.13,21 E.3.5.
4 H.6.9. 19 H.6.3.65.
3 E.4.14. 19 E.3. Mortm. 8.
34 H.6.37. 19 H.6.63.
7 E.4.14.
Pl.com.19.in Wroteleys caſe.

Le ſtatut. de religioſis. 7 E.1.

43 Aſſ.p.23.

Bract.lib.2,ſo.12,& 32.

But no ſimile holds good in every thing, according to ꝫ ancient ſaying, Nullum ſimile quatuor pedibus currit. (a) An Hermaphrodite may purchaſe according to that Sex which prævaileth. A Feme covert cannot take any thing of the gift of her husband, but is of capacity to purchaſe of others without the conſent of her husband. And of this opinion was Littleton in our books, and in this book, Sect. 677. but her husband may diſagree thereunto, and devеſt the whole eſtate, but if he neither agree nor diſagree, the purchaſe is good, but after his death, albeit her husband agreed thereunto, yet ſhe may without any cauſe to be alledged waive the ſame, and ſo may her heirs alſo, if after the decеaſe of her husband ſhe her ſelf agreed not thereunto.

a) 1 H.7.16. 7 H.4.17. 18 H.6.8. 39 E.4.13.30. 15 E.4.fol.1.b. 27 H.8.24.

(b) A wife (Uxor) is a good name of Purchaſe, without a Chriſtian name, and ſo it is, if a Chriſtian name be added and miſtaken, as Em for Emelyn, &c. for utile per inutile non vitiatur. But the Queen, the Conſort of the King of England, is an exempt perſon from the King by the Common Law, and is of ability and capacity to purchaſe and grant without the King. Of which ſee more at large, Sect. 206.

b) A name of purchaſe. 2 H.4.25. 1 H.5.8. 46 E.3.22.12 Aſſ.18. 30 E.3.18. 1 Aſſ.11. 11 H.4.33. 9 E.4.49. 13 E.3. Eltoppel.231. F.N.B.9.7.a

(c) The Pariſhoners or Inhabitants, or probi homines of Dale, or the Churchwardens, are not capable to purchaſe lands, but goods they are, unleſs it were in ancient time, when ſuch grants were allowed.

c) 12 H.7.28.37 H.6.30. 10 H.4.3.b.

(d) An ancient grant by the Lord to the Commoners in ſuch a waſte, that a way leading to their Common ſhould not be ſtreightned, was good, but otherwiſe it is of ſuch a grant at this day. (e) And ſo in ancient time a grant made to a Lord, & hominibus ſuis tam liberis quam nativis, or the like, was good, but they are not of capacity to purchaſe by ſuch a name at this day. But yet at this day if the King grant to a man to have the goods and cattels de hominibus ſuis or de tenentibus ſuis, or de reſidentibus intra feodum, &c. it is good, for there they are not named as purchaſers or takers, but for another mans benefit, who hath capacity to purchaſe or take.

d) 32 E.3.barre 261. e) 33 E.3.grant.83. 18 E.3.50.12 Aſſ.35. 14 H.6.13. 39 Aſſ.p.12. 40 Aſſ.p.21.

(f) And regularly it is requiſite that the Purchaſer be named by the name of Baptiſm and his ſurname, and that ſpeciall heed be taken to the name of Baptiſm, for that a man cannot have two names of Baptiſm as he may have divers ſirnames. (g) And it is not ſafe in writs, pleadings, grants, &c. to tranſlate ſurnames into Latine. As if the ſurname of one be Fitz-William, or Williamſon, if he tranſlate him to filius Willi. if in truth his father had any other Chriſtian name than William, the writ, &c. ſhall abate, for Fitzwilliam or Williamſon is his ſirname whatſoever Chriſtian name his father had, therefore the Lawyer never tranſlates ſurnames. And yet in ſome caſes, though the name of Baptiſm be miſtaken, (as in the caſe before put of the wife) the grant is good.

f) Bract. lib.4. tract.1.ca. 20. Britton fol. 121,122. 3 E.3.78.25. 4 E.3.43. 20 Aſſ.61.30 Aſſ.16. 46 E.3.22.39 E.3.17. 3 H.6.25.19 H.6.2. 30 H.6.1.34 H.6.19. 11 H.4.27.9 E.4.29. 5 E.4.46.65. 14 H.7.11. 20 Eliz. Dier.259. 8 E.3.436. 29 E.3.25. 1 D.4.3 D.6.26. 19 D.6.2. 34 D.6.19. 5 E.4.55. 27 D.8.11. 1 D.5.5. 18 E.3.32. 27 E.3.85. 8 E.3.427.7 D 6.29. 9 D.5.9.

g) 40 E.3.22. Fitzwilliam. 24 E.3.64. Fitz Iohn. 39 E.3.24. Fitz Robert. 27 E.3.85. tit. grant 67. 18 E.3.23.24. 18 E.4.8.b. 14 H.7.31.32. 13 E.4.8.5 E.3. Vouch.179. 27 E.3.85. where the proper name is miſtaken.

So it is if lands be given to Robert Earl of Pembroke where his name is Henry, to George Biſhop of Norwich, where his name is John, and ſo of an Abbot, &c. for in theſe and the like caſes there can be but one of that Dignity or name. And therefore ſuch a grant is good, albeit the name of Baptiſm be miſtaken. If by Licence lands be given to the Dean & Chapter of the holy and undivided Trinity of Norwich, this is good, although the Dean be not named by his proper name, if there were a Dean at the time of the grant, but in pleading he muſt ſhew his proper name. And ſo on the other ſide, If the Dean & Chapter make a Leaſe without naming the Dean by his proper name, the Leaſe is good, if there were a Dean at the time of the Leaſe, but in pleading the proper name of the Dean muſt be ſhewed, and ſo is the Book of 18 E.4. to be intended for the ſame Judges in 13 H.4. held the grant good to a Major, Aldermen, & Commonalty albeit the Major was not named by his proper name, but in pleading it muſt be ſhewed, as it is there alſo holden. If a man be baptized by the name of Thomas, and after at his Confirmation by the Biſhop is named John, he may purchaſe by the name of his Confirmation. And this was the caſe of Sir Francis Gawdye, late chief Juſtice of the Court of Common Pleas, whoſe name of Baptiſm was Thomas, and his name of Confirmation Francis, & that name of Francis by the advice of all the Judges in Anno 36 H.8. he did bear and after uſed in all his purchaſes and grants. (h) And this doth agree with our ancient Books, where it is holden that a man may have divers names at divers times, but not divers Chriſtian names. And the Court ſaid, that it may be that a woman was baptized by the name of Anable, and forty years after ſhe was confirmed by the name of Douce, and then her name was changed, and after ſhe was to be named Douce, and that all purchaſes &c. made by her by the name of Bapti m before her Confirmation remain good, a matter not much in uſe nor requiſite to beput in ure, but yet neceſſary to be known. (i) But purchaſes are good in many caſes by a known name, or by a certain deſcription of the perſon without either ſirname or name of Baptiſm, as Uxori I.S. as hath been ſaid, or primogenito filio, or ſecundo genito filio, &c. or filio natu minimo I. S. or ſeniori puero, or omnibus filiis or filiabus I. S. or omnibus liberis ſeu exitibus of I.S. or to the heirs of I.S.

(h) 22 R.2. bre.936. 12 R.2. feoffments 58. 9 E.3.14.46 E.3.21. 3 H.6.26. 34 H.6.29. 1 H.7.29.3 E.2.bre.741. 14 H.7.11.

(i) 17 E.3.29. 18 E.3.59. 30 E.3.18. 11 H.4.84. Pl.Com.525.21 R.2. deviſe 41 E.3.19.15 E.3. Counter.plea de Vouch.43. 3 Aſſ.13.37 H.6.3c. 11 E.4.2.7 H.4.5. 40 E.3.9. 37 H.8. Noſme 40.Br.

(k) But if a man do infranchiſe a Villein, cum tota ſequela ſua, that is not ſufficient to infranchiſe his children born before, for the uncertainty of the word ſequela. (l) But regularly in Writs, the Demandant or Tenant is to be named by his Chriſtian name and ſurname, unleſs it be in caſes of ſome Corporations or Bodies politique.

(k) 15 H.7.14. (l) 8 E.3.437. 29 E.3.44. 19 E.4.1.21 E.4.19. 7 H.6.29.

(a) 39 E.3.11.24. 17 E.3.42. 35 Aſſ.13. 41 E.3.19.

(a) A baſtard having gotten a name by reputation may purchaſe by his reputed or known name to him & his heirs, although he can have no heir but of his body. A man makes a leaſe to B. for life, remainder to the eldeſt iſſue male of B. & the heirs males of his body. B. hath iſſue a baſtard ſon, he ſhall not take the remainder, becauſe in Law he is not his iſſue, for qui ex damnato coitu naſcuntur inter liberos non computentur. And as Littleton ſaith, A baſtard is quaſi nullius filius & can have no name of reputation as ſon as he is born. (b) So it is if a man make a leaſe for life to B. the remainder to the eldeſt iſſue male of B to be begotten of the body of Jane S. whether the ſame iſſue be legitimate or illegitimate. B. hath iſſue a baſtard on the body of Jane S. this ſon or iſſue ſhall not take the remainder, for (as it hath been ſaid) by the name of iſſue, if there had been no other words he could not take, and (as it hath ban alſo ſaid) a baſtard cannot take, but after he hath gained a name by reputation, that he is the ſon of B, &c. (c) And therefore he can take no remainder limited before he be born, but after he be born & that he hath gained by time a reputation to be known by the ſame of a ſon, then a remainder limited to him by the name of the ſon of his reputed father is good. But if he cannot take the remainder by the name of iſſue at the time when he is born he ſhall never take it. And ſo it ſeemeth, and for the ſame cauſe, if after the birth of the iſſue, B. had married Jane S ſo as he became Baſtard eigne, and had a poſſibility to inherit, yet he ſhall not take the remainder.

Vid. Sect.188.

(b) So it was reſolved, M.38.& 39.Eliz. in Bre. de errore, for land in Portington in Com. Salop.

(c) 39 E.3.11.21. 35 Aſſ.23. 41 E.3.19. 17 E.3.42.

Perſons deformed having humane ſhape, Ideots, mad men, lepers, deaf, dumb, and blind, minors, and all other reaſonable creatures have power to purchaſe and retain lands or tenements. (d) But the Common Law doth diſable ſome men to take any eſtate in ſome particular things: As if an office either of the grant of the King or Subject, which concerns the adminiſtration, proceeding, or execution of Juſtice, or the Kings revenue, or the Commonwealth, or the intereſt, benefit, or ſafety of the ſubject or the like; if theſe, or any of them be granted to a man that is unexpert, & hath no ſkill & ſcience to exerciſe or execute the ſame, the grant is meerly void, & the party diſabled by Law, & incapable to take the ſame, pro commodo regis & populi, for onely men of ſkill, knowledge, & ability to exerciſe the ſame are capable of the ſame to ſerve the King & his people. (e) An infant or minor is not capable of an office of Stewardſhip of the Court of a Mannor either in poſſeſſion or reverſion. (f) No man though never ſo skilful and expert, is capable of a judicial office in reverſion, but muſt expect until it fall in poſſeſſion. And ſee Sect.378. where bargaining or giving of money, or any manner of reward, &c. for offices there mentioned, ſhall make ſuch a purchaſer incapable thereof, which is worthy to be known, but more worthy to be put in due execution.

(d) 5 E.4.tit.offic.& officer. B.48. Vintors caſe. 5 Mar. Dier.fo.150. Scrogs caſe.

(e) M.40.& 41 Eliz. in the Kings Beuch between Seamler and Walters.

(f) Lib.11.fo.2.in Auditor Curles caſe. Vid.Sect.378.1 H.7.31.

Some are capable of certain things for ſome ſpecial purpoſe, but not to uſe or exerciſe ſuch things themſelves. As the King is capable of an office, not to uſe, but to grant, &c.

A monſter born within lawful matrimony, that hath not humane ſhape cannot purchaſe much leſs retain any thing. (g) The ſame Law is de profeſſis & mortuis ſeculo, for they are civiliter mortui, whereof you ſhall read at large in his proper place. Sect.200.

(g) Bract.lib.5.fo.421. 415.Brit.ca.22.39. Fleta lib.6.ca.41. E.3.9.44.E.3.4. 3 H.6.24.21 R.2. judgment 263.7 H.4.2. 14 H.8.16. Doct.& Stud.141. Pl.Com.fo.47. Britt.c.33.

¶ *Purchaſe.* In Latine Perquiſitum of the Verb Perquirere, Littleton deſcribeth it in the end of this Chapter in this manner, Item, purchaſe eſt appel le poſſeſſion de tres ou tenen ens que home ad per ſon fait, ou per ſon agreement, a quel poſſeſſion il ne avient per title de diſcent de nul de ſes anceſters, ou de ſes cofens mes per ſon fait dem. So as I take it, a purchaſe is to be taken, when one cometh to lands by conveyance or title, and that diſſeiſons, abatements, intruſions, uſurpations, and ſuch like eſtates gained by wrong, are not ſaid in Law purchaſes, but oppreſſions and injuries.

Note that purchaſers of lands, tenements, leaſes and hereditaments for good and valuable conſideration, ſhall avoid all former fraudulent and covinous conveyances, eſtates, grants, charges and limitations of uſes, of or out of the ſame, (h) by a Statute made ſince Littleton wrote, whereof you may plainly and plentifully read in my Reports, to which I will add this caſe, I.C. had a Leaſe of certain lands for 60 years, if he lived ſo long, & forged a Leaſe for 90 years abſolutely, and he by Indenture reciting the forged Leaſe for valuable conſideration bargained and ſold the forged Leaſe, and all his intereſt in the Land to R.G. It ſeemed to me that R.G. was not purchaſer within the Statute of 27 Eliz. for he contracted not for the true and unlawful intereſt, for that was not known to him, for then perhaps he would not have dealt for it, and the viſible and known term was forged; and although by general words the true intereſt paſſed, notwithſtanding he gave no valuable conſideration, nor contracted for it. And of this opinion were all the Judges in Serjeants Inne in Fleetſtreet.

(h) 27 Eliz. ca.4. 13 Eliz.ca.5. Lib.3.fo.80.82.83. Twines caſe. Lib.5.fo.60. Gooches caſe, l.6.fo.72. Burrels caſe, lib.11.fo.74. Paſch.12 Ia.inter Iones pl. and Sir Rich. Groobham def. in ejectione firme in evidence all Iurie.

(i) In an ancient time when a man made a fraudulent feoffment it was ſaid, quod poſuit terram illam in brigam, where brigam doth ſignify wrangle, contention, or intricacy, for fraud is the mother of them all. (k) And on the other ſide, purchaſes, eſtates and contracts may be avoided ſince Littleton wrote by certain Acts of Parl. againſt Uſury above ten in the hundred, in ſuch manner and form as by thoſe Acts is provided. Which Statutes are well expounded in my books of Reports which may be read there. To them y tend money my caveat is, that

(i) Hill.18.E.3. coram Rege in Theſaur.

(k) 37 H.8. cap.6. 13 Eliz.ca.8.lib.5.fo.69. Burtons caſe, eodem lib.fo.7. Chittons caſe.

neither

neither directly nor indirectly, by art, or cunning invention, they take above ten in the hundred; for they that ſeek by ſleight to creep out of theſe Statutes, will deceive themſelves, and repent in the end.

¶ *Purchaſe terres.* Littleton here and in many other places putteth Lands but for an example, for his rule extendeth to Seigniories, Rents, Advowſons, Commons, Eſtovers, and other hereditaments of what kind and nature ſoever. Lands and other things to be purchaſed.

¶ *Terre.* Terra, Land in the legal ſignification comprehendeth any ground, ſoil or earth whatſoever, as Meadows, Paſtures, Woods, Moors, Waters, Marſhes, Furſes and Heath, Terra eſt nomen generaliſſimum, & comprehendit omnes ſpecies terræ, but properly Terra dicitur à terendo, quia vomere teritur, and antiently it was written with a ſingle r, and in that ſenſe it excludeth whatſoever may be plowed, and is all one with arvum ab arando. It legally includeth alſo all Caſtles, Houſes and other buildings: for Caſtles, Houſes, &c. conſiſt upon two things, viz. land or ground, as the foundation and ſtructure thereupon, ſo as paſſing the land or ground, the ſtructure or building thereupon paſſeth therewith, † Land is anciently called Flech, but land builded is more worthy than other land, becauſe it is for the habitation of man, and in that reſpect hath the precedency to be demanded in the firſt place in a Præcipe, as hereafter ſhall be ſaid. And therefore this element of the Earth is preferred before the other elements; firſt and principally, becauſe it is for the habitation and reſting place of man, for man cannot reſt in any of the other elements, neither in the Water, Ayr or Fire. For as the Heavens are the habitation of Almighty God, ſo the Earth hath he appointed as the Suburbs of Heaven, to be the habitation of man; ¡Cœlum cœli Domino, terram autem dedit filiis hominum All the whole Heavens are the Lords, the Earth hath he given to the children of men. Beſides, every thing as it ſerveth more immediately or more meerly for the food and uſe of man (as ſhall be ſaid hereafter), hath the precedent dignity before any other. And this doth the earth, for out of the earth cometh mans food, and bread that ſtrengthens mans heart, Confirmat cor hominis, and Wine that gladdeth the heart of man, and Oyl that makes him a chearful countenance. And therefore Terra olim Ops mater dicta eſt qui omina hæc opus habeant ad vivendum. And the Divine agreeth herewith, for he ſaith, Pauciam tibi & nutricem, & marrem, & menſam, & domum poſuit terram Deus, ſed & ſepulchrum tibi hanc eandem dedit. Alſo the Waters that yield fiſh for the food and ſuſtenance of man, are not by that name demandable in a Præcipe but the land whereupon the water floweth or ſtandeth is demandable, (as for example), vigintiacr' tre aqua coopert', and beſides, the earth doth furniſh man with many other neceſſaries for his uſe, as it is replenished with hidden treaſures: namely, with Gold, Silver, Braſſe, Iron, Tinne, Lead, and other mettals, and alſo with great variety of precious ſtones, and many other things for profit, ornament and pleaſure. And laſtly, the earth hath in Law a great extent upwards; not only of Water, as hath been ſaid, but of Ayr, and all other things, even up to Heaven, for cujus eſt ſolum ejus eſt uſque ad cœlum, as it is holden, 14 H. 8. fo. 12. 22 H. 6. 59 10 E. 4. 14. Regiſt. origin. and in other Books.

Pl. Com. 168. b. & 170. a & 151 Lib. 4. 87. b. Lutterels caſe. 4 E. 3. 161. & 6 E. 3. 283. 8 E 3. 377. Temp E. 1. Bre. 811. 28 H. 8. Dyer 47.

† Tr. 7 E. 3. coram Rege Northamps. in Theſaur.

Pſal. 115. 16.

Pſal. 104. 15.

Chryſoſt. Hom. 30.

And albeit land whereof our Author here ſpeaketh, be the moſt firm and fixed inheritance; and therefore it is called ſolum, quia eſt ſolidum, and Fee ſimple, the moſt highest and abſolute eſtate that a man can have, yet may the ſame at ſeveral times be movable, ſometime in one perſon, and alternis vicibus in another, nay ſometime in one place, and ſometime in another. As for example, if there be 86 acres of meadow which have been uſed time out of mind of man, to be devided between certain perſons, and that a certain number of acres appertain to every of theſe perſons; as for example, to A. 13 acres to be yearly aſſigned and allotted out, ſo as ſometime the 13 acres lye in one place, and ſometime in another, and ſo of the reſt. A hath a moveable Fee ſimple in 13 acres, and may be parcell of his Mannor, albeit they have no certain place, but yearly ſet out in ſeveral places, ſo as the number only is certain, and the particular acres or place wherein they lye after the year incertain. And ſo it was adjudged in the Kings Bench upon an eſpecial verdict.

Vid. ſect. 57. wherein this caſe livery ſhall be made.

Vid. ſect. 948. How theſe 13 acres may be charged. Hill. 34 Eliz. Rot. 489. in trns inter Weldon & Bridgwater in Banco Regis Temps. E. 1. tit. partition. 21 F. N. B. 62. I. Videli. 1 fo. 87. per. Walmſ. F. N. B. 62 K.

If a partition be made between two Coparceners of one and the ſelf-ſame land, that the one ſhall have the land from Eaſter until Lammas to her and to her heirs, and the other ſhall have it from Lammas to Eaſter to her and her heirs; or the one ſhall have it the firſt year, and the other the ſecond year, alternis vicibus, &c. there it is one ſelf ſame land, wherein two perſons have ſeveral inheritances at ſeveral times. So it is if two Coparceners have two ſeveral Mannors by deſcent, & they make partition, that the one ſhall have § one Mannor for a year, and the other the other Mannor for the ſame year, & after that year, then he that had the one Mannor ſhall have the other, & ſi alternis vicibus for ever, and albeit the Mannors be ſeveral, yet are they certain, and therefore ſtronger then Bridgewaters caſe, ſo as this doth make a diviſion of ſtates of inheritances of lands, viz. Certain or unmoveable whereof Littleton here ſpeaketh, and incertain and moveable whereof theſe three caſes for examples have been put. Wherein it is to be noted, that the poſſeſſion is not only ſeveral, but the inheritance alſo.

Vide ſect. 184. where avowſons, &c. may be appendant and in gros.

It

It is alſo neceſſary to be ſeen by what names lands ſhall paſs. (a) If a man hath twenty acres of land, and by Deed granteth to another and his heirs, veſturam terræ, and maketh Livery of ſeiſin ſecundum formam cartæ, the land it ſelf ſhall not paſs, becauſe he hath a particular right in the land, for thereby he ſhall not have the houſes, timber, trees, mines, and other things parcell of the Inheritance, but he ſhall have the veſture of the land; (that is) the Corn, Graſſe, Underwood, Swepage, and the like, and he ſhall have an Action of treſpaſſe, quare clauſum fregit. (b) The ſame Law, if a man grant herbagium terræ, he hath a like particular right in the Land, and ſhall have an Action quare clauſum fregit, but by grant thereof and livery made the ſoil, ſhall not paſs, as is aforeſaid. (c) If a man let to B. the herbage of his woods, & after grant all his lands in the tenure, poſſeſſion, or occupation of B. the woods ſhall paſs, for B. hath a particular poſſeſſion and occupation, which is ſufficient in this caſe, and ſo it was reſolved. (d) So if a man be ſeiſed of a River, and by Deed do grant ſepa alem piſcariam in the ſame, and maketh livery of ſeiſin ſecundum formam cartæ, the ſoil doth not paſs nor the water, for the Grantor may take water there; and if the river become dry, he may take the benefit of the ſoil, for there paſſed to the Grantee but a particular right, and the livery being made ſecundum formam cartæ, cannot enlarge the grant. (e) For the ſame reaſon, if a man grant aquam ſuam, the ſoil ſhall not paſs, but the Piſchary within the water paſſeth therewith. And land covered with water, ſhall be demanded by the name of ſo many Acres, aqua coopert, whereby it appeareth that they are diſtinct things. (f) So if a man grant to another, to dig turbes in his land, and to carry them at his will and pleaſure, the land ſhall not paſs, becauſe but part of the profit is given, for trees, mines, &c. ſhall not paſs. (g) But if a man ſeiſed of lands in fee, by his Deed granteth to another the profits of thoſe lands, to have & to hold to him and his heirs, and maketh livery ſecundum formam cartæ, the whole land it ſelf doth paſs: for what is the land but the profits thereof, for thereby eſtuze, herlage, trees, mines, and all whatſoever parcel of that land doth paſs.

(h) By the grant of the Voilloury of ſalt, it is ſaid, that the ſoil ſhall paſs, for it is the whole profit of the ſoil. And this is called Saliva of the French word Saltre, for a Salt pit, and you may read de Saliva in Domeſday; and Selda, ſignifieth the ſame thing: (i) & where you ſhall read in Records, de lacerra in profunditate aque laſſe, there lacerta ſignifieth a fathome. A man ſeiſed of divers acres of wood, grants to another omnes boſcos ſuos, all his woods, not only the woods growing upon the land paſs, but the land it ſelf, & by the ſame name ſhall be recovered in a Præcipe, for Boſcos doth not only include the trees, but the land alſo whereupon they grow. (k) The ſame Law if a man in that caſe grant omnes Boſcos ſuos creſentes, &c. yet the land it ſelf ſhall paſs, as hath been adjudged. † Graſſetum ſignifieth a wood, or ground that is woody. (l) If a man hath a wood of Elder trees, containing 20 acres, & granteth to another 20 acras Alneti (with an N, not a V,) the wood of Elders, & the ſoil thereof ſhall paſs, but no other kind of woods ſhall paſs by that name. Alnetum eſt ubi alni arbores creſcent. † And Sallings are taken for Elders. (m) Salicetum doth ſignifie a wood of willowes, ubi ſalices creſcent, the ſe trees in our Bobs are called Sawces. † Selda is a wood of Sallowes, Willowes, or Withies. A blacky ground is called Filecetum, ubi filices creſcunt. A wood of Aſhes is called Fraxinetum ubi fraxini creſcunt, and paſſeth by that name, and Lupulicetum where hops grew, and Arundinetum, where reeds grow. Some ſay that Dene or Denne, whereof Dena commeth, is properly a valley or dale. Dena ſylvæ, and the like. (n) As Droſden, or Druſden, or Druden, ſignifieth a thicket of wood in a valley, for Druf or Dru, ſignifieth a thicket of wood, and is often mentioned in Domeſday. And ſometime Dena or Denna ſignifieth, as Villa and Denne, a town.

(o) Cope ſignifieth a hill, & ſo doth Lawe, as Stanlawe is Saxens collis. (p) Howe alſo ſignifieth a hill. And Hope combe, and Stow are valleys, & ſo doth Clough. And Dunum or Duna, ſignifieth a hill or higher ground, and therefore commonly the towns that end in Dun have hills or higher grounds in them, which we call Downs. It commeth of the old French word Dun.

(q) In our Latine a wood is called Boſcos. Glava ſignifieth a little wood, in old Deeds, and Huſt or Hurſt a wood, and ſo doth Holt and Shawe. Twaite ſignifieth a wood grubbed up, and turned to arable Stethe or Strede, betokeneth properly a bank of a River, and many times a place, as Stowe doth, and Wic, a place upon the Sea ſhore, or upon a River. Ley or Ley ſignifieth paſture.

(r) If a man doth grant all his paſtures, Paſturas, the land it ſelf imployed to the feeding of beaſts doth paſſe, and alſo ſuch paſtures or feedings, as he hath in another mans ſoil, Leſwes or Leſues is a Saxon word, and ſignifieth paſtures. (ſ) Between Paſtura and Paſcum, the legal difference is that Paſtura in one ſignification containeth the ground it ſelf called paſture, and by that name is to be demanded, Paſcum feeding, is whereſoever cattel are fed, of what nature ſoever the ground is, and cannot be demanded in a Præcipe by that name.

(t) If a man grant omnia prata ſua, all his meadowes, the land it ſelf of that kind paſſe, & dicitur pratum quaſi paratum, becauſe it groweth ſponte without manurance. (u) A man grant omnes bruerias ſuas, the ſoil where heath doth grow paſſeth, and may be demanded by that name

By what names, &c. lands, &c. ſhall paſs.
(a) Vide Sect. 279. 14 H. 8. 6. 4 H. 7. 3. 10 H. 7. 24 11 H. 7. 21. 14 H. 7. 4. 6. 21 H. 7 36. 37. 9 H. 6. 31. 37 H. 6. 35. 22 E. 4. barre 116. 11 H. 4. 90. 18 E. 3. Execution 56. 4 E. 3. 48 E. 3. 13. 9 Aſſ. p. 12. 38 E. 3. 24.
(b) Bracton fo. 222. 17 E. 3. 75. 39 H. 6. 38. 11 Eliz. Dier 285.
(c) Paſch. 12. Ia, Inter Dockwray & Points in evidence all Iury in Banke le Roy.
(d) Vide Sect. 279. Bracton fo. 208. 40 E. 3. 45. Pl. Com. 154. 10 H. 7. 24. 28. 7. 13. 18 H. 7. 26. 9. 34. 7 H. 6. 43. 20 H. 7. 6. 4. 18 E. 4. 4. 4 E. 3. 48. 1 E. 3. 4. 32 E. 3. Scir. fac. 102. 22 E. 4. barre 116. 12 H. 8. Aſſ. 427. 34 Aſſ. 11. 13 E. 3. tit. Entry 57. 20 E. 3. 3. Bre. 685. W. 2. ca. 24
(e) Tr. 11 R. 2. in tranſment. imprimee ne abridg. 11 A. 74.
(f) 7 E. 3. 342. 5. Aſſ. 9, 10. 7. Aſſ. 9.
(g) 45 E. 3. tit. feoffments & faits 90. 4 H. 8. 6. Pl. Com. 541. b. F. N. B. fo. 8. 12 E. 3. Dower 90.
(h) 9. Aſſ. p. 12. 9 E. 3. 443. 466. Domeſday.
7 R. 2. int. fines in Theſaur.
(i) Int. Inquiſit apud Launcait, Anno 6 E. 1. in Theſaur. Mich. 1 H. 5. coram Rege Rot. 3. in Theſaur.
(k) Tr. 7. Eliz. in Banco regis lib. 5. fo. 11. Iues caſe. 14 H. 8. 1. 46 E. 3. 22. 28 H. 8. Dier 19. 32 H. 8. Br. reſervat. 39. 7 E. 6. Dier 79.
† Glanvil. lib. 8. cap. 3.
(l) Domeſday Regiſt. F. N. B 2.
(m) 8 E. 2. Waſt. 111. 7 Aſſ. 8. 11. Aſſ. p. 13. 41 E. 3. Waſt. 82.
† Hill. 4 E. 3. coram Rege Lanc. in Theſaur.
† Inter inquiſit. apud Lanc. in com. Cornubie coram Iuſti. Aud. anno. 6 E. 1. in Theſaur. The B. of Exceſters caſe.
(n) Domeſday.
(o) Camden. 460. 151.
(p) Paſch. 44 E. 3. coram. Rege in Theſaur.
(q) Hill. 13 E. 2. Lanc. coram Rege in Theſaur. Canden Britt. 247. Rot. Parl. 38 E. 1. 8. Eveſque de Carliles caſe.
(r) Pl. Com. 69 2. 4 E. 2. Bre. 792, 793. 3 E. 3. 86. 4 E. 4. 1. 27 H. 8. 12.
(ſ) 20. Aſſ. pl. 9.
(t) Pl. Com. 69. a. 33 E. 3. Bre. 24. 33 E. 3. Entry 80.
(u) Domeſday. F. N. B. 2. Reg.

in a præcipe, it is derived from bruyer, a French word for heath, and it is called Ros in the Britiſh tongue.

Roncaria or rancaria ſignifieth landfull of brambles and briers, and is derived of Roncier the French word, which ſignifieth the ſame, and as much as ſenticetum. (a) By the grant of omnes Juncarias or joncarias, the ſoil where ruſhes do grow, doth paſs; for Jonc in French is a Ruſh whereof Juncaria cometh. (b) A man grants omnes Ruſcarias ſuas, the ſoil where ruſcarii knebolme, or butchers pricks or broom do grow, ſhall paſs, and ſo in the verſe, in the Regiſter, it is called, but in F. N. B. fol. 2. in the verſe, Piſcharia is put in ſtead of Ruſcaria. And lampna commeth of Lonc and nower, a waterish place and is all one in effect with Juncaria. He that granteth omnes mariſcos ſuos, all his fennes or marſh grounds do paſs. Mariſcus is derived of the French word mares or marets; the Latin word for it, is palus or locus paludoſus. Mora is derived of the Engliſh word Moor, and ſignifieth a more barren and unprofitable ground than Marſhes, dangerous for any Cattel to go there, in reſpect of myrie and mooriſh ſoyl, neither ſerves it for getting of turves there: (c) you ſhall read in Record, that ſuch a man perquiſivit treſcent. acr. maretti, &c. this word maretum is derived of mare the ſea, and rego, and properly ſignifieth a mooriſh and gravelly ground, which the ſea doth cover and overflow at a full ſea, and lyeth between the high water-mark, and the low water-mark, infra fluxum & refluxum maris. By grant of theſe particular kinds, the land of theſe particular kinds only do paſs, but, as hath been ſaid by the grant of land in generall, all theſe particular kinds, and ſome others, do paſs. Non mihi ſi centum linguæ ſint oraque centum, Omnia terrarum percurrere nomina poſſem. And therefore let us turn our eye to generall words, which do include lands of ſeveral ſorts and qualities. (d) By the name of an Honor, which a ſubject may have, divers mannors and lands may paſs. So by the name of an Iſle, Inſula, many mannors, lands, and tenements may paſs.

Holme or Holmus (ſignifieth an Iſle or fenny ground). A Commote is a great Seignory, & may include one or divers mannors. (e) By the name of a caſtle, one or more mannors may be conveyed; & è converſo, by the name of a mannor, &c. a caſtle may paſs. In Domeſday I read Comes Alanus habet in ſuo caſtellatu 200 maneria, &c. præter caſtellarium habet 43 maneria and in that book a caſtle is called caſtellum and caſtrum, and domus defenſibilis and manſus muralis (f). But note by the way, that no ſubject can build a caſtle, or houſe of ſtrength imbattelled, &c. or or other fortreſſe defenſible, called in Law by the name aforeſaid, and ſometimes domus kernellatæ, or Carnellatæ, imbattellatæ, tenellatæ, macheollatæ, meſe carnellei, &c. without the licence of the King, for the danger which might enſue, if every man at his pleaſure might do it. And they be called imbattlements, becauſe they are defences againſt battels in aſſaults. Tenellare or tanellare, is to make holes or lopes in walls to ſhoot againſt the Aſſailants. Machecollare or machecoulare, is to make a warlike device over a gate or other paſſage, like to a grate, through which ſcalding water, or ponderous, or offenſive things may be caſt upon the aſſaylants. But to return to the matter; from whence upon this occaſion we are fallen.

By the name of a town Villa, a mannor may paſſe. In Domeſday, Alodium (in a large ſenſe) ſignifieth a free mannor, and Alodiarii or Alodarii, Lords of the ſame, and Lannimanni there ſignified, Lords of a Mannor, having ſocam & ſacam de teneribus & hominibus ſuis. (g) And by the name of a mannor divers towns may paſs, quod olim dicebatur fundus a nunc materium dici ur: by the name of a ferm or fearme firma, houſes, lands, and tenements may paſſe, and firma is derived of the Saxon word feormian, to feed or relieve, for in antient time they reſerved upon their Leaſes, cattel and other victual and proviſion for their ſuſtenance. (h) Note, a fearm in the North parts is called a Tacke, in Lancaſhire a Fermholt, in Eſſex a Wike. But the word fearme, is the general word, and anciently fundus ſignified a fearme, and ſometime land. (i) Lands making a Knights fee, ſhall paſſe by the grant of a Knights fee, de uno feodo militis.

(k) Unum ſolinum, or ſolinus terræ in Domeſday book containeth two plow Lands, and ſomewhat leſſe then an half; for there it is ſaid, Septem Solini, or Solina terræ ſunt 17 carucat. Una hida ſeu carucata terræ, which is all one as a plow land, viz. aſmuch as a plough can till: ſullerye, alſo ſignifieth a plow land. Una virgata terræ, a yard land; the Saxons called it Girdland, and now the G. is turned to a Y. as in ſome Countries 10. in ſome 20. in ſome 24. in ſome 30. &c. (l) Una bovata terræ, an oxgange, or an oxgate of land, is as much as an oxe can till. (m) But carucata terræ, and bovata terræ, are words compound, and may contain meadow paſture, and wood, neceſſary for ſuch tillage. Jugum terræ in Domeſday, containeth half a plow land. And by all theſe names in the reign of R. 1. lands were uſually demanded & long after.

(n) By the name of a Grange Grangia a houſe or edifice not only where corn is ſtored up, like as in barns, but neceſſary places for husbandry alſo, as ſtables for hay and horſes, and ſtables and ſties for other cattell, and a curtillage, and the Cloſe wherein it ſtandeth ſhall paſſe, and it is a French word, and ſignifieth the ſame, as we take it.

(o) Stagnum, in Engliſh a pool, doth conſiſt of water and land, and therefore by the name of Stagnum

(a) Regiſt. 1 E. 3. 4 F. N. B. 7.

(b) 19. Aſſ. p. 9. Regiſter. Iampna.

(c) Paſch. 41 E. 1. coram Rege Lincoln. rot. 28.

(d) Mag. Cart. c. 31. Wallingford, Nott. Bolon. Lanc. &c. Trin. 33 E. 1. coram Rege in Theſ. honor de Huntingdon. Mich. 9 E. 1. coram Rege in Theſ. 18 E. 2. Aſſ. 377. 26. Aſſ. 4. 60. 6 E. 3. 55. 47 E. 3. 21. honor de Peverel. 49 E. 24. honor de Egles 9 H. 8. 27. 36 H. 8. Dyer 58. honor de Glouc. F. N. B. 265. honor Abbath, de Merle 5 E. 4. 129. 7 H. 6. 39. 1 E. 3. 4. &c. 13 E. 3. juriſdict. 23. Li. 4. fo. 88. Shutterels caſe. 5 H. 7. 9. 14 H. 4. in recordo longo 8 H. 4. Pl. Com. 168. 8 H. 3. 1. 4 E. 4. 16. 13 E. 3. Juriſdict. 23.

(e) 20 Aſſ. 54. 29 E. 3. 15. 29 H. 6. travers 4. Pract. fo. 434. 1 E. 3. 4. 37 H. 6. 26. 18 H. 6. 11. Lib. rubr. cap. fol. 18.

(f) In veter. Mag. Carta. Cap. eſcheatriæ fol. 192. Britton. cap. 20. 5 H. 9. 9. 3 E. 2. Avowry 188. Rot. Parliam. 45 E. 3. nu. 34. 6 H. 4. nu. 19. 1 E. 4. cap. 1. Rot. Parlm. 1 E. 3. 2. pars Alano Charelton. 12 E. 2. pars Thomæ Barkley, &c.

(g) Lamb. expoſit. verb. ferme. Pl. Com. 195.

(h) Pl. Com. 169. Regiſt. 227. b. eject firmæ.

(i) 17 E. 3. fo. 8. 5 E. 3. 213. 16 E. 3. bre. 165. 12 E. 2. bre. 81.

(k) 4 E. 3. 16. 1. 6 E. 3. 283. 2 E. 3. 5. 53 H. 6. 29. Pl. Com. 168. 7. Aſſ. 18. 11 Aſſ. 13. Lamb. expoſ. verb. Hydra & virgat. terræ. Glanvil. lib. cap. Domeſday. Bract. lib. 2. cap 26. 27. & lib. 5. fo. 434. Regiſt. 72.

(l) 5 E. 3. fine 49. 13 E. 3. fine 5. 7. 8. 9 H. 6. 8. 4 E. 3. 159. 8 E. 3. 377. Bracton fol. 186, 269. 431. 5 H. 3. Droit, 66. Pl. Com. 168.

(m) 13 E. 3. bre 241. 2 E. 3. 57. temps. E. 1. bre 811. Pl. Com. 168.

(n) Pl. Com. 169. Linwood. 44 E. 3. 21. 4 E. 3. 32.

(o) 4 E. 3. tit. feoffments & faits 79. 14 E. 3. Formedon. 34. 34 Aſſ. pl. 11.

Stagnum or a pool, the water and land ſhall paſs alſo. (a) In the ſame manner, Gurges a deep pit of water, a gors or gulf conſiſteth of water and land, and therefore by the grant thereof by that name the ſoil doth paſs, and a præcipe doth lye thereof, and ſhall lay his eſpleas in taking of fiſhes, as Weares and Roches. In Domeſday, it is called guort, gort, and gors plurally, as for example, de 3. gorz. mille anguillæ.

(b) So it is of a Foreſt, Parke, Chaſe, Vibarye, and Warren in mans own Ground, by the grant of any of them, not only the priviledge, but the land it ſelf paſſes, for they are compound. In the book of Domeſday, that is called leuvad and leuga, and leuved and leuve, which in Latine is called leuca.

(c) Stadium, or ferlingus ſive ferlingum, or quarentena terræ, is a furling of Land, and is as much as to ſay, a furrow-long, which in antient time was the eighth part of a mile, and land will paſs by that name. And ſome hold, that by that name land may be demanded. And de ferlingis & quarentenis, you ſhall read divers times in the book of Domeſday, and there you ſhal read In inſulta Rex habet unum fruſtum terræ, unde exeunt ſex vomeres. Nota fruſtum ſignifieth a parcell, (d) Warectum, or warecum, or varectum, doth ſignify fallow; Terra jacet ad Warectum, the land lyeth fallow: but in truth the word is vervactum, quaſi vere novo victum ſeu ſubactum, terra novalis ſeu requieta, quia alternis annis requieſcat. (e) Tam culta novalia. (f) By the grant of a meſſuage, or houſe, meſſuagium, the orchard, garden and curtilage doth paſs, and ſo an acre or more may paſs by the name of a houſe. It is derived of a French word Meſe. (g) In Domeſday, a houſe in a City or Burrough, is called haga; other houſes are called there manſiones manſuræ & domus, (h) and in an antient plea concerning Feverſham in Kent, bawes are enterpreted to ſignifie manſiones. In Normans French, it is called meſuil or meſuil. Bye ſignifieth a dwelling, bye an habitation, and byan to dwell.

It is to be noted, that in Domeſday there be often named bordarii ſeu borduanni, coſces, coſcet, cotucami, cotarii, are all in effect boyes or husbandmen, or cottagers, ſaving that bordarii, which cometh of the French word borde for a cottage, ſignifieth their boyes holding a little houſe with ſome land of husbandry biggar than a cottage, and cotcetli are meer cottagers, qui cotagia & curtilagia tenent.

Villani in Domeſday (often named) are not taken there for bondmen, but had their name de villis, becauſe they had Fermes, and there did work of husbandry for the Lord, and they were ever named before bordarii, &c. and ſuch as are bondmen are called there ſervi.

(i) Coleberti often alſo named in Domeſday, ſignifieth Tenents in free ſoccage by free rent, and ſo it is expounded of record. Radmans and Radchemiſters (Rad or rede, ſignifieth firm and ſtable) there alſo often named, theſe are liberi tenentes qui arabant & hercebant ad curiam domini, ſeu ſarcabant, aut merebant, becauſe their eſtates are firm and ſtable, and they are many times called Sochemans and Sokemanni, becauſe of their plough-ſervice.

Dreuchs ſignifieth free tennants of a Mannor there alſo named. Taini or thaini mediocres were free holders, and ſometime called milites regis, and their land called Tainland, and there it is ſaid, hæc terra TRE fuit Tainland, ſed poſtea converſa in Reveland. (k) But thainus regis is taken for a Baron, for it is ſaid in an antient Author, Thainus regis proximus Comiti eſt, & ibidem mediocris thainus, & alibi Baro ſive thainus. Berquarium or Bercaria cometh of Berca, an old Saxon word, uſed at this day for barkes or rindes of trees, and ſignifieth a Tanhouſe, or a heath houſe, where barks or rindes of trees are laid to tan withal, & Berquarii are mentioned in Domeſday. It ſignifieth alſo, and more legally a ſhyp coat, of the French word Bergerie.

(l) By Vaccaria in Law is ſignified a Dary-houſe, derived of Vacca the cow. In Latine, it is Lactarium or Lactiticum, and vaccarius is mentioned in Domeſday. And Fleta maketh alſo mention of porcaria a ſwine-ſty.

The content of an Acre is known, the name is common to the Engliſh, German, and French. In legal Latin it is called Acra, which the Latiniſts call jugerum. In Domeſday, it is called Arpen prati, ſylvæ, &c. 10. R. 1. inter fines, Acra in Cornwall continet 40. perticatas in longitudine, & 4. in latitudine. & quælibet perticata de 16. pedibus in longitudine.

(m) By the grant of a Selion of land, Selio terræ, a ridge of land which containeth no certainty, for ſome be greater and ſome be leſſer, and by the grant de una porca, a ridge doth paſs. Selio is derived of the French word Sellon for a ridge.

(n) By the grant de centum libratis terræ, or 50. libratis terræ, or centum ſolidatis terræ, &c. land of that value paſſeth, and ſo of a more or leſs, and in antient time by that name it might have been demanded. (o) And many things may paſs by a name, that by the ſame name cannot be demanded by a præcipe (for that doth require more preſcript form), but whatſoever may be demanded by a præcipe, may paſs by the way of grant.

Frythe is a plain between woods, and ſo is lawnd or lound, Combe, hope, dene, glyn, howgh, howgh, ſignifieth a Vally, Howe, hoo, knol, law, peu, and cope a hill. Ey, Eng and worth, ſignifieth a watry place or water. Faleſia is a bank or hill by the ſea-ſide, it cometh of falaize, which ſignifieth the ſame: of all theſe you ſhall read in antient books, charters, deeds, and

(a) 13 E. 3. 4. 4 E. 3. 143. 8 E. 3. 381. 10 E. 3. 482. 13 E. 3. entry 57. F. N. B. 191. h. Domeſday.

(b) Temps E. 1. brc. 861. 4 E. 3. 5. 10 H. 7. 30. 44 E. 3. 12. 43 E. 34. 35 H. 6. 55. 3 H. 6. 2. Domeſday, Bracton lib. 4. fo. 235. Int. adjudicat. coram Rege. P. 39 E. 3. lib. 2. fo. 95. in Theſaur.

(c) 40. Aſſ. 38. 4 H. 6. 14. 35 E. 1. cap. 6. Anno 10. R. 1. inter fines in Theſaur. Ferlingus terræ continet 32. acras. Domeſday.

Fruſtum, 16 E. 3. tit. common. 9

(d) Mich. 8 H. 3. in cipien. 9. Coram Rege. War. Ro. 6.

(e) Virg. eclog. 1. 2.

(f) Bract. 211. 233. 22 E. 4. trns 140. Pl. com. 168. 171. 23 H. 8. Br. feoffments 53. 9. Aſſ. p. 21. 35 H. 6. 44. Pl. com. 169.

(g) Domeſday.

(h) Pſach. 30 E. 1. coram Rege Kanc. in Theſaur. Statut. de extent. manerii Domeſday.

Domeſday.

(i) Int. placita coram domino Rege Mich. 10 E. 3. Rot. 26. Lamb. Expoſit. ve. b. Thanus.

(k) Lib. Rub. cap. 15. & cap. 41. & 76. W. 2. c. 46. 7 H. 4. 38. Lib. dentries tit. Aſſ. corps. pol. 2.

Domeſday.

(l) 7 H. 4. 38. Fleta lib. 2. cap 35. Domeſday. 10 R. 1. Inter fines.

(m) 9 E. 3. 39 E. Temps I. Br. 886. Mich. 30 E. 1. coram Rege. Glouc. in Theſaur.

(n) Bract. fo. 377. 432. 43 E. 3. 27. Regiſt. fo. 1. 94. 248. 24. F. N. B. fo. 87. F. I.

(o) Regula.

(p) 7 R. 1. inter fines Suſſex.

and recoꝛds, and to the end that our ſtudent ſhould not be diſcouraged foꝛ want of knowledge when he meeteth with them (neſcit enim generoſa mens ignorantiam pati) we have armed him with the ſignification of them, to the end he may proceed in his reading with alacrity, and ſet upon, and know, how to woꝛk into with delight theſe rough mines of hidden treaſure.

(m) By the name of Minerva, oꝛ Fodina Plumbi, &c. the land it ſelf ſhall paſs in a grant if it be ſo by be made, and alſo be recovered in an aſſiſe, & ſic de ſimilibus.

By the grant of a fould courſe, oꝛ the like, lands and tenements may paſs. (n) Tenementum, Tenement, is a large woꝛd to paſs, not only lands and other inheritances which are holden; but alſo offices, rents, commons profits, apprender out of lands, & the like, wherein a man hath any ſtanding tenement, and whereof he is ſeiſed ut de libero tenemento. But hæreditamentum, hereditament, is the largeſt woꝛd of all in that kind: foꝛ whatſoever may be inherited is an hereditament, be it coꝛpoꝛeal oꝛ incoꝛpoꝛeal, real, oꝛ perſonal, oꝛ mixt.

(o) A man ſeiſed of lands in fee hath divers Charters, deeds & evidences, and maketh a feoffment in fee, either without warranty, oꝛ with warranty only againſt him and his heirs the purchaſer ſhall have all the Charters, deeds and evidences, as incident to the lands, & ratione terræ, to the end he may the better defend the land himſelf, having no warranty to recover in value, foꝛ the evidences are as it were the ſinews of the land & the feoffoꝛ being not bound to warranty, hath no uſe of them. But if the feoffoꝛ be bound to warranty, ſo that he is bound to render in value, then is the defence of the title at his peril, and therefoꝛe the feoffee in that caſe ſhall have no deeds that comprehend warranty, whereof the feoffoꝛ may take advantage. Alſo he ſhall have ſuch Charters as may ſerve him to deraigne the warranty paramount; Alſo he ſhall have all deeds and evidences, which are material foꝛ the maintenance of the title of the land, but other evidences which concern the poſſeſſion, and not the title of the land, the feoffee ſhall have them.

(n) 17 E. 3. 7, 43 El. 35. b. Regiſt. 6. 10 H. 7. 21. Pl. Com. 191, 195. Bract. 211, 326.

(n) 45 E. 3. Vouchee 72. 33 E. 3. grant 102. 11 H. 6. 23. 27. 14 E. 4. 4. 2. Aſs. p. 9. 3 E. 4. 19. 11 H. 7. 25.

(o) Lib. 1. fol. 1. & 2. in Seignior Buckhurſts caſe. 44 E. 3. 11. b. 39. E. 3. 17. a. 19 H. 6. 65. b. 4 H. 5. 2. 10 E. 4. 9. b. 18 E. 4. 12. 15. 6 H. 7. 3. b. 3 H. 7. 33. a.

*Caver & tener.* Theſe two woꝛds do in this place pꝛove a double ſignification, viz. a aver to have an eſtate of inheritance of lands deſcendible to his heirs, and tener to hold the ſame of ſome ſuperioꝛ Lord.

There have been eight foꝛmal oꝛ oꝛderly parts of a deed of feoffment, viz. 1 the premiſſes of the deed implyed by Littleton. 2. the habendum whereof Litl. here ſpeaketh. 3. the tenendum mentioned by Littleton. 4. the Reddendum. 5. the Clauſe of warranty. 6. the In cujus rei teſtimonium, comprehending the ſealing. 7. The date of the deed containing the day, the month, the year, and ſtile of the King, oꝛ of the year of our Loꝛd. (p) Laſtly, the clauſe of his teſtibus: and yet all theſe parts were contained in very few and ſignificant woꝛds. (q) Hæc fuit candida illius ætatis fides & ſimplicitas, quæ pauculis lineis omnia fidei firmamenta poſuerunt.

Vide Sect. 40. & 370. 371. many things, de cartis & tabis, Fleta lib. 2. 1. cap. 14. Britton 100, 101. Bracton lib. 5. fol. 396. a. 299, 38 H. 6. 32. 36. Pl. Com. Wrotelleyes caſe, fol. 96.

(p) Vide Throgmortous caſe, Pl. Com.

(q) Lib. 5. fol. 43. in Sir Anthony Mildmayes caſe, Vide ſect. 278.

The office of the premiſſes of the Deed is twofold. Firſt, rightly to name the feoffoꝛ and the feoffee. And ſecondly, to comprehend the certainty of the lands oꝛ tenements to be conveyed by the feoffment, either by expreſs woꝛds, oꝛ which may by reference be reduced to a certainty; foꝛ Certum eſt quod certum reddi poteſt. The habendum hath alſo two parts, viz. firſt, to name again the feoffee, and ſecondly, to limit the certainty of the eſtate. The Tenendum at this day where the fee ſimple paſſes, muſt be of the chief Loꝛds of the fee. And of the Reddendum moꝛe ſhall be ſaid in his pꝛoper place, in the Chapter of Rents. Of the Clauſe of warranty moꝛe ſhal be ſaid in the chapter of warranties. In cujus rei teſtimonium ſigillum meum appoſui was added; foꝛ the Seal is of the eſſential part of the deed. The date of the deed many times Antiquity omitted, and the reaſon thereof was, Foꝛ that the limitation of preſcription, oꝛ time of memoꝛy, did often in pꝛoceſs of time change, and the law was then holden, that a deed, bearing date befoꝛe the limited time of preſcription, was not pleadable, and therefoꝛe they made their deeds without date, to the end they might alleage them within the time of preſcription. And the date of the deeds was commonly added in the reign of E. 2. and E. 3. and ſo ever ſince.

Brit. fol. 101.

And ſometime Antiquity added a place, as Datum apud D. which was in diſadvantage of the feoffee, foꝛ being in general, he may alleage the deed to be made where he will. And laſtly, Antiquity did add, his teſtibus in the continent of the deed, after the In cujus rei teſtimonium, written with the ſame hand that the deed was which witneſſes were called, the Deed read, & then their names entred. (r) And this is called charter land, and accoꝛdingly the Saxons called it Bockland, as it were bookland. Which clauſe of his teſtibus in ſubjects deeds continued untill and in the reign of H. 8. but now is wholly omitted. And it appeareth by the ancient Authoꝛs and Authoꝛities of the Law, that befoꝛe the Statute of 12 E. 2. cap. 2. Pꝛoceſs ſhould be awarded againſt the witneſſes named in the deed, teſtes in carta nominatos, (s) and that the ſame Statute was but an affirmance of the common Law, which not being well underſtood, hath cauſed variety of opinions in our books. But the delay therein was ſo great, and ſometimes (though rarely) by exceptions againſt thoſe witneſſes, which being found true, they were not to be ſworn at all, neither to be joyned to the Jury, noꝛ as Witneſſes, (t) as if the witneſs were infamous; foꝛ example, if he be attainted of a falſe verdict, oꝛ of a conſpiracy at the ſuit

(r) Lamb. expoſit. verb. terra ex ſcripto. Vide Forteſcue cap. 32. See the ſecond part of the inſtitut. cap. 38. 12 E. 2. c. 2. ſee the ſecond part of the Inſtitutes. Marlbr. cap. 6. & cap. 14.

(s) Brit. fol. 65, 101. 11 E. 3. Proces. 179. 6 H. 3. Proces 209. 8 H. 3. Proces. 210. 2 E. yard. 119.

(t) Mirrour. cap. 4. ſect. de infamies & perjuries. Glanvil. lib. 2. cap. 15. Bract. lib. 5. 288. 292. Brit. fol. 134. 135. 101. Fleta lib. 5. cap. 21. 8 E. 2. Aſſ. 396. 2 E. 3. 32. 24 E. 3. 34.

ſuit of the king, or convicted of perjury, or of a Premunire or of forgery upon the Statute of 5 Eliz. cap. 14. and not upon the Statute of 1 H. 5. cap. 3. or convict of felony, or by judgment loſt his ears, or ſtood upon the pillory or tumbrell, or bene ſtigmaticus branded, or the like, whereby they become infamous for ſome offences, Quæ ſunt minoris culpæ ſunt majoris infamiæ. (e) If a Champion in a Writ of right become recreant or coward, he thereby loſeth liberam legem, and thereby becomes infamous, & cannot be nō witneſs, for regularly he that loſeth liberam legem, becommeth infamous, and can be no witneſs. Or if the witneſs be an Infidel, or of non ſane memorie, or not of diſcretion, or a party intereſſed, or the like. (d) But oftentimes a man may be challenged to be of a Jury, that cannot be challenged to be a Witneſs, & therefore though the Witneſs be of the neereſt alliance or kindred, or of counſel, or tenant, or ſervant to either party, (or any other exception that maketh him not infamous, or to want underſtanding or diſcretion, or a party in intereſt) though it be proved true, ſhall not exclude the witneſs to be ſworn, (e) but he ſhall be ſworn, and his credit upon the exceptions taken againſt him left to thoſe of the Jury, who are triers of the fact, inſomuch as ſome Books have ſaid, that though the witneſs named in the Deed be named a Diſſeiſor in the writ, yet he ſhall be ſworn as a witneſs to the deed. (f) A witneſs amongſt others named in a deed was outlawed, & no Proceſs was awarded againſt him by the Statute, becauſe he was extra legem, and an outlawed perſon cannot be an Auditor. And the Court in ſome books have ſaid, that they have not ſeen witneſſes challenged, which is regularly to be underſtood with the limitations aboveſaid, but ſuch as are returned to be of a Jury, are to be challenged for the cauſes aforeſaid for outlary, & divers other cauſes (for the which a witneſs cannot be challenged) and ſuch Proceſs againſt witneſſes vaniſhed. But ſeeing the witneſſes named in a deed ſhall be joyned to the Inqueſt, and ſhall in ſome ſort joyn alſo in the verdict (in which caſe if Jury & Witneſſes find the Deed that is denied to be the Deed of the party, the adverſe party is barred of his attaint, becauſe there is no more than twelve that affirm the verdict.) It is reaſon that in that caſe of joyning, ſuch exception ſhall be taken againſt the witneſs as againſt one of the Jury, becauſe he is in the nature of a Juror. (a) And therefore to put one example, If he be outlawed in a perſonal action, he cannot be joyned to the Jury; but yet that is no exception againſt him, to exclude him to be ſworn as a Witneſs to the Jury. And the reaſon of all this is, for that if he with others ſhould joyn in verdict with the Jury in affirmance of the Deed, the party ſhould be barred of his Attaint. But note, there muſt be more than one witneſs, that ſhall be joyned to the Inqueſt. And albeit they joyn with the Jury, and find it not his Deed, notwithſtanding this joyning, the party ſhall have his attaint, for it is a maxim in Law, (b) That Witneſſes cannot teſtifie a negative, but an affirmative. And if one of the witneſſes named in the Deed be one of the pannell, he ſhall be put out of the pannell, and all theſe ſecrets of all do notably appear in our books.

43 E. 3. Conſpir. 11. 27. Aſſ. 59. 33 H. 6. 55. 21 H. 6. 30. (c) Forteſcu. cap. 26. Par. 55 H. 3. m. 3. Stant. Pl. Cor. 174. 1.

(d) Forteſcu. cap. 25.

(e) 22. Aſſ. 12. & 41. 23. Aſſ. 11. 19 E. 2. tit. Aſſ. 409.

(f) 34 E. 1. Proces. 208.

(a) 34 E. 1. tit. proces 208. 11. Aſſ. p. 19. 20. 12. Aſſ. p. 1. 12. 41. 18. Aſſ. p. 11. 22. Aſſ. 18. 23 Aſſ. 15. 40. Aſſ. 23. 48. Aſſ. p. 5. 21 H. 6. 30.

(b) 48 E. 3. 30. 12 H. 6. fo. 6. 2. 50 E. 3. 16. 43 E. 3. 32. 12. 4. 9. 19 E. 2. Aſſ. 408. Paſch. 14 E. 3. coram rege Devon. in Theſaur. Fleta lib. 6. cap. 6. F. N. B. 106. h. & 97. c. (c) Mirrour cap. 3. Pl. Com. fo. 10. Bract. lib. 5. fo. 400.

To put up this point, It is to be known, (c) that when a trial is by witneſſes, regularly the affirmative ought to be proved by two or three witneſſes, as to prove a ſummons of the Tenant, or the challenge of a Juror, & the like. But when the trial is by verdict of 12 men, there the judgment is not given upon witneſſes, or other kind of evidence, but upon the verdict, & upon ſuch evidence as is given to the Jury they give their verdict. And Bracton ſaith, there is probatio duplex, viz. Viva, as by witneſſes, viva voce; & Mortua, as by deeds, writings, and inſtruments. And many times Juries, together with other matter, are much induced by preſumptions, whereof there be three ſorts, viz. violent, probable, and light or temerary. Violenta præſumptio is many times plena probatio, as if one be run thorow the body with a ſword in a houſe whereof he inſtantly dieth, & a man is ſeen to come out of that houſe with a bloody ſword, & no other man was at that time in the houſe. Præſumptio probabilis, moveth little, but, Præſumptio levis ſeu temeraria, moveth not at all. So it is in the caſe of a Charter of feoffment, if all the witneſſes to the Deed be dead (as no man can keep his witneſſes alive, and time weareth out all men) then violent preſumption, which ſtands for a proof, is continual & quiet poſſeſſion, for ex diuturnitate temporis omnia præſumuntur ſolenniter eſſe acta alſo the Dead may receive credit, per collationem ſigillorum, ſcripturæ, &c. &, Super fidem chartarum mortuis teſtibus erit ad patriam de neceſſitate currendum.

Fleta lib. 6. cap. 33. 8 E. 3. 290. 19 E. 3. 21. b. Glanvil. lib. 10. cap. 12. Fleta lib. 6. cap. 33.

Note, it hath been reſolved by the Juſtices, that a wife cannot be produced either againſt or for her huſband, quia ſunt duæ animæ in carne una, and it might be a cauſe of implacable diſcord and diſſenſion between the huſband and the wife, and a mean of great inconvenience, but (d) in ſome caſes women are by Law wholly excluded to bear teſtimony, as to prove a man to be a Villein, Mulieres ad probationem ſtatus hominis admitti non debent. It was alſo agreed by the whole Court, (e) that in any information upon the Statute of Uſury, the party to the uſurious contract ſhall not be admitted to be a witneſs againſt the Uſurer, for in effect he ſhould be teſtis in propria cauſa, and ſhould avoid his own bonds and aſſurances, and diſcharge himſelf of the money borrowed; and though he commonly raiſe up an Informer to exhibit the Information, yet, in rei veritate, he is the party. And herewith in effect agreeth Britton

Paſch. 10. Ia. in Com. Banco upon the ſtat. of Bankrouts. (d) Fleta. lib. 2. cap. 44. 13 E. 1. tit. Vill. 367. 37. 19 E. 1. Ibid. 32. (e) Tr. 8. Ia. in Com. Banco Smiths caſe, In evidence upon an information upon the ſtatute of Uſury. Brit fol. 124.

ton that he that challengeth a right in the thing in demand, cannot be a witneſs, for that he is a party in intereſt. But now let us return to that from the which by way of digreſſion (upon this occaſion we are fallen.

And the ancient Charters of the King which paſſed away any franchiſe or revenue of any eſtate of inheritance, had ever this clauſe of his teſtibus of the greateſt men of the Kingdom, as the Charters of creation of Nobility yet have at this day: when his teſtibus was omitted, and when teſte me ipſo came in into the Kings grants, you ſhall read in the ſecond part of the Inſtitutes, Mag. Chart. cap. 38. I have termed the ſaid parts of the Deed, formal or orderly parts, for that they be not of the eſſence of a Deed of feoffment, for if ſuch a Deed be without præmiſes, habendum tenendum, reddendum, clauſe of warranty, the clauſe of In cujus rei teſtimonium, the Date and the clauſe of his teſtibus, yet the Deed is good. (f) For if a man by Deed give lands to another & to his heirs, without more ſaying, this is good, if he put his Seal to the Deed, deliver it, and make livery accordingly. (g) So it is if A. give lands, to have and to hold, to B. and his heirs, this is good, albeit the Feoffee is not named in the præmiſes. And yet no well adviſed man will truſt to ſuch Deed which law by conſtruction maketh good ut res magis valeat, but when form and ſubſtance concur, then is the Deed fair and abſolutely good. The ſealing of Charters & Deeds is much more ancient than ſome, out of errour, have imagined, for the Charter of the King Edwin, brother of King Edgar, bearing date Anno Domini 956 made of the land called Jecklea in the Iſle of Ely, was not only ſealed with his own Seal (which appeareth by theſe words, Ego Edwinus gratia Dei totius Britanniæ telluris Rex meum donum propria ſigillo meo confirmavi) but alſo the Biſhop of Wincheſter put to his Seal, Ego Ælfwinus Wintoñ Eccleſiæ divinus ſpeculator proprium ſigillū impreſſi. And the Charter of King Offa, whereby he gave the Peter pence, doth yet remain under Seal. But no King of England, before or ſince the conqueſt, ſealed with any ſeal of Arms, before King R. 1. but the Seal was the King ſitting in a chair on the one ſide of the Seal, and on horſe back on the other ſide in divers forms. And King R. 1. ſealed with a Seal of two Lyons for the Conqueror for England bare two Lyons & King John in the right of Aquitain (the Duke whereof bare one Lyon) was the firſt that bare three Lyons, and made his Seal accordingly, & all the Kings ſince have followed him. And King E. 3. anno 13. of his reign, did quarter the Arms of France with his three Lyons, and took upon him the title of King of France, and all his Succeſſors have followed him therein.

In ancient Charters of feoffment there was never mention made of the delivery of the deed or any livery of ſeiſin indorſed, for certainly & witneſſes named in the Deed, were witneſſes of both: and witneſſes either of delivery of the deed, or of livery of ſeiſin by expreſs terms was but of latter times, & the reaſon was in reſpect of the notoriety of the feoffment. And I have known ſome ancient deeds of feoffment having livery of ſeiſin indorſed ſuſpected & after detected of forgery. As ika Dei in the ſtile of the King, name him Defenſor fidei before 13. H. 8. or Supreme Head before 20 H. 8. at what time he was firſt acknowledged ſupreme head by the Clergy, albeit the King uſed not ſtyle of Supreme head in his Charters, &c. till 22 H. 8. or King of Ireland, before 33 H. 8. at which time he aſſumed the title of the King of Ireland, being before that called Lord of Ireland, it is certainly forged, & ſic de ſimilibus. 21 H. 8. ca. 16.

And ſome have obſerved that Grace was attributed to King H. 4. Excellent Grace to King H. 6. Majeſty to King H. 8. and before, the King was called, Soveraign Lord, Leige Lord, Highneſs, and Kingly Highneſs, which in Latine in legall proceedings is called Regia Celſitudo, as the beginning of the petition of right to the King is, Humiliimè ſupplicavit veſtræ Celſitudini regiæ, &c. and the like. And upon this occaſion it ſhall not be impertinent, ſeeing it is part of the formal Deed, to ſet down the ſeveral ſtiles of the Kings of England ſince the Conqueſt. Vid. 2 H. 4. c. 15. where Royal Majeſty is attributed to the King, and Crimen læſæ Majeſtatis, far more ancient.

William the Conqueror commonly ſtiled himſelf Willielmus Rex, and ſometimes Willielmus Rex Anglorum. And the like did William Rufus, and ſometimes Willielmus Dei gratia Rex Anglorum.

Henry the firſt, Henricus Rex Anglorum, and ſometimes Henricus Dei gratia Rex Anglorum.

Mawde the ſole Daughter and heir of H. 1. wrote, Matildis Imperatrix Henrici Regis filia & Anglorum D mina. Divers of whoſe creations and grants I have ſeen.

King Stephen uſed the ſtile that King H. 1. did.

Henry the 2. Fitz Emprice omitted Dei gratia, and uſed this ſtile, Henricus Rex Angliæ, Dux Normanniæ, & Aquitaniæ, & Comes Andegaviæ, he having the Duchy of Aquitain, and Earldom of Poitiers in the right of Elianor his wife heir to both: And the Earldoms of Anjowe, Tourain, and Maine, as ſon and heir to Jeffery Plantagenet by the ſaid Mawde his wife, daughter and ſole heir of King H. 1. She was firſt married to Henry the Emperour, & after his death to the ſaid Jeffery Plantagenet. Which Duchy of Aquitain doth include Gaſcoign and Guian.

King R. 1. uſed the ſtile that H. 2. his father did, yet was he King of Cyprus, and after of Jeruſalem, but never uſed either of them.

(f) Mirr. 6. ca. 1. ſect. 6, 1. cap. 5. ſect. 1. Glanvil. lib 10. ca. 12. Bract. lib. 5. fol. 396. Fet. li. 6. c. 32. Britt. f. 66.

(g) Vid. Tearms of the Law, verb. faits. Vid. Glauvil. lib. 10. c. 12. Mir. c. 1. ſect. 3. c. 3.

King John uſed that ſtile, but with this addition Dominus Hiberniæ, and yet all that he had in Ireland was conquered by his father King H. 2. which title of Dominus Hiberniæ, he aſſumed as annexed to the Crown, albeit his father, in the 23. year of his reign, had created him King of Ireland in his life time.

King H. 3. ſtiled himſelf as his father King John did, untill the 44 year of his reign, and then he left out of his ſtile Dux Normaniæ, & Comes Andigavæ, and wrote onely Rex Angliæ, Dominus Hiberniæ, & Dux Aquitaniæ.

King E. 1. ſtiled himſelf in like manner as King H. 3. his father did, Rex Angliæ, Dominus Hiberniæ & Dux Aquitaniæ. And ſo did King E. 2. during all his reign. And King E. 3. uſed the ſelf ſame ſtile untill the 13. year of his reign, and then he ſtiled himſelf in this form, Edwardus Dei gratia Rex Angliæ, & Franciæ, & Dominus Hiberniæ, leaving out of his ſtile Dux Aquitaniæ. He was King of France, as ſon and heir of Iſabel wife of King E. 2. daughter and heir of Philip le Beau King of France, he firſt quartered the French Armories with the Engliſh in his great Seal, Anno Domini 1338. & regni ſui 14.

King R. 2. and King H. 4. uſed the ſame ſtile that King E. 3. did. And King H. 5. untill the 8 year of his reign continued the ſame ſtile, and then wrote himſelf, Rex Angliæ, Hæres & Regens Franciæ, & Dominus Hiberniæ, and ſo continued during his life.

Vid. Rot. Parliam. anno 1 H. 6. nu. 15. he was ſtiled Rex Franciæ & Angliæ & Dominus Hiberniæ.

King H. 6 wrote, Henricus Dei gratia Rex Angliæ, & Franciæ, & Dominus Hiberniæ; this King being crowned in Paris King of France uſed the ſaid ſtile 39 years, till he was diſpoſſeſſed of the Crown by King E. 4. who after he had reigned alſo about ten years, King H. 6. was reſtored to the Crown again, and then wrote, Henricus Dei gratia Rex Angliæ & Franciæ, Dominus Hiberniæ ab inchoatione regni ſui 49. & recaptionis regiæ poteſtatis primo.

King E. 4. R. 3. and H. 7. ſtiled themſelves, Rex Angliæ & Franciæ, & Dominus Hiberniæ.

King H. 8. uſed the ſame ſtile till the tenth year of his reign, and then he added this word (Octavus) as Henricus octavus Dei gratia, &c. In the 13 year of his reign he added to his ſtile Fidei Defenſor. In the 32 year of his reign in the end of his ſtile he added, Supremum Caput Eccleſiæ Anglicanæ. And in the 23 year of his reign he ſtiled himſelf thus, Henricus octavus Dei gratia Angliæ, Franciæ & Hibernæ Rex, Fidei Defenſor, &c. & in terra Eccleſiæ Anglicanæ & Hiberniæ ſupremum caput.

King E. 6. uſed the ſame ſtile, and ſo did Queen Mary in the beginning of her reign, and by that name ſummoned her firſt Parliament, but ſoon after omitted Supremum Caput. And after her marriage with King Philip the ſtile notwithſtanding that omiſſion was the longeſt that ever was, viz. Philip and Mary by the Grace of God King and Queen of England and France, Naples, Jeruſalem and Ireland, Defenders of the Faith, Princes of Spain and Cicily, Archdukes of Auſtria, Dukes of Millain, Burgundy and Brabant, Counces of Hasburgh, Flanders and Tyrol. And this ſtile continued till the fourth and fifth year of King Philip and Queen Mary and then Naples was put out, and in place thereof both the Cicilies put in, and ſo it continued all the life of Queen Mary.

I need not mention the ſtile of Queen Elizabeth, King James, nor of our Soveraign Lord King Charls, becauſe they are ſo well known, and I fear I have been too long concerning this point, which certainly is not unneceſſary to be known for many reſpects. But to ſhew the cauſes and reaſons of theſe alterations would aſk a Treatiſe of it ſelf, & doth not ſort to the end that I have aimed at. And now let us return to the learning of Charters and Deeds, of Feoffments and Grants.

Livery of ſeiſin incident to a feoffment. Vid. ſect. 59.

Very neceſſary it is that Witneſſes ſhould be underwritten or indorſed, for the better ſtrengthning of Deeds, and their names (if they can write) written with their own hands. For Livery of ſeiſin ſee hereafter, Sect. 59. and for Deeds, Sect. 66. and of Conditional Deeds, ſee our Author in his Chapter of Conditions. And now let us proceed to the other words of our Author.

Mirr. ca. 2. ſect. 15. Bract. lib. 2. fol. 62. b. Flet. lib. 6. cap. 1. & 54. & lib. 1. cap. 13. Glanvil. lib. 7. cap. 1. & cap. 12. & 13.

¶ *A luy & a ſes heires.* Hæres, in the legall underſtanding of the Common Law, imporeth that he is ex juſtis nuptiis procreatus, for hæres legitimus eſt quem nuptiæ demonſtrant, and is he to whom lands, tenements, or hereditaments by the act of God, and right of blood do deſcend of ſome eſtate of inheritance, for Solus Deus hæredem facere poteſt non homo: dicuntur autem hæreditas & hæres ab hærendo, quod eſt arctè inſidendo, nam qui hæres eſt, hæret, vel dicitur ab hærendo quia hæreditas ſibi hæret, licet nonnulli hæredem dictum velint quod hærus ſuit, hoc eſt dominus terrarum, &c. quæ ad eum perveniunt.

(a) Bract. lib. 5. fol. 437. 438. Britt. cap. 66. fol. 167. & cap. 83. Fleta lib. 1. cap. 5.

A monſter which hath not the ſhape of mankind, cannot be heir or inherit any land, albeit it be brought forth within marriage, (a) but although he hath deformity in any part of his body yet if he hath humane ſhape he may be heir. Hi qui contra formam humani generis converſo more procreantur, ut ſi mulier monſtroſum, vel prodigioſum enixa, inter liberos non computentur, partus tamen cui natura aliquantulum ampliaverit vel diminuerit, non tamen ſuperabundanter (ut ſi ſex digitos vel niſi quatuor habuerit) bene debet inter liberos connumerari.

Si

ſi inutilia natura reddidit, ut ſi membra tortuoſa habuerit, non tamen is partus monſtroſus. Another ſaith, Ampliatio ſeu diminutio membrorum non nocet. (b) A baſtard cannot be heir, for (as hath been ſaid before) qui ex damnato coitu naſcuntur inter liberos non computentur. Every heir is either a male, or female, or an Hermaphrodite, that is, both male and female. And an Hermaphrodite (which is alſo called Androginus) ſhall be heir, either as male or female, according to that kind of the ſex which doth prevail. Hermaphrodita, tam maſculo, quam fœminæ comparatur ſecundum prævaleſcentiam ſexus incaleſcentis. And accordingly it ought to be baptized. See more of this matter, Sect. 35.

b) Vid.ſect.188.390. Bract.lib.2.fol.92. Brit.fo. Fleta lib.1.ca.5. & l.6.c.8. Fleta ubi ſupra. 3 R.2. Entr.cong.38.

(c) A man ſeiſed of lands in fee hath iſſue an Alien that is born out of the Kings ligeance, he cannot be heir, propter defectum ſubjectionis, albeit he be born within lawful marriage. If made Denizen by the Kings Letters Patents, yet cannot he inherit to his father or any other. But otherwiſe it is if he be naturalized by Act of Parliament, for then he is not accounted in Law Alienigena, but Indigena. But after one be made Denizen the iſſue that he hath afterwards ſhall be heir to him but no iſſue that he had before. If an Alien cometh into England and hath iſſue two ſons, theſe two ſons are Indigenæ ſubjects born, becauſe they are born within the Realm. And yet if one of them purchaſe lands in fee, and dieth without iſſue, his brother ſhall not be his heir, for there was never any inheritable blood between the father and them, and where the ſons by no poſſibility can be heir to the father, the one of them ſhall not be heir to the other. See more at large of this matter, Sect. 198.

c) Mirror.ca.1. ca.3.ſect.ca.5.ſect. Bract.l.5. fol.415.327. Brit.fo.27.Fleta lib.6.ca.47. 13 E. 3. br.677. 25 E.3. de natis ultra mare. 31 E.3.Coſinage 5. 42 E. 3.1. 11 H.4.46. 14 H.4.19.20.3 H.6.55. 22 H.6.38. 9 E.4.7. lib.7.fo.1.in Calvins caſe.

If a man be attainted of treaſon, or felony, although he be born within wedlock, he can be heir to no man, nor any man heir to him propter delictum, for that by his attainder his blood is corrupted. And this corruption of blood is ſo high, as it cannot abſolutely be ſalved, and reſtored but by act of Parliament, for albeit the perſon attainted obtain his Charter of pardon, yet that doth not make any to be heir whoſe blood was corrupted at the time of the attainder, either downward or upward. (d) As if a man hath iſſue a ſon before his attainder, and obtaineth his pardon, and after the pardon hath iſſue another ſon, at the time of the attainder, the blood of the eldeſt was corrupted, and therefore he cannot be heir. But if he dye living his father, the younger ſon ſhall be heir, for he was not in eſſe at the time of the attainder, and the pardon reſtored the blood as to all iſſues begotten afterwards. But in the caſe if the eldeſt ſon had ſurvived the father, the younger ſon cannot be heir, becauſe he hath an elder brother which by poſſibility might have inherited, but if the elder brother had been an Alien, the younger ſon ſhould be heir, for that the Alien never had any inheritable blood in him. See more plentifully of this matter, Sect. 646, 647.

1 E. 3.4.6 E.3.55. 27 E.3.77. 3 E. 2.diſcent.br.64. 31 E.1.diſcent.17. 46 E.3.Petition 20. 26 Aſſ.p.2. 49 Aſſ.p.4. 29 Aſſ. p.11. 9 H.5.9. d) Stanf.pl.cor.195,196. Bracton lib.3.fo.132. 133.276. & lib.5.fo.374. Britton fo.215.b. Fleta lib.1.ca.28.

If a man hath iſſue two ſons, and after is attainted of treaſon, or felony, the one of the ſons purchaſe lands and dieth without iſſue the other brother ſhall be his heir, for the attainder of the father corrupteth the lineal blood only, and not the collateral blood between the brethren, which was veſted in them before the attainder, and each of them by poſſibility might have been heir to the father, and ſo hath it been adjudged, (†) but otherwiſe in the caſe of the Alienee, as hath been ſaid. (e) But ſome have holden that if a man after he be attainted of treaſon or felony have iſſues two ſons, that the one of them cannot be heir to the other, becauſe they could not be heir to the father, for they never had any inheritable blood in them.

†) In the Exchequer Mic. 40. & 41 Eliz. in le caſe de Hobby. e) Bract.lib.3. fol.130. Britton fol.15. Fleta lib.2.cap.58.

(f) One that is born deaf and dumb may be heir to another, albeit it was otherwiſe holden in ancient time. And ſo if born deaf, dumb and blind, for in hoc caſu, vitio parcitur naturali, but contract they cannot. Idiots, lepers, mad men, outlaws in debt, treſpaſſers, or the like, perſons excommunicated, men attainted in a Præmunire, or convicted of hereſy may be heirs.

f) Bract.lib.5.421. 430.434.lib.2.fol.12. Fleta lib.6. ca.39.47. 14 H.3.Bre.877.32 E.3. Age 8.10 E.3.535. 18 E.3.53.13 E.3. Ley 49.

(g) If a man hath a wife, and dieth, and within a very ſhort time after the wife marrieth again, and within nine moneths hath a child, ſo as it may be the child of the one or the other. Some have ſaid That in this caſe the child may chuſe his father, quia in hoc caſu filiatio non poteſt probari, and ſo is the Book to be intended, for avoiding of which queſtion and other inconveniencies, this was the Law before the Conqueſt, Sit omnis vidua ſine marito duodecim menſibus, & ſi maritaverit perdat dotem.

g) 21 E.3.39. Panarollus nova rep. 485.&c.Opus eximium 48 b. Lambard de priſcis Anglorum legibus 120.72.acc.

(h) A man by the Common Law cannot be heir to goods or Chattels, for hæres dicitur ab hæreditate. (i) If a man buy divers fiſhes, as Carps, Breams, Tenches &c. and put them in his Pond, and dyeth, in this caſe the heir ſhall have them, and not the Executors, but they ſhall go with the inheritance, becauſe they were at liberty and could not be gotten without induſtry, as by nets, and other engines, otherwiſe it is if they were in a trunk or the like. Likewiſe Deer in a Park, Coneys in a Warren, and Dobes in a Dobe-houſe, young and old ſhall go to the heir. (k) But of ancient time the heir was permitted to have an Action of debt upon a bond made to his Anceſtor and his heirs, but the Law is not ſo holden at this day. Vid. Sect. 12.

h) Bract.lib.4.ca.9. fol.245.lib.4. fo.62.b. Fleta lib.6.ca.1. Lib.8.fo.54. Syms caſe. i) Mich.36.& 37 El. Rot.25. Inter Gray & Paulet in the Kings Bench. Stanford 25.b. 18 E.4.8. 22 Aſſ.25. 18 H.8.2. k) 11 H.2.det.334.339,340. 47 E.3.23.25 E.3.fol.48. 26 E.3.10.

(l) It is to be noted that one cannot be heir till after the death of his Anceſtor, he is called hæres apparens, heir apparant.

Vid.for an heire lome. hæreditarium or principalius, ſect.12. l) Mirror ca.1. ſect.3.

In our old Books and Records there is mention made of another heir, viz. hæres aſtrarius, ſo called of Aſtre, that is, an harth of a houſe, becauſe the Anceſtor by conveyance hath fet his heir apparant, and his family in a houſe and living in his life time, of whom Bracton ſaith thus, (a) Item eſto quod hæres ſit aſtrarius, vel quod aliquis anteceſſor reſtituat hæredi in vita ſua hæreditatem, & ſe dimiſerit, videtur quod nullo tempore jacebit hæreditas, & ideo quod nec relevari poſſit, nec debet, nec relevium dari. (b) For the benefit and ſafety of right heirs contra partes ſuppoſitos, the Law hath provided remedy by the Writ De ventre inſpiciendo, whereof the title in the Regiſter is this; Nota ſi quis habens hæreditatem duxerit aliquam in uxorem & poſtea moriatur ille ſine hærede de corpore ſuo exeunte, per quod hæreditas illa fratri ipſius defunct. deſcendere debeat, & uxor dicit ſe eſſe pregnantem de ipſo defuncto eum non ſit, habeat frater, & hæres breve de ventre inſpiciendo. It ſeemeth by Bracton and Fleta which followed him, that this Writ doth lye, Ubi uxor alicujus in vita viri ſui ſe pregnantem fecit cum non ſit, vel poſt mortem viri ſui ſe pregnantem fecit cum non ſit ad exhæredationem veri hæredis, &c. ad quærelam veri hæredis per præceptum domini regis, &c. which is to be underſtood according to the rule of the Regiſter: when a man having lands in Fee ſimple dieth, and his wife ſoon after marrieth again, and feigns her ſelf with child by her former husband, in this caſe though ſhe be married, the Writ De ventre inſpiciendo doth lye for the heir. But if a man ſeiſed of lands in fee (for example) hath iſſue a daughter, who is heir apparant, ſhe in the life of her father cannot have this Writ for divers cauſes; firſt, becauſe ſhe is not heir, but heir apparant, for as hath been ſaid, nemo eſt hæres viventis, and this Writ is given to the heir to whom the land is deſcended. And both Bracton and Fleta ſaith, that this Writ lieth ad querelam veri hæredis, which cannot be in the life of his Anceſtor, and herewith agreeth Britton and the Regiſter. Secondly, the taking of a husband in the caſe aforeſaid being her own act, cannot bar the heir of his lawful Action once veſted in him. Thirdly, the Law doth not give the heir apparant any Writ, for it is not certain whether he ſhall be heir, ſolus Deus facit hæredes. Fourthly, the inconvenience were too great if heirs apparant in the life of their Anceſtor ſhould have ſuch a Writ to examine and try a mans lawful wife in ſuch ſort as the Writ De ventre inſpiciendo doth appoint, and if ſhe ſhould be found to be with child, or ſuſpect, then ſhe muſt be removed to a Caſtle and there ſafely kept until her delivery, and ſo any mans wife might be taken from him againſt the Laws of God and man.

(a) Bract. lib. 2. fo. 86. Heref. p. 8. E. 1. Ro. 80. de Banco. Mirror cap. 2. ſect. 19. Britton 151. b.

(b) Regiſtr. o. 227. Bracton lib. 2. fo. 93. Britton fol. 165. Fleta lib. 1. ca. 14.

Britton. fo. 165. b. Regiſt. ubi ſupra.

Vid. Bracton Britton & Fleta ubi ſupra. Regiſt. ubi ſupra. Bracton and Fleta ubi ſupra have (ad exhæredationem.)

The words of the Writ De ventre inſpiciendo make this evident. Rex Vic. ſalutem, monſtravit nobis A. quod cum R. *quæ fuit uxor Clementis* B. prægnans non ſit, ipſa falsò dicit ſe eſſe prægnantem de eodem Clemente, *ad exhæredationem* ipſius A. de ſicut terra quæ fuit ejuſdem C. *ad ipſum A jure hæreditario deſcendere debeat* tanquam *ad fratrem & hæredem* ipſius C. ſi prædict. R. prolem de eo non habuerit, &c. But this rather belongs to the Treatiſe of original Writs, and therefore thus much herein ſhall ſuffice.

And it is to be obſerved that every word of Littleton is worthy of obſervation, firſt, (Heirs) in the plural number, for if a man give land to a man & to his heir in the ſingular number, he hath but an eſtate for life, for his heir cannot take a Fee ſimple by deſcent, becauſe he is but one, and therefore in that caſe his heir ſhall take nothing. Alſo obſervable is this conjunctive (Et), For if a man give lands to one, To have and to hold to him or his heirs, he hath but an eſtate for life for the uncertainty. (Ses, ſais) If a man give land unto two, To have and to hold to them two & hæredibus (c) omitting ſuis, they have but an eſtate for life for the uncertainty, whereof more hereafter in this Section. But it is ſaid, if land be given to one man, & hæredibus, omitting ſuis, that notwithſtanding a Fee ſimple paſſeth, but it is ſafe to follow Littleton.

(c) 10 H. 6. 7. 12 H. 6. 15. Pl. Com. 28. b. 22 E. 4. 16. 2 H. 4. 12. 20 E. 3. br. 377.

(d) Lib. 5. fo. 96. 97. Britt. fo. 28 H. 8. Dyer. Pl. Com. 287, 288.

(e) Bract. lib. 2. ca. 39. fo. 92. b. Br. ca. 39. fo. 99. b. Fleta lib. 2. ca. 192. & lib. 3. cap. 2. 20 H. 6. 35. 36. 19 H. 6. 17. 22. 74. 22 E. 4. 16. b. 4 E. 6. Pl. Com. 26.

(f) Vid. ſect. 413.

(g) 7 E. 3. 25. Vid. ſect. 686. 25 E. 3. 35. Bract. lib. 2. fo. 62. b. Vid. ſect. 413.

(h) Pl. Com. 242. Seignior Berkleyes caſe.

(i) Vid. Britt. fo. 86. 121. & 130. 17 E. 3. 25. b. 53 H. 6. 22. 10 H. 7. 13. 14. 9 H. 7. 11. 16 H. 7. 9. 15 E. 4. 13. 14 H. 6. 12. 35 H. 6. 54. 24 Aſſ. 14. 40 Aſſ. 21. Tr. 5 E. Rot. . in Scaccario. 3 E. 3. 32. 7 E. 3. 40. 11 H. 4. 34. 12 H. 4. 12. 18 E. 2. Conſians 39. b. 5 E. 4. 121. 38 E. 3. 4. Lib. 9. fo. 28. in Caſe de Abb. de Strata Marcella.

(d) *Et ſes aſſignes.* Aſſignee cometh of the verb Aſſigno. And note there be Aſſigns in Deed and Aſſigns in Law, whereof ſee more in the Chapter of Warranty, Sect. 733.

*Ceux parolx (ſes heires) tantſolement font leſtate denheritance en touts feoffments & grants.* (e) Si autem facta eſſet donatio, ut ſi dicam, do tibi talem terram, iſta donatio non extendit ad hæredes ſed ad vitam donatoris, &c. (f) Here Littleton treateth of purchaſes by natural perſons, and not of Bodies politique or corporate; (g) for if lands be given to a ſole Body politique or corporate, (as to a Biſhop, Parſon, Vicar, Maſter of an Hoſpital, &c.) there to give him an eſtate of inheritance in his politick or corporate capacity, he muſt have theſe words, To have & to hold to him & his ſucceſſors, for without theſe words Succeſſors, in thoſe caſes there paſſeth no inheritance, for as the heir doth inherit to the Anceſtor, ſo the Succeſſor doth ſucceed to the Predeceſſor & the Executor to the Teſtator. (h) But it appeareth here by Littleton, that if a man at this day give lands to I. S. and his Succeſſors, this createth no Fee ſimple in him, for Littleton ſpeaking of natural perſons ſaith, theſe words (his heirs) make an eſtate of inheritance in all Feoffments and Grants whereby he excludeth theſe words (his ſucceſſors) (i) And yet if it be an ancient grant it muſt be expounded as the Law was taken at the time of the grant. (k) A Chantry Writ incorporate took a Leaſe to him

him and his ſucceſſors for a hundred years, & after took a releaſe from the Leaſor to him and his ſucceſſors, and it was adjudged that by the releaſe he had but an eſtate for life, for he had the Leaſe in his natural capacity for it could not go in ſucceſſion, and (his ſucceſſors) gave him no eſtate of inheritance for want of theſe words (his heirs.) (i) If the King by his Letters Patents giveth lands Decano & Capitulo, habendum ſibi & hæredibus & ſucceſſoribus ſuis, In this caſe albeit they be perſons in their natural capacity to them and their heirs, yet becauſe the Grant is made to them in their politique capacity, it ſhall enure to them and their ſucceſſors And ſo if the King do grant lands to I.S. Habendum ſibi & ſucceſſoribus ſive hæredibus ſuis, this Grant ſhall enure to him and his heirs.

(k) Hill. 21 Eliz. Dyers Manuſcript, inter Aſſley and Johnſon in Com. Banco.

(l) 18 H. 6. 11. b. &c. adjudge.

(m) B. having divers ſons and daughters. A. giveth lands to B. & liberis ſuis, & a four heires, the father and all his children do take a Fee ſimple jointly by force of theſe words (their heirs) but if he had no child at the time of the feoffment the child born afterward ſhall not take.

(m) 15 E. 3. tit. Counterplea de Voucher 43. 37 H. 6. 30. 11 E. 4. 2.

Theſe words (his heirs) do not only extend to his immediate heirs, but to his heirs remote) and moſt remote, born and to be born (n) Sub quibus vocabulis (hæredibus ſuis) omnes hæredes propinqui comprehenduntur, & remoti nati, & naſcituri. And hæredum appellatione veniunt hæredes hæredum in infinitum And the reaſon wherefore the Law is ſo preciſe to preſcribe certain words to create an eſtate of inheritance. is for avoiding of uncertainty, the mother of contention and confuſion.

(n) Fleta lib. 3. cap. 9. Pl. Com. 163.

There be many words ſo appropriated, as that they cannot be legally expreſſed by any other word or by any periphraſis, or circumlocution: Some to eſtates of lands, &c. as here and in (a) other places of our Author. In this place theſe words tantſolement, not ſolement alone, but tantſolement all onely i. ſolummodo, or duntaxat are to be obſerved; (b) Some to Tenures (c) Some to perſons; (d) Some to offences; (e) Some to forms of originall writs either for recovery of right, or removing, or redreſs of wrong. (f) Some to warranty of land. Theſe have I touched for examples. I leave others to the ſtudious Reader to obſerve and add, holding this for an undoubted verity, that there is no knowledg, caſe, or point in Law, ſem it of never ſo little account, but will ſtand our Student in ſtead at one time or other, and therefore in reading nothing to be pretermitted.

(a) Sect. 17 61. 13. 3.
(b) Sect. 156. 181.
(c) Sect. 184.
(d) Sect. 190. 194. 746.
(e) Sect. 9. 67. 194. 204. 234. 236. 241. 405. 485. 478. 551. 655. 646. 520. 614. 637. 692.
(f) Sect. 732.

¶. *Font leſtate.* Status dicitur à ſtando, becauſe it is fixed and permanent. The Iſle of Man, which is no part of the Kingdom, but a diſtinct Territory of it ſelf, hath been granted by the great Seal to divers ſubjects and their heirs. (g) It was reſolved by the Lord Chancellor, the two chief Juſtices, and chief Baron, that the ſame is an eſtate deſcendible according to the courſe of the Common Law, for whatſoever ſtate of inheritance paſs under the great Seal of England, it ſhall be deſcendible according to the rules, and courſe of the Common Law of England.

(g) Tr. 40. Eliz. in le Countee de Derbyes caſe, by the Lord Chancellor, les 2. chief Juſtices, and Chief Baron.

¶ *En touts feoffments & grants.* Here he giveth the Feoffment the firſt place, as the ancient and moſt neceſſary conveyance, both for that it is ſolemn and publick, and therefore beſt remembred and proved, (g) and alſo for that it clearеth all diſſeiſins abatements, intruſions, and other wrongful or defaſible eſtates, where the entry of the Feoffor is lawful, which neither Fine, Recovery, nor Bargain and Sale by Deed indented and inrolled doth. And here is implyed a diviſion of Fee, or Inheritance, viz. (h) into corporeal (as Lands and Tenements which lye in Livery) comprehended in this word Feoffment, and may paſs by Livery by Deed or without Deed, which of ſome is called Hæreditas corporata, and incorporeal, (which lye in Grant, and cannot part by Livery but by Deed, (as Advowſons, Commons &c. and of ſome is called Hæreditas incorporata) and by the delivery of the Deed, the Freehold, and Inheritance of ſuch Inheritance, as doth lye in Grant, doth paſs) comprehended in this word Grant. And the Deed of incorporate inheritances doth equal the Livery of corporeate. And therefore Littleton ſaith, in all Feoffments and Grants, Hæreditas alia corporalis, alia incorporalis: Corporalis eſt, quæ tangi poteſt & videri; incorporalis, quæ tangi non poteſt, nec videri.

(g) Vide ſect. 59. & 66.

(h) Mirrour c. 2. ſect. 15. & cap. 5. ſect. 1. Bracton lib. 2. fol. 53. 366. 368. Fleta, lib. 3. cap. 1. 3. 15. Britton 84. 87. 2. & fol. 61. 101, 102, 141, 142, agreeth herewith. Pl. Com. 171. Hill. & Grange.

Mirrour cap. 5. Sect. 1. Britton, cap. 34.

Feoffment is derived of the word of Art Feodum, quia eſt donatio feodi, for the ancient Writers of the Law called a feoffment donatio, of the verb do or dedi, which is the apteſt word of feoffment. And that word Ephron uſed, † when he enfeoffed Abraham, ſaying, I give thee the field of Machpelah ober againſt Mamre, and the Cabe therein I give thee, and all the trees in the field and the borders round about, all which were made ſure unto Abraham for a poſſeſſion, in the preſence of many witneſſes.

For the Antiquity of Feoffments, ſee the ſecond Part of the Inſtitutes, Merlebridge cap. 9. 8 E. 3. 24. 18 H. 6. 24. 39 H. 6. 39.
† Geneſis 23.
† Vide Sect. 57. Britton, cap. 34. 44 E. 3. 41.

By a feoffment the corporeate fee is conveyed, & it properly betokeneth a conveyance in fee as our Author himſelf hereafter ſaith, † in his Chapter of Tenant for life. And yet ſometime improperly it is called a feoffment when an eſtate of freehold onely doth paſs, Done eſt nomine generall plus que neſt feoffment, car done eſt generall a touts choſes moebles & nient moebles, feoffment eſt riens forſque del ſoyle. And note there is a difference inter cartam & factum, for

See more of feoffments, ſect. 60. See of factum ſect. 259.

carta is intended a Charter which doth touch inheritance, and ſo is not factum unleſs it hath ſome other addition.

Lib.3.f.63.in Lincoln College caſe.

Grant, Conceſſio, is properly of things incorporeal, which (as hath been ſaid) cannot paſs without deed. And here it is to be obſerved (that I may ſpeak once for all) that every period of our Author in all his three Books contains matter of excellent learning, neceſſarily to be collected by implication, or conſequence, for example, he ſaith here, that theſe words (his heirs) make an eſtate of inheritance in all feoffments & grants, he expreſſing feoffments & grants, neceſſarily implyeth, that this rule extendeth not, firſt, to laſt Wills & Teſtaments, for thereby (i) as he himſelf after ſaith, an eſtate of inheritance may paſs without theſe words (his heirs.) (k) As if a man deviſe 20 acres to another, & that he ſhall pay to his Executors, for the ſame ten pound, & hereby the Deviſee hath a Fee ſimple by the intent of the Deviſor, albeit it be not to the value of the land. (l) So it is if a man deviſe lands to a man in perpetuum, or to give and to ſell, or in feodo ſimplici, or to him, and to his aſſigns for ever. In theſe caſes a Fee ſimple doth paſs by the intent of the Deviſor, but if the deviſe be to a man & his aſſigns without ſaying (for ever) the Deviſee hath but an eſtate for life. (m) If a man deviſe land to one & Sanguini ſuo, that is a Fee ſimple, but if it be Semini ſuo, it is an eſtate tail.

(i) Litt.lib.3.c.de Attorn. ſect.5.8.6.
4 E.6.Eſtates Br.78.
29 H.8.Teſtaments 18.
22 Eliz.Dier 371.
Temps H.8.tit. Conſcience Br.25.
(k) 21 E.3.16.34 H.6.7.
19 H.8.9.lib.3.fo.21.in Boroltons caſe lib.6. f.16,17. lib.10.fo.67.
(l) Vide ſect.585.
(m) Mich. 40.& 41 Eliz. in Error.Int.Downhal & Catesby adjudge.
Brook tit.tail 21.

(n) Secondly, that it extendeth not to a Fine ſur conuſans de droit come ceo que il ad de ſon done, by which a Fee alſo may paſs without this word (heirs) in reſpect of the height of that fine and that thereby is implyed that there was a precedent gift in fee.

(n) Lib.1.fo.100. Shelleyes caſe 42 E.3.7.
19 H.6.17.b.22.b.
Pl.Com.248.

Thirdly, not to certain Releaſes, and that three manner of ways, (o) firſt when an eſtate of inheritance paſſeth and continueth as if there be three coparceners or Joyntenants. & one of them releaſe to the other two, or to one of them generally without this word (heirs) by Littletons own opinion they have a Fee ſimple as appeareth hereafter. 2. By releaſe (p) when an eſtate of inheritance paſſeth & continueth not, but is extinguiſhed, as where the Lord releaſes to the Tenant, or the Grantee of a rent, &c. releaſe to the Tenant of the land generally all his right, &c. hereby the Seigniory, rent, &c. are extinguiſhed for ever without theſe words (his heirs). 3. (q) When a bare right is releaſed, as when the Diſſeiſee releaſe to the Diſſeiſor all his right, he need not (ſaith our Author in another place) ſpeak of his heirs. But of all theſe, & the like caſes, more ſhall be treated in their proper places. 4. Nor to a Recovery, A. ſeiſed of land ſuffereth B. to recover the land againſt him by a common recovery where the judgment is quod prædictus B. recuperet verſus prædict' A. tenementa prædicta cum pertinen', yet B. recovereth a Fee ſimple without theſe words (heirs) for regularly every Recoveror recovereth a Fee ſimple. 5. Nor to a creation of Nobility by Writ, for when a man is called to the Upper Houſe of Parliament by Writ, he is a Baron & hath inheritance therein without the word (heirs) yet may the King limit the general ſtate of inheritance created by the Law and Cuſtom of the Realm to the heirs males, or general, of his body by the Writ, as he did to Bromflete who in 27 H.6. was called to Parliament by the name of the Lo: Veſcye, &c. with the limitation in the Writ to him and the heirs males of his body, but if he be created by Patent, he muſt of neceſſity have theſe words (his heirs) or the heirs males of his body, or the heirs of his body, &c. otherwiſe he hath no inheritance. The firſt creation of a Baron by patent that I find was of John Beauchampe of Holt, created Baron by patent in 11 R.2. for Barons before that time were called by Writ. And it is to be obſerved that of ancient times Earls, &c. were created by girding them with a ſword, and nominating him Earl, &c. of ſuch a County or place, and this with a calling of him to Parliament by Writ by that name was a ſufficient creation of inheritance.

(o) Litt.lib.2.ca. Tenant in common. ſect.304,305. cap.Attorn. ſect.374.
Dier 9 Eliz.263.
(p) Litt.lib.3.c. Releaſes ſect.479,480.
20 H. 6.17. 1 H.6.17.22.
(q) Litt.cap. Releaſes. ſect. 467.

27 H.6.Lo. Veſcies caſe.

But out of this rule of our Author, the Law doth make divers exceptions (Et exceptio probat regulam) for ſometime by a Feoffment a Fee ſimple ſhall paſs without theſe words (his heirs) For example. firſt (r) if the father enfeoff the ſon, To have and to hold to him and to his heirs, & the ſon enfeoffeth the father as fully as the father enfeoffed him. by this the father hath a fee ſimple, quia verba relata hoc maximè operantur per referentiam ut in eſſe videntur. (ſ) Secondly, in reſpect of the conſideration, a fee ſimple had paſſed at the Common Law without this word (heirs) as at this day an eſtate of inheritance in tail, as if a man had given land to a man with his daughter in frankmarriage generally, a fee ſimple had paſſed without this word (heirs) for there is no conſideration ſo much reſpected in law, as the conſideration of marriage, in reſpect of alliance and poſterity. (t) Thirdly, if a Feoffment or Grant be made by Deed to a Major & Communalty or any other Corporation aggregate of many perſons capable, they have a fee ſimple without the word (Succeſſors) becauſe in judgment of the Law they never die. (u) Fourthly, in caſe a ſole Corporation a fee ſimple ſhall ſometime paſs without this word (Succeſſors) as if a feoffment in fee be made of land to a Biſhop, To have & to hold to him in libera eleemoſyna a fee ſimple doth paſs without this word (Succeſſors.) (w) And ſo if a man give lands to the King by deed inrolled a fee ſimple doth paſs without theſe words (Succeſſors or heirs) becauſe in judgment of law the King never dieth. Fifthly, in Grants ſometimes an Inheritance ſhal paſs without this word (heirs) (x) as if partition be made between Coparceners of lands in fee ſimple, & for owelty of partition the one grant a rent to the

(r) 39 Aſſ.12. 41 E.3.tit. Feoffments & Faits 254.
14 H.4.13.34 E.3.
Avowry 258.
(ſ) Vide ſect.17.
12 H.4.19. in Formedon.

(t) 8 E.3.27. 11 H.7.12.
22 E.4.11 H.4.84.
2 H.4.13.

(u) 19 H.6.74.
20 H.6.36.
(w) Pl.Com.Lo. Berkleyes caſe.

(x) 29 Aſſ.23.15 H.7.14.
2 H.7.5. 11 H.4.3.
21 E.3.l.21 Aſſ.

the other generally, the Grantee ſhall have a Fee ſimple without this word (heires) becauſe the Grantor hath a Fee ſimple, in conſideration whereof, he granted the rent. Ipſæ etenim leges cupiunt ut jure regantur. Sixthly, by the Foreſt Law, if an Aſſart be granted by the King at a Juſtice ſeat (which may be done without Charter) to another. Habendum & tenendum ſibi imperpetuum, he hath a Fee ſimple without this word (heires) (y) for there is a ſpecial Law of the Foreſt, as there is a Law Marſhal for wars, and a Marine Law for the ſeas. (z) And this rule of our Author extendeth to the paſſing of eſtates or inheritances in exchanges, releaſes, or confirmations that enure by way of enlargement of eſtates, warranties, bargaine and ſales by Deed indented & inrolled, & the like, in which this word (heires) is alſo neceſſary, for they do tant amount to a feoffment or grant, or ſtand upon the ſame reaſon that a feoffment or grant doth: for like reaſon doth make like Law. Ubi eadem ratio, ibi idem jus. And this is to be obſerved throughout all theſe three Books that where other caſes fall within the ſame reaſon, our Author doth put his caſe but for example: for ſo our Author himſelf in another place † explaineth it, ſaying, Et memorandum que en tours autres caſes coment que ne ſoint icy expreſſment moves & ſpecifies, ſi ſont en ſemblable reaſon ſont en emblable ley. And here our Author is to be underſtood to ſpeak of heirs when they are inheritable by deſcent, for they are capable of land alſo by purchaſe, and then the courſe of diſcent is ſometime altered, as if lands of the nature of Gavelkind be given to B. and his heirs having iſſue divers ſons, all his ſons after his deceaſe ſhall inherit; but if a leaſe for life be made, the remainder to the right heirs of B. and B. dieth, his eldeſt ſon only ſhall inherit, for he only to take by purchaſe is right heir by the Common Law. So note a diverſity between a purchaſe and deſcent, but where the remainder is limited to the right heirs of B. it need not be ſaid, and to their heirs for being plurally limited, it includeth a Fee ſimple, and yet it reſteth but in one by purchaſe.

(y) 40 H. 7. 7.
(z) 22 E. 3. 3. 45 E. 3. 20. 9 E. 3. 21. Lib. 4. fo. 121. Baſtards caſe. Vide Sect. 465. 469. 610. 19 H. 6. 17. 22. 17 E. 2. garr. 85.

† Sect. 301.

Out of that which hath been ſaid, it is to be obſerved, that a man may purchaſe lands to him and his heirs by ten manner of conveyances, (for I ſpeak not here of Eſtoppels.) Firſt, by Feoffment: Secondly, by Grant (of which two our Author here ſpeaketh.) Thirdly, by Fine, which is a Feoffment of record. Fourthly, by common Recovery, which is a common conveyance, & is in nature of a feoffment of record. Fifthly, by Exchange, which is in nature of a Grant. Sixthly, by Releaſe to a particular Tenant. Seventhly, by Confirmation to a particular Tenant, both which are in nature of Grants. Eighthly, by Grant of a reverſion or remainder, with attornment of the particular Tenant, of all which our Author ſpeaketh hereafter. Ninthly, by bargain & ſale, by Deed indented and inrolled, ordained by Statute ſince Littleton wrote. Tenthly, by Deviſe, by Cuſtom of ſome particular place, as he ſheweth hereafter; and, ſince he wrote, by Will in writing, generally by authority of Parliament.

27 H. 8. cap. 16.
32 H. 8. cap. 2.
34 H. 8. cap. 5.
Sect. 531.
37. Aſſ. p. p. 38. 8. Aſſ. 5. 9. 12 E. 4. 9. &c.

What words are apt words for a feoffment or Grant, vide Sect. 531. Our Author ſpeaketh of Feoffments & Grants, whereby is implyed lawful conveyances; and therefore this rule extendeth not to Diſſeiſins, Abatements, or Intruſions into lands or tenements, or to uſurpations to Adowſons, &c. in which caſes eſtates in Fee ſimple are gained by the act & wrong of the Diſſeiſors, Abators, Intruders, and Uſurpers; and if a diſſeiſin, abatement, or intruſion be made to the uſe of another, if cey que uſe agreeth thereunto in pays, by this bare agreement he gaineth a Fee ſimple without any livery of ſeiſin, or other ceremony.

## Sect. 2.

¶ ET ſi home purchaſe terres en Fee ſimple & deux ſans iſſue chescun q eſt ſon prochein coſin collateral del entire ſanke, de quel pluis long degree q il ſoit, poit inheriter & aver en la fee come heire a luy.

AND if a man purchaſe land in fee ſimple and dye without iſſue, he which is his next coſen collaterall of the whole bloud, how farre ſo ever he be from him in degree, may inherit and have the land as heir to him.

¶ Littleton ſheweth here, who ſhall be heir to lands in Fee ſimple, for he intendeth not this caſe of an eſtate tail, for that he ſpeaketh of an heire of the whole bloud, for that extendeth not to eſtates in tail, as ſhall be ſaid hereafter in this Chapter, Sect. 6.

¶ *Prochein coſin collaterall.* Neither excludeth he brethren or ſiſters, becauſe he hath a ſpecial caſe concerning them in this Chapter, Sect. 5. & in this Chapter of Parceners: but this is intended where

where a man purchaſeth lands, and dieth without iſſue, and having neither brother nor ſiſter, then his next couſin collaterall ſhall inherit. So as here is implyed a diviſion of heirs, viz. lineal (who ever ſhall firſt inherit) and collateral, (who are to inherit for default of lineal). For in deſcents, it is a maxime in Law, quod linea recta ſemper præfertur tranſverſali. Lineal deſcent is conveyed downward in a right line, as from the grandfather to the father, from the father to the ſon, &c. Collateral deſcent is derived from the ſide of the lineal; as grandfathers brother, fathers brother, &c. Prochein couſin collateral enheritera, doth give a certain direction to the next couſin to the ſon, and therefore the fathers brother and his poſterity ſhall inherit before the grandfathers brother and his poſterity. Et ſic de cæteris, for propinquior excludit propinquum, & propinquus remotum, & remotus remotiorem.

Glanvil, lib. 7. cap. 3, 4. Bract. lib. 2. cap. 30. fol. 65. Britton, cap. 119. Fleta, lib. 6. cap. 1, & 2. Bract. lib. 2, cap. 30. fol. 64. Fleta, lib. 5. cap. 5. & lib. 6. cap. 1. & 2. Britton, cap. 119. Mirrour, 11. cap. 1. ſect. 3. 30. Aſſ. p. 47.

Upon this word (Prochein), I put this caſe. One hath iſſue two ſonnes A. & B. and dieth, B. hath two ſonnes C. and D. and dieth. C. the eldeſt ſon hath iſſue and dieth: A. purchaſeth lands in Fee ſimple and dieth without iſſue, D. is his next couſin, and yet ſhall not inherit but the iſſue of C. for he that is inheritable, is accounted in Law next of bloud: And therefore here is underſtood a diviſion of next, viz. next, jure repræſentationis, and next, jure propinquitatis, that is, by right of repreſentation, and by right of propinquity. And Littleton meaneth of the right of repreſentation, for legally in courſe of deſcents he is next of bloud inheritable. And the iſſue of C. doth repreſent the perſon of C. and if C. had lived, he had been legally next of bloud. And whenſoever the father, if he had lived, ſhould have inherited, his lineal heir by right of repreſentation, ſhall inherit before any other, though another be jure propinquitatis nearer of bloud. And therefore Littleton intendeth his caſe of next couſin of bloud, immediately inheritable. So as this produceth another diviſion of next bloud, viz. immediately inheritable, as the iſſue of C. & mediately inheritable as D. if the iſſue of C. die without iſſue, for the iſſue of C. and all that live, be they never ſo remote, ſhall inherit before D. or his line, and therefore Littleton ſaith well, De quel pluis long degree, que il ſoit.

19 R. 2. tit. gar. 100.

And here ariſeth a diverſity in Law between next of bloud inheritable by deſcent, & next of bloud capable by purchaſe. And therefore in the caſe before mentioned, if a Leaſe for life were made to D. the remainder to his next of bloud in fee. In this caſe, as hath been ſaid, D. ſhall take the remainder, becauſe he is next of bloud and capable by purchaſe, though he be not legally next to take as heir by deſcent.

30. Aſſ. p. 47.

## Sect. 3.

¶ *Uncore le pier eſt plus prochein de ſanke.* And therefore ſome do hold upon theſe words of Littleton, That if a Leaſe for life were made to the ſonne, the remainder to his next of bloud, that the father ſhould take the remainder by purchaſe, and not the uncle; for that, Littleton ſaith, the father is next of bloud, and yet the uncle is heir. As if a man hath iſſue two ſonnes, and the eldeſt ſonne hath iſſue a ſonne and die, a remainder is limited to the next of his bloud, the younger ſon ſhall take it, yet the other is his heire.

5 E. 6. tit. Adminiſtr. Br. 47. Ratcliffs caſe, ubi ſupra. See after in the Chapter of Socage.

¶ (p) *Eſt un Maxime en le Ley que enheritance poet linealment diſcender mes nemy aſcender.*

(p) Pl. Com. 293. b. Osborns caſe.

Maxime i. A ſure foundation or ground of Art, and a

¶ Mes ſi ſoit pier & fits, & le pier ad un frere q eſt uncle a le fits, & le fits purchaſe tre en Fee ſimple, & mor ſans iſſue vivāt ſon pier, luncle avera la tre come heire al fits & nemy le pier, uncore le pier eſt pluis prochein de ſanke, pur ceo que eſt un maxime en le ley, Que inheritāce poet linealment diſcender, mes nemy aſcender. Uncor ſi le fits e tiel caſe mor ſans iſſue, & ſon uncle entra en la tre come heire a le fits

But if there be father & ſon, and the father hath a brother that is uncle to the ſon; and the ſon purchaſe land in fee ſimple, and die without iſſue, living his father; the uncle ſhall have the land as heire to the ſon, and not the father; yet the father is nearer of bloud: becauſe it is a maxime in Law, That inheritance may lineally deſcend, but not aſcend. Yet if the ſon in this caſe dye without iſſue, and his uncle enter into the Land as heire to the fits

fits (ſicome il devoit p la ley) & apres l'uncle de via ſans iſſue, vivant le pier donqs le pier, avera la terre come heire al uncle, & nemy cõe heire a ſon fits, pur ceo que il veigne al terre p collaterall diſcent & nõy p lineall aſcention.

ſon (as by Law he ought) and after the uncle dieth without iſſue, living the father, the father ſhall have the land as heire to the uncle, and not as heir to his ſonne, for that he commeth to the land by collaterall diſcent & not by lineal aſcent.

concluſion of reaſon ſo called, (q) quia maxima eſt ejus dignitas & certiſſima authoritas, atque quod maximè omnibus probetur, ſo ſure and uncontrollable, as that they ought not to be queſtioned. (r) And that which our Author here and in other places calleth a Maxime, hereafter he calleth a Principle, and it is all one with a Rule, a common ground, Poſtulatum, or an Axiome, and it were too much curioſity to make nice diſtinctions betwixt them. And it is well ſaid in our Books, (ſ) neſt my a diſputer l'ancient principles del ley. I never read any opinion in any book old or new againſt this maxime, but only in lib. rub. where it is ſaid, (t) ſi quis ſine liberis diſceſſerit, pater aut mater ejus in hæreditatem ſuccedat, vel frater & ſoror ſi pater & mater deſit; ſi nec hos habeat, ſoror patris vel matris & deinceps qui propinquiores in parentela fuerint, hæreditariò ſuccedant, & dum virilis ſexus extiterit, & hæreditas abinde ſit, fœmina non hæreditat. But all our ancient Authors, and the conſtant opinion ever ſince, do affirm the maxime.

(q) Pl. Com. 27. b.

(r) Sect. 20. 648.

(ſ) 12 H. 4. Glanvil. lib. 7. cap. 1, Bract. lib. 2. cap. 29.

(t) Lib. Rub. cap. 70.

By this maxime, in the concluſion of his caſe, only lineall aſcention in the right line is prohibited, and not in the collaterall, (u) Quælibet hæreditas naturaliter quidem ac hæredes hæreditabiliter deſcendit, nunquam quidem naturaliter aſcendit; deſcendit itaque jus quaſi ponderoſum quod cadens deorſum recta linea vel tranſverſali, & nunquam reaſcendit ea via qua deſcendit poſt mortem anteceſſorum, à latere tamen aſcendit alicui propter defectum hæredum inferiùs provenientium; ſo as the lineall aſcent is prohibited by Law, and not the collateral. And in prohibiting the lineal aſcent, the Common Law is aſſiſted with the Law of the twelve tables.

(u) Britt. cap. 119. Fleta lib. 6. cap. 1. Nun. b. cap. 27. Ratcliffs caſe ubi ſupra.

Here our Author, for the confirmation of his opinion, draweth a reaſon and a proof (as you have perceived) from one of the Maxims of the Common Law: Now that I may here obſerve it once for all, his proofs and arguments, in theſe his three books, may be generally divided into two parts, viz. from the Common Law and from Statutes: of both which, and of their ſeveral branches, I ſhall give the ſtudious Reader ſome few examples, and leave the reſt to his diligent obſervation.

For the Common Law, his proofs and arguments are drawen from twenty ſeverall fountains or places.

(a) Firſt, from the Maximes, Principles, Rules, Intendment, and Reaſon of the Common Law, which indeed is the rule of the Law, as here, and in other places our Author doth uſe.

(b) Secondly, from the books, records, and other authorities of Law cited by him, Ab authoritate, & pronunciatis.

(c) Thirdly, from original Writs in the Regiſter, à re ſcripta valet argumentum.

(d) Fourthly, from the forme of good pleading.

(e) Fifthly, from the right entry of Judgments.

(f) Sixthly, à præcedentibus approbatis & uſu, from approved Precedents and Uſe.

(g) Seventhly, á non uſu, from not uſe.

(h) Eighthly, ab artificialibus argumentis, conſequentibus, & concluſionibus, artificial arguments, conſequents, and concluſions.

Ninthly, (i) à communi opinione juriſprudentium, from the common opinion of the Sages of the Law.

Tenthly, (k) ab inconvenienti, from that which is inconvenient.

Eleventhly, (l) a diviſione, from a diviſion, vel ab enumeratione partium, from the enumeration of the parts.

Twelfthly, (m) à majore ad minus, from the greater to the leſſer, or (n) from the leſſer to the greater, (o) à ſimili. (p) à pari.

13. (ꝑ) Ab impoſſibili, from that which is impoſſible.

14. (q) A fine, from the end.

15. (†) Ab utili vel inutili, from that which is profitable or unprofitable.

16. (r) Ex abſurdo, for that thereupon ſhall follow an abſurdity, quaſi à ſurdo prolatum, becauſe it is repugnant to underſtanding and reaſon.

17. (ſ) A natura & ordine naturæ, from nature, or the courſe of nature.

18. (t) Ab

(a) Sect. 5. 8. 90. 96. 52. 53. 57. 59. 65. 99. 130. 146. 156. 169. 178. 231. 293. 302. 352. 360. 376. 377. 396. 410. 440. 441. 346. 347. 462. 431.

(b) Sect. 20. where a number other are quoted.

(c) Sect. 67. 132. 179. 234. 241. 263. 613. 614.

(d) Sect. 50. 170. 183. 369.

(e) Sect. 248. 249.

(f) Sect. 88. 74. 76. 145. 332. 371. 372. 445.

(g) Sect. 108. 733.

(h) Sect. 170. 264. 283. 302. 429. 464. 626. 633. 686. 348. 418. 616. 739.

(i) Sect. 697. 59. 104. 288. 330. 478.

(k) Sect. 87. where many others are quoted.

(l) Sect. 13. where many more are quoted, but ſee chiefly. Sect. 381.

(m) Sect. 438. 439. 441.

(n) Sect. 18.

(o) 301. &c.

(ꝑ) 291. 298. 409. &c.

(p) 229. 440.

(q) Sect. 46. 194.

(†) Sect. 36.

(r) Sect. 712.

(ſ) Sect. 114. 223. 129. 211. 107. 108.

18. (t) Ab ordine religionis, from the order of Religion.
19. (u) A communi præſumptione, from a common preſumption.
20. (w) A lectionibus juriſprudentium, from the readings of learned men of Law.

From Statutes, his arguments and proofs are drawn.

1. (x) From the hearſal or preamble of the Statute.
2. By the body of the Law diverſly interpreted.

Sometime by other parts of the ſame Statute, which is benedicta expoſitio, & ex viſceribus cauſæ.

(y) Sometime by the reaſon of the Common Law. But ever the general words are to be intended of a lawful Act, (z) and ſuch interpretation muſt ever be made of all Statutes, that the innocent, or he in whom there is no default, may not be damnified.

¶ *En la ley.* There be divers Laws within the Realm of England. As firſt, (a) Lex Coronæ, the Law of the Crown.

2. (b) Lex & conſuetudo Parliamenti. Iſta lex eſt ab omnibus quærenda, à multis ignorata, à paucis cognita.

3. (c) Lex naturæ, the Law of nature.

4. (d) Communis Lex Angliæ, the Common Law of England, ſometime called Lex terræ, intended by our Author in this and the like places.

5. (e) Statute Law, Laws eſtabliſhed by Authority of Parliament.

6. (f) Conſuetudines, Cuſtoms reaſonable.

7. (g) Jus Belli, The Law of Arms, War, and Chivalry, In republica maximè conſervanda ſunt jura belli.

8. (h) Eccleſiaſtical or Canon Law in Courts in certain Caſes.

9. (i) Civil Law in certain Caſes, not only in Courts Eccleſiaſtical, but in the Courts of the Conſtable and Marſhal, and of the Admiralty, in which Court of the Admiralty is obſerved, la ley Oleron, anno 5. of Richard the firſt, ſo called, becauſe it was publiſhed in the Iſle of Oleron.

10. (k) Lex foreſtæ, Foreſt Law.
11. (l) The Law of Marque, or repriſal.
12. (m) Lex mercatoria, Merchant, &c.
13. (n) The Laws and Cuſtoms of the Iſles of Jerſey, Garneſey, and Man.
14. (o) The Law and privilege of the Stannaries.
15. (p) The Laws of the Eaſt, Weſt, and middle Marches, which are now abrogated.

But hereof this little taſte for our Student, that he may be capable of that which he ſhall read concerning theſe and others, in Records, and in our Books, and orderly obſerve them, ſhall ſuffice.

¶ *Et ſon uncle enter en la terre.* For if the Uncle in this caſe doth not enter into the land, then cannot the Father inherit the land, for there is another maxim in Law herein implyed. (q) That a man that claimeth as heir in Fee ſimple to any man by deſcent, muſt make himſelf heir to him that was laſt ſeiſed of the actual Freehold and inheritance. And if the Uncle in this caſe doth not enter, then had he but a freehold in Law, and no actual freehold, but the laſt that was ſeiſed of the actual freehold, was the ſon, to whom the father cannot make himſelf heir; and therefore Littleton ſaith, Et ſon uncle enter en la terre (ſi come devoit per la ley) to make the father to inherit as heir to the uncle. (r) Note, that true it is, that the uncle in this caſe is heir, but not abſolutely heir; for if after the deſcent to him, the father hath iſſue a ſon or daughter, that iſſue ſhall enter upon the Uncle. (ſ) And ſo it is if a man hath iſſue a ſon and daughter, the ſon purchaſeth land in fee, and dieth without iſſue, the daughter ſhall inherit the land; but if the father hath afterward iſſue a ſon, this ſon ſhall inter into the land, as heir to his brother; and if he hath iſſue a daughter and no ſon, ſhe ſhall be coparcener with her ſiſter.

¶ *Si come il devoit per lay ley.* Theſe words, as a key, do open the ſecrets of the Law, for hereupon it is concluded, that where the Uncle cannot get an actual poſſeſſion by entry or otherwiſe, there the father in this caſe cannot inherit. And therefore if an Advowſon be granted to the ſon & his heirs, & the ſon dye without iſſue, and this deſcend to the uncle, and he dye before he doth or can preſent to the Church, the father ſhall not inherit, becauſe he ſhould make himſelf heir to the ſon, which he cannot do: And ſo of a rent, and the like. But if the uncle had preſented to the Church, or had ſeiſin of the rent, there the father ſhould have inherited. For Littleton putteth his caſe of an entry into land, but for an example. If the ſon [illegible] a leaſe for life, & die without iſſue, and the reverſion deſcend to the uncle, and he die, the reverſion ſhall not deſcend to the father, becauſe in that caſe he muſt make himſelf heir to the ſon. If he infeoffe the ſons with warranty to him and his heirs, the ſons dies, the uncle enters into the land, and dies, the father, if he be impleaded, ſhall not take advantage of this warranty,

(t) Sect. 202.
(u) Sect. 440.
(w) Sect. 481.

(x) Sect. 139 &c. Sect. 731. 692, 635. 633. 441. 103, 193. 154, 140. a.

(y) Sect. 464.
(z) Stud. 731, 685.

(a) 17 E. 3. Rot. parl. nu. 19. 25 E. 3, cap. 1. Regiſt. inter Jura regia 6. 1, &c.
(b) Commonly ſpoken of in Parliament Rols.
(c) 13 E. 4. 9. lib. 7. Calvins caſe Pl. Com. Sharingtons caſe.
(d) This Law appeareth in our Books and Judicial Records.
(e) Theſe are of Record in Rolls of Parliament.
(f) Whereof you ſhall read in our Authour, and in our Books.
(g) Rot. parl. 2 R. 2. nu. 3. 13 E. 2. cap. 2.
(h) Lib. 7. Caudries caſe. articul. ſuper cartas, &c.
(i) 37 H. 6. Forteſc. cap. 32. 13 H. 4. 4. 28 H. 8. cap. 15.
(k) Carta de Foreſta, &c. the Eires of the Foreſts.
(l) 27 E. 3, cap. 17. Wi. ca. 23. 4 H. 5. cap. 7.
(m) Mirrour de Juſtic. cap. 1. Bract. 334. 444. Fleta lib. 2. cap. 5 I. 52, &c. 5 E. 3. 11. 38 E. 3. 7. 27 E. 3. cap. 8. Forteſc. 32. F. N. B. 117. 13 E. 4. 9. Rot parl. 6 H. 4. nu. 43. 20 H. 7. 16. 47 E. 3. 22. 30 E. 1. Account. 127. Carta mercatoria 31 E. 1. Rot. patent.
(n) Mich. 21 E. 3. coram Rege in Theſaur. 12 E. 3. 5. b. H. 8. fol. 5. Rot. pat. an. 20 E. 1. lib. 7. Calvins caſe. fol. 21. Regiſt. fol. 22.
(o) 50. E. 3. Rot. parl. 50 E. 3. Rot. patent. &c.
(p) 31 H. 6. cap. 3. 4 Jac. 1.
(q) 1 H. 4. 11, 10. Aſſ. 27. 34. Aſſ. p. 20. 19 E. 2. Quar. imped. 177. 45 E. 3. 1. 3. 40. Aſſ. p. 6.
(r) 11. Aſſ. p. 6. Doct. & Stud. 1. 2. b. 32 H. 6. 35.
(ſ) 19 H. 6. 6 I.

ranty, for then he muſt vouch A. as heir to his ſon, which he cannot do; for albeit the warranty deſcended to the uncle, yet the uncle leaveth it as he found it, and then the father by Littletons (de voit) cannot take advantage of it. For Littleton, Sect. 603. ſaith, that warranties ſhall deſcend to him that is heir by the Common Law; and Sect. 718. he ſaith, that every warranty which deſcends, doth deſcend to him that is heir to him which made the warranty by the Common Law, which proveth that the father ſhall not be bound by the warranty made by the ſon, for that the father cannot be heir to the ſon that made the warranty. And a warranty ſhall not go with tenements, whereunto it is annexed, to any ſpecial heir, but always to the heir at the Common Law. And therefore if the uncle be ſeiſed of certain lands, and is diſſeiſed, the ſon releaſe to the diſſeiſor with warranty, and die without iſſue, this ſhall bind the uncle; but if the uncle die without iſſue, the father may enter, for the warranty cannot deſcend upon him. So if the ſon concludeth himſelf by pleading concerning the tenure and ſervices of certain lands, this ſhall bind the uncle; but if the uncle die without iſſue, this ſhall not bind the father, becauſe he cannot be heir to the ſon, and conſequently not to the Eſtoppel in that caſe: but if he be ſuch an Eſtoppel as runneth with the land, then it is otherwiſe.

Vide ſect. 603, 718.

vide ſect. 735, 736, 737.

35 H. 6. 33. John Crooks caſe.

## *Sect.* 4.

¶ EN tiel caſe, lou le fits purchaſe terre en Fee ſimple, & debie ſauns iſſue, ceux de ſon ſanke de part ſon pier enheriteront come heires a luy, devant aſcun de ſanke de part ſa mere: mes ſi nad aſcun heire de part ſon pier, donques la terre diſcendera a les heires de part la mere: mes ſi home prent enheritrix des tres en Fee ſimple, qux ont iſſue fits, & deviont & le fits enter en les tenements, come fits & heire a ſa mere, & puis debie ſans iſſue, les heires de part la mere doyent enheriter les tenements & jammes les heires de part le pier. Et ſi ny ad aſcun heire de part

AND in caſe, where the ſon purchaſeth Land in Fee ſimple, and dies without iſſue; they of his blood on the fathers ſide ſhall inherit as heirs to him, before any of the blood on the mothers ſide. But if he hath no heir on the part of his father, then the land ſhall deſcend to the heirs on the part of the mother: but if a man marrieth an inheritrix of lands in Fee ſimple who hath iſſue a ſon, and die, and the ſon enter into the tenements, as ſonne and heir to his mother, and after dies without iſſue, the heirs of the part of his mother ought to inherit, and not the heirs of the part of the father. And if he hath no heir on the part of the mo-

¶ BY this it appeareth, that our Author divideth heirs into heirs of the part of the father, and into heirs of the part of the mother.

Vid. Sect. 354. an excellent point.

(a) And note, it is an old and true Maxime in Law, that none ſhall inherit any lands as heir, but only the blood of the firſt Purchaſer; for * refert à quo fiat perquiſitum. As for example, Robert Coke taketh the daughter of Knightly to wife, and purchaſeth lands to him and to his heirs, and by Knightly hath iſſue Edward, none of the blood of the Knightlyes, though they be of the blood of Edward, ſhall inherit, albeit he had no kindred but them, becauſe they were not of the blood of the firſt Purchaſor, viz. of R. Coke.

(a) Pl. Com. Sir Edward Cleres caſe, 47.

* Fleta lib. 6. cap. 1. 2, &c. Bract. l. 2. fo. 65. 67 68, 69. &c. Brit. cap. 119 24 E. 3. 50. 36 E. 3, 29. 30. 38 49 E. 3. 12. 49 Aſſ. p. 4 12 E. 4. 14. Pl. Com. 445. & 450 7 E. 6. Dier 6. 24 E. 3. 24. 37 Aſſ. 4. 40 E. 3. 9. 42 E. 3. 10. 45 E. Releaſes 28. 7 H. 5. 3, 4. 8 Aſſ. 6. 35 Aſſ. 2. 5 E. 4. 7. 3 H. 5. 21 H. 7. 33. 40 Aſſ. 6. Ratcliffs caſe, l. 3. fo. 42.

¶ (b) *Ceux del ſanke de part ſon pier.* Here it is to be underſtood, that the father hath two immediate bloods in him, viz. the blood of his father, and the blood of his mother, both theſe bloods are of the part of the father. (c) And this made ancient Authors ſay, that if a man be ſeiſed of lands in the right of his wife, and is attainted of felony, and after hath iſſue, this iſſue ſhould not inherit his mother, for that he could derive no blood inheritable from the father. And both theſe bloods of the part of the father muſt be ſpent before the heir of the blood of the part of the mother ſhall inherit; wherein ever the line of the male

(b) Bracton, ubi ſupra. Fleta, ubi ſupra. Britton, cap. 118, 119. Pl. Com. 445. Cleres caſe. Tr. 19 E. 1. in Banco Rot. 25 Lincoln. Will. Scels caſe.

(c) Britton, fol. 14. Fleta, lib. 1. cap. 18. Pl. Com. 445, 446, &c. Cleres caſe.

male of the part of the father, (that is) the poſterity of ſuch male, be they male or female, (who ever in deſcents are preferred) muſt fail before the line of the mother ſhall inherit: (d) And the reaſon of all this is, for that the blood of the part of the father is more worthy, and more neer in judgment of the Law, than the blood of the part of the mother.

(d) 19 R. 2. Garr. 100.

¶ *Devant aſcun del ſanke del part del mere.* And it is to be obſerved, that the mother hath alſo two immediate bloods in her, (viz.) her fathers blood, and her mothers blood. Now to illuſtrate all this by example, Robert Fairfield, ſon of John Fairfield and Jane Sandie, takes to wife Anne Boyes, daughter of John Boyes and Jane Bewpree, and hath iſſue William Fairfield, who purchaſeth lands in fee; here William Fairfield hath four immediate bloods in him, two of the part of the father, viz. the blood of the Fairfields, and the blood of the Sandies; and two of the part of his mother, viz. the blood of the Boyſes and the blood of the Bewprees; and ſo in both caſes upward in infinitum. Now admit that William Fairfield die without iſſue, firſt the blood of the part of his father, viz. of the Fairfields, and for want thereof the blood of the Sandies (for both theſe are of the part of the father;) if both theſe fail, then the heirs of the part of the mother of William Fairfield ſhall inherit, viz. firſt the blood of the Boyſes, and for default thereof the blood of the Bewprees.

Britton, cap. 118, 119. Fleta l. 6. c. 2.

Ia mere, denque le Seignior de que la terre eſt tenus, avera la terre per Eſcheat. En meſme le manner eſt, ſi tenements diſcendont a le fits de part le pier, & il enter, & puis morust ſans iſſue, cel terre diſcendra as heires de part le pier, & nemy as heires de part la mere. Et ſil ny ad aſcun heire de part le pier, donques le Seignior, de que la terre eſt tenus, avera la terre per Eſcheat. Et ſic vide diverſitatem, lou le fits purchaſe terres ou tenements, en Fee ſimple, & lou il vient eins a tiels terres ou tenements per diſcent de part ſa mere ou de part ſon pier.

ther, then the Lord of whom the land is holden ſhall have the land by Eſcheat. In the ſame manner it is, if lands deſcend to the ſon of the part of the father, and he entreth, and afterwards dies without iſſue, this land ſhall deſcend to the heirs on the part of the father, and not to the heirs on the part of the mother. And if there be no heir of the part of the father, the Lord of whom the land is holden ſhall have the land by Eſcheat. And ſo ſee the diverſity, where the ſonne purchaſeth lands or tenements in Fee ſimple, and where he cometh to them by deſcent on the part of his mother, or on the part of his father.

It is neceſſary to be known in what caſes the heir of the part of his mother ſhall inherit, and where not. If a man be ſeiſed of lands as heir of the part of his mother, and maketh a feoffment in fee, and taketh back an eſtate to him and to his heirs, this is a new purchaſe; and if he dieth without iſſue, the heirs of the part of the father ſhall firſt inherit. If a man ſo ſeiſed maketh a feoffment in fee upon condition, and die, the heir of the part of the father which is the heir at the common Law, ſhall enter for the condition broken: but the heir of part of the mother ſhall enter upon him and enjoy the land. (m) A man ſo ſeiſed maketh a feoffment in fee, reſerving a rent to him and to his heirs, this rent ſhall go to the heirs of the part of the father: but (n) if he had made a gift in tail, or a leaſe for life reſerving a rent, the heir of the part of the mother ſhall have the reverſion; and the rent alſo, as incident thereunto, ſhall paſs with it: but the heir of the part of the mother ſhall not take advantage of a condition annexed to the ſame, becauſe it is not incident to the reverſion, nor can paſs therewith. (o) If a man had been ſeiſed of a manner as heir on the part of his mother, and before the Statute of Quia emptores terrarum, had made a feoffment in fee of parcel to hold of him by rent and ſervice, albeit they be newly created, yet for that they are parcel of the manner, they ſhall with the reſt of the manner deſcend to the heir of the part of the mother, quia multa tranſeunt cum univerſitate quæ per ſe non tranſeunt. If a man hath a rent ſeck of the part of his mother, and the tenant of the land granteth

9 H. 7. cap. 24.

(m) 7 H. 6. 4. Lib. 1. fol. 100. Shellyes caſe.

(n) 5 E. 2. tit. avowry 207.

(o) 5 E. 2. avowry 207.

granteth a distress to him and his heirs, and the Grantee dieth, the distress shall go with the rent to the heir of the part of the mother as incident or appurtenant to the rent, for now is the rent seek become a rent charge.

(p) A man is seised as heir on the part of his mother, maketh a feoffment in Fee to the use of him and his heirs. the use being a thing in trust and confidence shall ensue the nature of the land, and shall descend to the heir on the part of the mother. (q) A man hath a Seignory as heir of the part of his mother, and the Tenancy doth escheat, it shall go to the heir of the part of the mother. If the heir of the part of the mother of land whereunto a warranty is annexed is impleaded and Vouche, and judgment is given against him, and for him to recover in value, and dieth before execution. () the heir of the part of the mother shall sue execution to have in value against the Voucher, for the effect ought to pursue the cause, and the recompence shall ensue the lois.

If a man giveth lands to a man, to have and to hold to him and his heirs on the part of his mother, yet the heirs of the part of the father shall inherit, for no man can institute a new kind of inheritance not allowed by the Law and the words (of the part of his mother) are void, as in the case that Littleton putteth in this Chapter. If a man giveth lands to a man to him and his heirs males, the Law rejecteth this word males, because there is no such kind of inheritance whereof you shall read more in his proper place.

If a man hath issue a son, and dieth, and the wife dieth also, lands are letten for life, the remainder to the heirs of the wife, the son dieth without issue, the heirs of the part of the father shall inherit, and not the heirs of the part of the mother, because it vested in the son as a Purchaser. And the rule of Littleton holdeth as well in other kind of inheritances, as in Lands and Tenements. (t) And therefore if there be Lord, fem mesne and Tenant, and the Mesne bind her self and her heirs by her Deed to the acquital of the Tenant, the Mesne take husband, the Tenant by his Deed granteth to the husband and his heirs, that he or his heirs shal not be bound to acquital, the husband and wife have issue, and dye, this issue, being bound as heir to his mother, shall not take benefit of the said grant of discharge, for that extends to the heirs of the part of the father, and not to the heirs of the part of the mother, and therefore the heir of the part of the mother was bound to the acquital. And thus much for the better understanding of Littletons Cases concerning the heir of the part of the mother shall suffice.

(p) 5 E.4.4.lib.1. fol.100. Shelleys case.
27 H.8. Dyer, Buckenhams case. 32 H.8. gard. Brook 93. 13 ..7. .
(q) 16 H.3. pag.6.

(t) Pl.Com.292. & 515. See more of this in the Chapter of Warranties.

¶ *Mes si home prist feme inheritrix, &c.* Here there is another maxime, (t) That whensoever lands do descend from the part of the mother, the heirs of the part of the father shall never inherit. And likewise when lands descend from the part of the father, the heirs of the part of the mother shall never inherit. Et sic paterna paternis, & è converso materna maternis. For more manifestation hereof, and of that which hereafter shall be said touching Descents, see a Table in the end of this Chapter.

(t) 39 E.3.29. 49 E.3.12.

¶ *Avera la terre per Escheat.* (u) Escheat, Eschaeta is a word of art, and derived from the French word Eschear (id est) cadere, excidere, or accidere, and signifieth properly when by accident the lands fall to the Lord of whom they are holden, in which Case we say the Fee is escheated. And therefore, of some, Escheats are called excadentiæ, or terræ excadentiales (w) Dominus vero capitalis loco hæredis habetur quoties per defectum vel delictum extinguitur sanguis sui tenentis, loco hæredis & haberi poterit, nisi per modum donationis sit reversio cujusque tenementi. And Ockam (who wrote in the reign of Henry 2.) treating of Tenures of the King, saith, Porro escheatæ vulgo dicuntur, quæ decedentibus hiis quæ de Rege tenent, &c. cum non existit ratione sanguinis hæres ad fiscum relabuntur. (x) So as an Escheat doth happen two manner of wayes aut per defectum sanguinis, i. for default of heir, aut per delictum tenentis, i. for felony, and that is by judgment thæ manner of wayes, aut quia suspensus per collum, aut quia abjuravit regnum, aut quia utlagatus est. And therefore, they which are hanged by Martial law, in furore belli forfeit no lands: and so in like Cases Escheats by the Civilians are called Caduca.

(u) Vide sect.130. Glanvill lib.7. cap.17. Bract.lib.3.fol.118. Fleta lib.5.cap.5. & lib.3. cap.10. Britton ca.37. & cap.119. F.N.B.100. Tr.19 E.1.in Banco Rot. 25.
(w) Fleta lib.6. cap.1. Ockam cap.quod non absolvitur, &c.
(x) Pl.Com.Dame Hales case

(y) The father is seised of lands in fee holden of I.S. the son is attainted of high treason, the father dieth, the land shall escheat to I.S. propter defectum sanguinis, for that the father dieth without heir And the King cannot have the land because the son never had any thing to forfeit. But the King shall have the Escheat of all the lands whereof the person attainted of high treason was seised, of whomsoever they were holden.

(y) Pl.Com.in Nichols case.

(z) In an Appeal of Death or other Felony &c. process is awarded against the Defendant, and hanging the process the Defendant conveyeth away the land, & after is outlawed the conveyance is good & shal defeat the Lord of his escheat, but if a man be indicted of felony, and hanging the process against him, he conveyeth away the land, and after is outlawed, the Conveyance shall not in that case prevent the Lord of his Escheat. And the reason of this diversity is manifest: For in the case of the Appeal, the Writ containeth no time when

(z) 38 E.3.f.37. 30 H.6.5. Bract.l.3.tit. de Forf. Stam.pl.cor.192. and according to this diversity was it resolved in 5 E.6. as it appeareth by my Lord Dyers Manuscript.

the Felony was done, & therefore the Eſcheat can relate but to the Outlawry pronounced. But the indictment containeth the time when the Felony was committed, and therefore the Eſcheat upon the Outlawry ſhall relate to that time. Which caſes I have added, to the end the Student may conceive that the obſervation of Writs, Indictments, Proceſs, Judgments and other Entries, doth conduce much to the underſtanding of the right reaſon of the Law.

(a) Mirror ca. 1. ſect. 5. 51 H. 3. ſtatutum de Scac. Britton fo. 23, 24. Flet. lib. 1. cap. 36. & lib. 2. cap. 34, 35. Regiſt. 301. his Oath. 18 E. 1. Rot. Parl. 21 E. 1. Rot. 1. 29 E. 1. ſtat. de Eſchaetoribus. 14 E. 3. c. 8. 28 E. 1. c. 18. F. N. B. 100. c. Stamf. Prar. 81. 1 H. 8. ca. 8. 3 H. 8. c. 2. Capitula Eſchaetriæ in Vet. Magna Carta, fo. 160, 161, &c.

Of this word (Eſchaeta) here uſed by our Author cometh (a) Eſchaetor, an ancient Officer ſo called, becauſe his office is properly to look to Eſcheats, Wardſhips, and other caſualties belonging to the Crown. In ancient time there were but two Eſcheators in England, the one on this ſide of Trent, and the other beyond Trent, at which time they had Subeſchaetors. But in the reign of Edward the ſecond, the Offices were divided, and ſeveral Eſcheators made in every County for life, &c. and ſo continued until the reign of Edward 3. And afterwards by the ſtatute of 14 E. 3. it is enacted by authority of Parliament, that there ſhould be as many Eſcheators aſſigned, as when King Edw. 3. came to the Crown, and that was one in every County, and that no Eſchеator ſhould tarry in his office above a year, and by another ſtatute to be in office but once in three years, the Lord Treaſurer nameth him.

And hereof alſo cometh Eſchaetria, which ſignifieth the Eſcheatorſhip, or the office of the Eſcheator. But now let us hear what our Author will further ſay unto us.

¶ Et ſic vide, &c. This kind of ſpeech is often uſed by our Author, and doth ever import matter of excellent obſervation, which you may find in the Sections noted in the margent †.

†Sect. 147, 149, 248, 289, 417, 667, &c.

And it is to be well obſerved, that our Author ſaith, Sil nad a'cun haire &c. la terre eſchaeters. In which words is implied a diverſity (as to the Eſcheat) between fée ſimple abſolute, which a natural body hath, and Fée ſimple abſolute which a body politique or incorporate hath. (b) For if land holden of I. S. be given to an Abbot and his Succeſſors: In this caſe if the Abbot and all the Covent die, ſo that the body politique is diſſolved, the Donor ſhall have again this land, and not the Lord by Eſcheat. And ſo if land be given in Fée ſimple to a Dean and Chapter, or to a Maior and Commonalty, and to their Succeſſors, and after ſuch body politique or incorporate is diſſolved, the Donor ſhall have again the land; and not the Lord by Eſcheat. And the reaſon and cauſe of this diverſity is, for that in the caſe of a body politique or incorporate the Fée ſimple is veſted in their politique or incorporate capacity created by the policy of man, and therefore the Law doth annex a condition in Law to every ſuch gift and grant, That if ſuch body politique or incorporate be diſſolved, that the Donor or Grantor ſhall re-enter, for that the cauſe of the gift or grant faileth, but no ſuch condition is annexed to the eſtate in Fée ſimple veſted in any man in his natural capacity, but in caſe where the Donor or Feoffor reſerveth to him a Tenure, and then the Law doth imply a condition in Law by way of Eſcheat. Alſo (as hath been ſaid) no Writ of Eſcheat lieth but in the three caſes aforeſaid, and not where a body politique or incorporate is diſſolved.

(b) 7 E. 11, 12. F. N. B. 33. 9 E. 3. 26. 17 E. 2. ſtat. de templariis.

## Sect. 5.

¶ NOw cometh our Author to the deſcent betweene brethren, which he purpoſely omitted before. ¶ Diſcent, deſcenſus cometh of the Latine word deſcendo, and, in the legal ſenſe, it ſignifieth, when lands doe by right of blood fall unto any after the death of his anceſtors: or a deſcent is a means whereby one doth derive him title to certain lands as heir to ſome of his anceſtors. And of this, and of that which hath been ſpoken doth ariſe another diviſion of eſtates in fée ſimple, viz. every man that hath a lawful eſtate in fee ſimple, hath it either by deſcent, or purchaſe.

¶ Item ſi ſoint trois freres, & le mulnes frere purchaſe terres en Fee ſimple & devie ſauns iſſne, leigne frere avera la terre per diſcent & nemy le puiſne, &c. Et auſi ſi ſoint trois freres & le puiſne purchaſe terres en Fee ſimple & devie ſans iſſue, leigne frere avera la terre per diſcent &

ALſo if there bee three brethren, and the middle brother purchaſeth lands in Fee ſimple, and die without iſſue, the elder brother ſhall have the Land by deſcent, and not the younger, &c. And alſo if there be three brethren, and the youngeſt purchaſe lands in Fee ſimple, & die without iſſue; the eldeſt brother ſhall

nemy

nemy le mulnes, pur ceo que leigne eſt pluis digne de ſanke.

have the land by deſcent & not the middle, for that the eldeſt is moſt worthy of blood.

¶ *Leigne eſt pluis digne de ſanke.* It is a maxime in Law that the next of the worthieſt blood ſhall ever inherit, as the male and all deſcendant from him before the female, & the female of the part of the father before the male or female of the part of the mother, &c. becauſe the female of the part of the father is of the worthieſt blood. (c) And therefore among the males the eldeſt brother & his poſterity ſhal inherit lands in fée ſimple, as heir before any younger brother or any deſcending from him, becauſe (as Littleton ſaith) he is plus digne de ſanke. Quod prius eſt dignius eſt, and qui prior eſt tempore potior eſt jure. Si quis plures filios habuerit, jus proprietatis primo deſcendit ad primogenitum, eo quod inventus eſt primo in rerum natura. In King Alfreds time Knights fées deſcended to the eldeſt ſon, for that by diviſion of them between males the defence of the Realm might be weakned, but in thoſe dayes Socage fée was divided between the heirs males, and therewith agréeth Glanvil. ‡ Cum quis hæreditatem habens moriatur, &c. ſi plures reliquerit filios, tunc diſtinguitur utrum ille fuerit miles, ſive per feodum militare tenéns, aut liber Sockmannus, quia ſi miles fuerit aut per militiam tenens, tunc ſecundum jus regni Angliæ primogenitus filius patri ſucceder in feodo &c. ſi verò fuerit liber Sockmannus, tunc quidem dividetur hæreditas inter omnes filios, &c. But hereof more ſhall be ſaid hereafter in his proper place.

(c) Britton cap.119. Bract.lib.2. cap.30. 277. 279. 2 E.3. 26.3 Eliz. Dyer.158. Stanf.prær. 51.58.3 E.1.tit.avowrie. 235.32 E.3. diſcent.80. Bract.lib.4.211. Fleta lib.6. cap.2. Glanvill lib.7. cap.1. Mirror cap.1. ſect.3. † Glanvill lib.7. cap.3. & ca.1. Vide Pl. Com. 229.b.

## *Sect.* 6.

¶ Item eſt aſcavoir, q̃ nul avera terre de fee ſimple per diſcent cõe heire a aſcun home, ſi non que il ſoit ſon heire dentire ſanke. Car ſi home ad iſſue deux fits per divers venters & leigne purchaſe terres en Fee ſimple & moruſt ſans iſſue, le puiſne frere navera la terre, mes luncle leigne frere ou auter ſon procheine cosin ceo avera, pur ceo que le puiſne frere eſt de demy ſanke al eigne frere.

Alſo it is to be underſtood, that none ſhal have land of Fee ſimple by deſcent as heire to any man, unleſs he be his heire of the whole blood, for if a man hath iſſue two ſonnes by divers venters and the elder purchaſe lands in Fee ſimple, and dye without iſſue, the younger brother ſhall not have the land, but the uncle of the elder brother, or ſome other his next coſin ſhall have the ſame, becauſe the younger brother is but of halfe blood to the elder.

¶ NO man can be heire to a fée ſimple by the Common Law, (d) but he that hath ſanguinem duplicatum, the whole blood, that is, both of the father, and of the mother, ſo as the halfe blood is no blood inheritable by deſcent, becauſe that he that is but of the half blood cannot be a compleat heire, for that he hath not the whole and compleat blood, and the Law in deſcents in fee ſimple doth reſpect that which is compleat and perfect. And this maxime doth not onely hold where lands (whereof Littleton here ſpeaketh) are claimed or demanded as heire, (e) but alſo in caſe of appeal of death: for if one brother be ſlain, the other brother of the half blood ſhall never have an appeal (albeit he ſhall recober nothing therein either in the realty or perſonalty) becauſe in the eye of the Law he is not heir to him. Alſo this rule extends to a warranty, as our Author himſelf elſewhere holdeth.

(d) Bract lib.4.279.b. Idem lib.2. fo.65. Britton cap.119. Fleta lib.6. cap.1. 1 E.3.19. John Giffords caſe.; 1 E.3. Counterpl. de Voucher 88. 40 Aſſ.6. 4 E.2. Formd.46. Vid. Ratcliffs caſe, lib.3. fol.40,41.

(e) 7 E.4.15.

## *Sect.* 7.

¶ ET ſi home ad iſſue fits & file

And if a man hath iſſue a ſon and a

¶ This is put for an example to illuſtrate that which hath



been

Britton cap.119.

bẽn ſaid, and nẽdeth no explanation. And herewith agreeth Britton.

per un venter, & fits per auter venter, & le fits del primer venter purchaſe terres en fee, & mor ſans iſſue, la ſoer aver a la terre p diſcent, come heirre a ſa freere & nẽy le puiſne frere, pur ceo que la ſoer eſt de le entire ſanke a ſon eigne frere.

daughter by one venter, and a ſon by another venter, & the ſon of the firſt venter purchaſe lands in fee & dye without iſſue, the ſiſter ſhall have the land by deſcent as heir to her brother, and not the younger brother, for that the ſiſter is the whole blood of her elder brother.

## *Sect.* 8.

¶ *Seiſie de terres en Fee ſimple.* Theſe words exclude a ſeiſin in Fee tail, albeit he hath a Fee ſimple expectant. (f) And therefore if Lands be given to a man and his wife, and to the heirs of their two bodies, the remainder of the heirs of the husband, and they have iſſue a ſonne, and the wife dyeth, and he taketh another wife, and hath iſſue a ſonne, the father dyeth, the eldeſt ſonne entreth, and dieth without iſſue, the ſecond brother of the halfe blood ſhall inherit, becauſe the eldeſt ſonne by his entry was not actually ſeiſed of the fee ſimple, being expectant but onely of the eſtate tail. And the rule is, that Poſſeſſio fratris de feodo ſimplici facit ſororem eſſe hæredem, and here the eldeſt ſonne is not poſſeſſed of the Fee ſimple but of the eſtate tail. And where Littleton ſpeaketh onely of Lands(g) yet there ſhall be Poſſeſſio fratris of an uſe, of a ſeigniory, a rent, an advowſon, & of other hereditaments.

(f) 24 E.3.24.36. 31 E.3. Count de Vouch:88. 32 E.3.tit. Voucher. 37 Aſſ.p.4. 40 E.3.9. 42 E.3.10. 30 E.3.fol.13. 7 H.5.3.

(g) 5 E.4.fo.7. Pl. Com.fo.58.in Wimbiſhes caſe.

¶ *Et leigne fits enter.* (h) Theſe words are materially added when the father dies ſeiſed of lands in fee ſimple, for if the eldeſt ſonne doth not in that caſe enter, then without queſtion the youngeſt

(h) 10 Aſſ 27.34 Aſſ.10. 31 E.3.Count de Vouchee 38.32 E.3.tit. Voueh.94.

¶ ET auxi ou hõe eſt ſeiſe de terres en Fee ſimple, & ad iſſue fits & file p un venter, & fits per autre venter, & mor, & leigne fits enter, & mor ſans iſſue, la file avera les tenements, & nemy le puiſne fits, uncore le puiſne fits eſt heir a le pere, mes nemy a ſon frere, mes ſi leigne fits ne entra en la tre apres la mort ſon pere, mes mor devant aſcun entrie fait per luy, donqs le puiſne frere poit enter, & avera le terre come heire a ſon pere. Mes ſon leigne fits en la caſe avantdit entra apres la mort ſon pere, & ad ent poſſeſſion, donqs la ſoer avera la tre

AND alſo where a man is ſeiſed of lands in fee ſimple & hath iſſue a ſon & daughter by one venter, and a ſon by another venter, and dye, & the eldeſt ſon enter, and dye without iſſue, the daughter ſhall have the land, & not the younger ſon, yet the younger ſon is heir to the father but not to his Brother, but if the eldeſt ſon doth not enter into the land after the death of his father but dye before any entry made by him then the younger brother may enter & ſhal have the land as heir to his father: but where the elder ſon in the caſe aforeſaid enters after the death of his father, & hath

poſ-

Quia poſſeſſio fratris de Feodo ſimplici facit ſororem eſſe hæredem. Mes ſi ſont deux freres per divers venters, & leigne eſt ſeiſie de terre en fee, & mor ſans iſſue, & ſon Uncle entra come prochein heire a luy quel aury mor ſans iſſue, ore le puiſne frere puit aver la terre come heire al uncle, pur ceo que il eſt de lentier ſanke a luy, coment que il ſoit de demy ſanke a ſon eigne frere.

ſeſſion there the ſiſter ſhall have the land, becauſe *Poſſeſſio fratris de feodo ſimplici facit ſororem eſſe hæredem.* But if there be 2 brothers by divers venters, and the elder is ſeiſed of land in fee, and die without iſſue, & his uncle enter as next heire to him, who alſo dye without iſſue, now the younger brother may have the land as heire to the uncle, for that he is of the whole blood to him, albeit he be but of the half blood to his elder brother.

ſon ſhall be heir, becauſe as it hath been ſaid before regularly he muſt make himſelf heir to him that was laſt actually ſeiſed (or to the purchaſer) and that was to the father where the eldeſt ſonne did not enter. And therefore Littleton addeth that the ſonne is heire to the father.

(i) But when the eldeſt ſonne in this caſe doth enter, then cannot the youngeſt ſonne being of the halfe blood be heire to the eldeſt, but the land ſhall deſcend to the ſiſter of the whole blood. Yet in many caſes albeit the ſon doth not enter into lands deſcended in Fee ſimple, the ſiſter of the whole blood ſhall inherit, and in ſome caſes where the eldeſt ſon doth enter, yet the younger brother of the half blood ſhall be heir.

(i) 11 H.4.11. 40 E.3.30. 45 E.3.13. 40 Aſſ.p.6. Ratcliffs caſe, lib.3. fol.41.

(k) If the father maketh a Leaſe for years, and the Leſſee entreth and dieth, the eldeſt ſon dieth during the term before entry or receipt of rent, the younger ſon of the half blood ſhall not inherit but the ſiſter, becauſe the poſſeſſion of the Leſſee for years, is the poſſeſſion of the eldeſt ſon, ſo as he is actually ſeiſed of the Fee ſimple, and conſequently the ſiſter of the whole blood is to be heir. The ſame Law it is if the lands be holden by Knights ſervice, and the eldeſt ſon is within age, and the Guardian entreth into the lands. And ſo it is if the Guardian in Socage enter.

(k) 5 E.4.7.b. 3 H.7.5. 8 Aſſ.p.6. 45 E.3.tit.Releaſes,28.

But in the caſe aforeſaid, if the father make a leaſe for life or a gift in tail, and dieth, & the eldeſt ſon dieth in the life of Tenant for life, or Tenant in tail, the younger brother of the half blood ſhall inherit, becauſe the Tenant for life or Tenant in tail is ſeiſed of the Freehold, & the eldeſt ſon had nothing but reverſion expectant upon that freehold or eſtate tail, and therefore the youngeſt ſon ſhall inherit the land as heir to his father, who was laſt ſeiſed of the actual Freehold. And albeit a rent had been reſerved upon the leaſe for life, and the eldeſt ſon had received the rent and died, yet it is holden by ſome † that the younger brother ſhall inherit, becauſe the ſeiſin of the rent is no actual ſeiſin of the Freehold of the land. But 35 Aſſ. pl.2. ſeemeth to the contrary, becauſe the rent iſſueth out of the land and is in lieu thereof, wherein the onely queſtion is, whether ſuch a ſeiſin of the rent be ſuch an actual ſeiſin of the land in the eldeſt ſon, as the ſiſter may in a Writ of right make her ſelf heir of this land to her brother. But it is clear that (l) if there be a baſtard eigne, and mulier puiſne, and the father maketh a leaſe for life or a gift in tail reſerving a rent and die, and the baſtard receive the rent and die, this ſhall bar the mulier, for the reaſon of that ſtandeth upon another maxime as ſhall manifeſtly appear in his apt place, Sect 399.

† 7 H.5.2 4. per Halls & Logdington. 25 Aſſ.p.2.

(l) 14 E.2. Baſtard.26. Vid.Sect.399.

¶ *Seiſie des terres.* (m) But in this caſe if the eldeſt ſon doth enter and get an actual poſſeſſion of the Fee ſimple, yet if the wife of the father be endowed of the third part and the eldeſt ſon dieth, the younger brother ſhall have the reverſion of this third part notwithſtanding the elder brothers entry, becauſe that his actual ſeiſin which he got thereby was by the endowment defeated. But if the eldeſt ſon had made a leaſe for life, and the Leſſee had endowed the wife of the father, and tenant in dower had died, the daughter ſhould have had the reverſion, becauſe the reverſion was changed and altered by the leaſe for life, and the reverſion is now expectant on a new eſtate for life.

(m) 7 H.5.2 3 2 4.

¶ *Enter.* Hereupon the queſtion groweth, whether if the father be ſeiſed of divers ſeveral parcels of land in one County, and after the death of the father the ſon entreth into one parcel generally, and before any actual entry into the other dieth, this general entry into part ſhall veſt in him an actual ſeiſin in the whole, ſo as the ſiſter ſhall inherit the whole. And this is a Quære in 21 H.7.33.a.

21 H.7.33.a.

And ſome do take a diverſity when an entry ſhal veſt or devest an eſtate, that there muſt be ſeveral entries in ſeveral parcels, but where the poſſeſſion is in no man, but the freehold in Law is in the heir that entreth, there the general entry into one part reduceth all into his actual poſſeſſion. And therefore if the Lord entreth into a parcel generally for a Mortmain, or the forfeit for a condition broken, or the Diſſeiſee into parcel generally, the entry ſhall not veſt nor devest in theſe or like caſes, but for that parcel. But when a man dies ſeiſed of divers parcels in poſſeſſion, and the freehold in Law is by a Law caſt upon the heir, and the poſſeſſion in no man, there the entry into parcel generally ſeemeth to veſt the actual poſſeſſion in him in the whole. But if his entry in that caſe be ſpecial, viz. that he enter only into that parcel and into no more, there it reduceth that parcel only into actual poſſeſſion.

(g) 19 E. 2. Quare Imped. 277. 3 H. 7. 5.

¶ *Homi ſeiſie des terres.* What then is the Law of a Rent, Advowſon or ſuch things that lye in grant? (g) If a Rent, or an Advowſon do deſcend to the eldeſt ſon and he dieth before he hath ſeiſin of the Rent, or preſent to the Church, the Rent or Advowſon ſhal deſcend to the youngeſt ſon, for that he muſt make himſelf heir to his father, as hath been oftentimes ſaid before. The like law is of Offices, Courts, Liberties, franchiſes, Commons of inheritance & ſuch like.

(h) 7 E. 3. 66. tit. bar. 293. 3 H. 7. 5.

(h) And this caſe differeth from the caſe of the Tenant by the Courteſy, for there if the wife dieth before the rent day, or that the Church become void, becauſe there was no laches or default in him, nor poſſibility to get ſeiſin, the law in reſpect of the iſſue begotten by him will give him an eſtate by the Courteſy of England. But the caſe of the deſcent to the youngeſt ſon ſtandeth upon another reaſon, viz. to make himſelf heir to him that was laſt actually ſeiſed, as hath been ſaid.

(i) 8 E. 8. 11. 49 E. 3. 12. Ratcliffs caſe, lib. 3. f. 41.

¶ *En Fee ſimple.* (i) For half blood is not reſpected in eſtates in tail, becauſe that the iſſues do claim in by deſcent, per formam Doni, and the iſſue in tail is ever of the whole blood to the Donee.

(k) Bracton lib. 2. fo. 65. & lib. 4. fol. 279. Britton cap. 119. Fleta li. 6. c. 1. 24 E. 3. 30.

¶ (k) *Poſſeſſio fratris de Feodo ſimplici facit ſororem eſſe hæredem.* Hereupon four things are to be obſerved, every word almoſt being operative and material. Firſt, That the brother muſt be in actual poſſeſſion: For Poſſeſſio eſt quaſi pedis Poſitio. Secondly, De feodo ſimplici, exclude eſtates in tail. Thirdly, Facit ſororem eſſe hæredem. So as

(l) Rateliffs caſe, lib. 3. fol. 42.

(l) Soror eſt hæres facta, and therefore ſome act muſt be done to make her heir, and the younger ſon is hæres natus,

(m) Britton cap. 119. *poſt* 191.

(m) if no act be done to the contrary. And albeit the words be Facit ſororem eſſe hæredem, yet this doth extend to the iſſue of the ſiſter, &c. who ſhall inherit before the younger brother. Fourthly, Of Dignities whereof no other poſſeſſion can be had but ſuch as deſcend (as to be a Duke Marquels, Earl, Viſcount, or Baron) to a man and his heirs, there can be no poſſeſſion of the brother to make the ſiſter to inherit, but the younger brother being heir (as Littleton ſaith) to the father, ſhall inherit the Dignity inherent to the blood, as heir to him that was firſt created noble.

6 H. 4. 2.

And you ſhall underſtand that concerning Deſcents there is a law, parcel of the laws of England, called Jus Coronæ, & differeth in many things from the general law concerning the ſubject. As for example, The King in any ſuit for any thing that pertains to the Crown ſhal not ſhew in certain his coſinage as a ſubject ſhall do, or as he himſelf ſhal do for things touching his Dutchy.

(n) 34 H. 6. fol. 34. Pl. Com. fol. 245. 25 E. 3. ca. de natis ultra mare.

(n) And in the caſe of the King, if he hath iſſue a ſon and a daughter by one venter, and a ſon by another venter, and purchaſeth lands and dieth, & the eldeſt ſon enter and dieth without iſſue, the daughter ſhall not inherit theſe lands, nor any other fee ſimple lands of the Crown, but the younger brother ſhall have them. Wherein note, that neither poſſeſſio fratris doth hold of lands of the poſſeſſions of the Crown, nor half blood is no impediment to the deſcent to the lands of the Crown, as it fell out in experience after the deceaſe of King Edw. the ſixth to Queen Mary, and from Queen Mary to Queen Elizabeth, both which were of the half blood, and yet inherited not onely the Lands which King Edward or Queen Mary purchaſed, but the ancient Lands parcel of the Crown alſo.

Pl. Com. ubi ſupra.

A man that is King by deſcent of the part of his mother, purchaſe lands to him & his heirs & dye without iſſue, this land ſhall deſcend to the heir of the part of the mother, but in the caſe of a ſubject, the heir of the part of the father ſhall have them.

So King Henry the eighth purchaſed lands to him and his heirs, & died having iſſue two daughters, the Lady Mary, and the Lady Elizabeth, after the deceaſe of King Edward, the eldeſt daughter Queen Mary did inherit only, all his lands in fee ſimple. For the eldeſt daughter, or ſiſter of a King ſhall inherit all his fee ſimple lands. So it is if the King purchaſe Lands of the cuſtom of Gabelkind, & dye having iſſue divers ſons, the eldeſt ſon ſhall onely inherit theſe lands. And the reaſon of all theſe caſes is for that the quality of the perſon doth in theſe & many other like caſes alter the deſcent, ſo as all the Lands & poſſeſſions whereof the King is ſeiſed in jure Coronæ, ſhall ſecundum jus Coronæ attend upon and follow the Crown, and therefore to whomſoever the Crown deſcend, thoſe lands & poſſeſſions deſcend alſo, for the Crown and the Lands whereof the King is ſeiſed in jure Coronæ are concomitantia. If the

Pl. Com. fol. 247.

right

# *Gradus Parentelæ & Consanguinitatis meliori intelligentia Authoris nostri.*

The degrees of Parentage and of Consanguinity, for better understanding of our Author.

*Approved by*
*Bracton*, lib. 2, cap 31, fol. 67.
*Britton*, cap. 89, fol. 220, 221.
*Fleta*, lib. 5, cap. 7.
Mirror c. 1, se. 2, & que herit.

Adgnati quasi à patre congeniti.

*Adnati ex parte Patris.*
Cousins on the part of the Father, the more worthy in Discents, though farther remote.

*Linea transversalis seu collateralis*
The side Line,

**Recta Linea, The right Line**

*Abpatruus magnus:*
The great Vncles Grand-father on the Fathers side.

*Tritanus:*
The great Grand-fathers great Grand-Father:

*Trita*
The great fathers gre Mo

*Abamita magna:*
the great Uncles Grand-mother on the Fathers side.

*Attauus:*
the great Grand-fa thers Grand-father.

*Attavi*
the great Gra Grand-m

*Propatruus magnus.*
the great Uncles Father on the Fathers side.

*Proamita magna:*
the great Uncles Mother on the Fathers side.

*Abauus:*
the great Grand-fathers Father.

*Abavia*
the great Gra thers Mo

*Patruus magnus:*
the great Uncle on the Fathers side.

*Amita magna.*
the great Aunt on the Fathers side.

*Proauus:*
the great Grand-father.

*Proavia*
the great Gr Mother.

Avus ab Ævo, quia patre antiquior.

*Auus:*
the Grand-Father

*Avia:*
the grand-Mot

Patruus quasi loco patris.

*Patruus:*
the Uncle or Fathers Brother.

*Amita:*
the Aunt or Fathers Sister.

*Pater:*
Father.

*Mater:*
Mother.

Amita quasi à me tertia.

Frater, quasi fere alter.

Soror, quasi sorte orta diversa. Semigermani fratres quasi ex eodem patre & seperalibus matri Fus natibilius, Filia, ἀπὸ τῆς φιλίας i. ab amore parentum

*Patrueles à Patruo*
Sons or Daughters, Cousin Germans on the Fathers side.

*Amitini ab Amita:*
Sons or Daughters, Cousin Germans on the Fathers side.

*Linea transversalis, seu collateralis.*

The side Line.

Linea Recta Ascendens
The Right Line ascending

Frater a Brother.
*Semi germanus frater*, Brother of one Father & severall Mothers.
Soror Sister

*Frater a Br*
*Primus frate*
Brother of ou ther and Fathers

*Eorum*
Of these
*Filius*
the Sonne
*Filia*
the Daughter
right Cous. G

Propo-

*Linea recta*
the right Line

*situs.*

*ascendens.*
ascending

Nepos quasi natus post.

*Eorum*
Of these
*Nepos collat.*
the collateral Nephew
*Neptis collat.*
the collateral Niece.

| | | |
|---|---|---|
| *Filius:* Sonne. | 1 | *Filia* Daughter. |
| *Nepos linealis:* the lineal Nephew. | 2 | *Neptis linealis* the lineal Niece |
| *Pronepos linealis* the lineal Nephews or Nieces Sonne. | 3 | *Proneptis lin* the lineal Nephew Daughter |
| *Abnepos linealis:* the Grand Sonne of the lineall Nephew or Niece. | 4 | *Abneptis* the Grand Daug Nephew |
| *Atnepos linealis:* the great grand Sonne of the lineal Nephew or Niece. | 5 | *Atnep* the great grand Nephe |
| *Trinepos linealis* the great great Grand Son, of the lineal Nephew or Niece. *Et sic in infinitum.* | 6 | *Trin* the great great Nephew o |

*Eorundem*
Of these
*Pronepos collat.*
the collateral Nephews Son
*Proneptis colla.*
the collaterall Nep Daughter
*Et sic in infinitũ*

Place this Folio 15.

*nitatis, pro*
*tri.*
ity', for the
r.

*Cognati ex patre Matris:*
Cousins on the part of the Mother, the lefs worthy in diſcents, though neerer of kinne.

Cognati quaſi ſimul nati ex parte matris

*Linea tranſverſalis ſeu collateralis*
the ſide Line.

*Tritavia:*
he great Grand-
thers great Grand
Mother.

*Abavunculus magnus*
The Great Uncles Grand-father on the Mothers ſide.

*Attavia:*
eat Grand-fathers
Grand-mother.

*Abmatertera magnus:*
the Great Uncles Grand-mother on the Mothers ſide.

*Abavia:*
reat Grand-fa-
hers Mother.

*Proavunculus magnus:*
the great Uncles Father on the Mothers ſide.

*Promatertera magna:*
the great Uncles Mother on the Mothers ſide.

*Proavia:*
great Grand-
Mother.

*Avunculus magnus:*
the great Uncle on the Mothers ſide.

*Avia:*
nd-Mother

*Matertera magna:*
the great Aunt on the Mothers ſide,

*ater:*
other.

*Avunculus:*
the Vncle, or Mothers Brother,

Avunculus qu
avus minor.

*Matertera:*
the Aunt, or Mothers Siſter.

Matertera qua
mater altera.

*Frater* Brother.
*Primus frater.*
Brother of one Mother and ſeverall Fathers

*Linea tranſverſalis, ſeu collateralis,*
The ſide Line.

*Anunculus ab Anunculo:*
Sonnes or Daughters, Couſin Germans on the Mothers ſide.

*Materterini à Matertera*
Sonnes or Daughters, Couſin Germans on the Mothers ſide.

Materini quaſi
ti eaedem
ro fratre
ralibus

ſitus.

*aſcendens.*
aſcending.

*Eorum*
Of theſe
*Filius*
the Sonne
*Filia*
the Daughter
right Couſin G

*a*
nter.

*Horum*
Of theſe
*Nepos collat.*
the collateral Nephew
*Neptis collat.*
the collateral Niece

*tis linealis:*
neal Niece.

*neptis linealis:*
l Nephews or Nieces
Daughter.

*Eorundem*
Of theſe
*Proneposcol.*
the collat.
Nephu Son
*Proneptis col*
the collater
Neph: Dau.
*Et ſic in infinit*

*Abneptis linealis:*
and Daughter of the lineal
Nephew or Niece.

*Atneptis linealis:*
eat grand Daughter of the lineal
Nephew or Niece.

*Trineptis linealis:*
reat great Grand Daughter of the lineal
Nephew or Niece. *Et ſic in infinitum.*

right heir of the Crown be attainted of treaſon, yet ſhall the Crown deſcend to him, and eo inſtante (without any other reverſal) the attainder is utterly avoided, as it fell out in the caſe of Henry the ſeventh. (o) And if the King purchaſe lands to him and his heirs, he is ſeiſed thereof in jure Coronæ; à fortiori, when he purchaſes land to him, his heirs, and ſucceſſors.

But hereof this little taſte ſhall ſuffice.

Pl. Com. 238. 1 H. 7. fol. 4. (o) 43 E. 3. fol. 22.

## *Sect.* 9.

¶ ET eſt aſcavoir que ẽ parol (enheritãce) neſt pas tãtſolement entendue, lou home ad trẽs ou tenements per diſcent denheritage, mes auſi chelcun Fee ſimple, ou taile que home ad per ſon purchaſe puit eſtre dit enheritance, pur ceo que ſes heyres luy purront inheriter. Car en Briefe de Droit que home porta de terre que fuit de ſon purchaſe demeſne, ie bẽe dirra: Quam clamat eſſe jus & hæreditatem ſuam. Et iſſint ſerra dit en divers autres briefs, ſur hõe ou fee porta ẽ ſõ purchaſe demeſn, hõe apiert p le Regiſt.

AND it is to wit, that this word (*inheritance*) is not only intended where a man hath Lands or Tenements by deſcent of inheritage, but alſo every Fee ſimple or tail which a man hath by his purchaſe may be ſaid an inheritance, becauſe his heirs may inherit him. For in a Writ of right which a man bringeth of land that was of his own purchaſe, the Writ ſhall ſay, *Quam clamat eſſe jus & hæreditatem ſuam.* And ſo ſhall it be ſaid in divers other Writs which a man or woman bringeth of his own purchaſe, as appears by the Regiſter.

¶ *ET eſt aſcavoir.* This kind of ſpeech is uſed twice in this Chapter, and oftentimes by our Author in all his three Books, and ever teacheth us ſome rule of Law, or general or ſure leading Point, as you ſhall perceive by reading, and obſerving of the ſame, which for the eaſe of the ſtudious Reader, I have obſerved.

Sect. 45, 46. 57. 59. 80. 100. 146. 164. 170. 184. 229. 243, 259. 274. 280. 293. 300. 305. 419. 420. 421. 489. 632. 697. 749.

¶ *Quam clamat eſſe jus & hæreditatem ſuam.* (a) Here our Author declareth the right ſignification of this word (inheritance.) And true it is, that in the Writ of right Patent, &c. Quando Dominus remittit Curiam ſuam, The words of the Writ be, Quam clamat eſſe jus & hæreditatem ſuam. And in the Præcipe in capite, in a Cui in vita, (b) when the Defendant claimeth by purchaſe, the Writ is Quam clamat eſſe jus & hæreditatem ſuam. And with Littleton agreeth the Regiſter, fol. 4. & 232. and the Book in 49 E. 3. 22. againſt ſodain opinions, 7 H. 4. 5. 10 H. 6. 9. 39 H. 6. 38. Pl. Com. Wimbeſhews caſe 47. And yet in 7 H. 4. 5. which is the Book of the greateſt weight. Sir William Thirning, Chief Juſtice of the Common Bench (as it ſeemeth doubting of it) went into the Chancery to enquire of the Chancery men the form of the Writ in that caſe, and they ſaid that the form was both one way and the other, ſo as thereby the opinion of Littleton is confirmed, and the Book in 6 E. 3. fol. 20. is notable, for there in an Action of waſte the Plaintiff ſuppoſed, that the Demandant did hold de hæreditate ſua, and it is ruled, that albeit the Plaintiff purchaſed the reverſion, yet the Writ ſhould ſerve. And there it is ſaid, It hath been ſeen, that in a Cui in vita, the Land was, which the Demandant claimed as her right & inheritance, when it was her purchaſe. And ſo this point wherein there might ſeem ſome contrariety in books is manifeſtly cleared. But in the Statute of W. 2. cap. 5. de hæreditate uxorum, by conſtruction of the whole, Statutes is taken only for the wifes inheritance by deſcent: and not by purchaſe, as appeareth 11 E. 2. tit. Quare imped. 43. 35 H. 6. 54 F. N. B. 34. b.

(a) Sect. 732. Bract. lib. 2. fol. 62. b. Fleta lib. 6. cap. 1.

(b) Regiſt. fol. 1. 2.

Regiſt. fol. 4. 232. 49 E. 3. 22. 7 H. 4. 5. 10 H. 6. 9. 39 H. 6. 38. 6 E. 3. 30. Pl. Com. Wimbeſhes caſe 47. & 58. b.

6 E. 3. 20.

W. 2. cap. 5. 11 E. 2. tit. Quare imped. 43. 35 H. 6. 54. F. N. B. 34. b.

There be ſome that have an inheritance (c) and have it neither by deſcent, nor properly by purchaſe but by Creation, as when the King doth create any man a Duke, a Marquiſſe, Earl, Viſcount, or Baron to him and his heirs, or to the heirs males of his body, &c. he hath an inheritance therein by Creation. A man may have an inheritance in title of Nobility and Dignity, three manner of ways, that is to ſay, by Creation, by Deſcent, and by Poſ-

(c) Lib. 6. fol. 52. 83. Counteſs de Rutlands caſe, lib. 8. fol. 6. 17. the Princes caſe.

Preſcription. By Creation two manner of ordinary ways (for I will not ſpeak of a Creation by Parliament) by Writ, and by Letters Patents. Creation by Writ, is the ancienter way; and here it is to be obſerved, that a man ſhall gain an inheritance by Writ. King Richard the ſecond, created John Beauchampe de Holte Baron of Kederminſter by his Letters Patents, bearing date the 10. of Octob. anno regni ſui 11. before whom there was never any Baron created by Letters Patents, but by Writ. And it is to be obſerved, that if he be generally called by Writ to the Parliament, he hath a Fee ſimple in the Barony without any words of inheritance. But if he be created by Letters Patents, the ſtate of inheritance muſt be limited by apt words, or elſe the grant is void. If a man be called by Writ to the Parliament, and the Writ is delibered unto him, and he dieth before he cometh and ſits in Parliament, whether he was a Baron or not. And it is to be anſwered, that he was no Baron, for the direction and delivery of the Writ to him maketh not him Noble: for the better underſtanding whereof, it is to be known that the words of the Writ in that caſe are, Rex, &c. E.B. de D. Chivalier ſalutem. Quia de adviſamento & aſſenſu concilii noſtri quibuſdã arduis & urgentibus negotiis ſtatum & defenſionem regni noſtri Angliæ, &c. concernentibus quoddam Parliamentum noſtrum apud Civitatem Weſtm̃ à 21. Octob. proxim. futuro teneri ordinavimus, & ib'd. vobiſcum & cum Prælatis, Magnatibus, & Proceribus dicti regni noſtri colloquium habere & tractatum, vobis in fide & ligeancia quibus nobis tenemini firmiter injungendo mandamus, quod conſideratis dictorum negotiorum arduitate, & periculis imminentibus ceſſante excuſatione quacunque, dictis die & loco perſonaliter interſitis nobiſcum & cum Prælatis, Magnatibus, & Proceribus ſupra dictis, ſuper dictis negotiis tractatur' veſtrumque conſilium impenſur', &c. And this Writ hath no operation or effect, until he ſit in Parliament, and hereby his blood is ennobled to him and his heirs lineall, and thereupon a Baron is called a Peer of Parliament. (d) And if iſſue be joyned in any action, whether he be a Baron, &c. or no, it ſhall not be tried by Jury, but by the Record of Parliament, which could not appear, unleſs he were of the Parliament. Therefore a Duke, Earl, &c. of another Kingdom, are not to be ſued by thoſe names here, for that they are not Peers of our Parliament. And albeit the Creation by Writ is the ancienter, yet the Creation by Letters Patents is the ſurer, for he may be ſufficiently created by Letters Patents, and made Noble, albeit he never ſit in Parliament.

(c) And it is to be obſerved, that Nobility may be granted for term of life, by act in Law, without any actual Creation; as if a Duke take a wife by the intermarriage, ſhe is a Dutcheſs in Law, and ſo of a Marqueſs, an Earl, and the reſt, and in ſome other caſes. And there is a diverſity betwẽ a woman that is noble by Deſcent, and a woman that is noble by marriage. (f) For if a woman that is Noble by Deſcent, marry one that is under the degree of Nobility, yet ſhe remaineth Noble ſtill; but if ſhe gain it by marriage, ſhe loſeth it; if ſhe marry under the degree of Nobility, and ſo is the rule to be underſtood, Si mulier nobilis nupſerit ignobili, deſinit eſſe nobilis. (g) But if a Dutcheſs by marriage marrieth a Baron of the Realm, ſhe remaineth a Dutcheſs, and loſeth not her name, becauſe her huſband is Noble, & ſic in cæteris.

And as an eſtate for life may be gained by marriage, ſo may the King create either man or woman noble for life, (b) but not for years, becauſe then it might go to Executors or Adminiſtrators. The true diviſion of perſons is, that every man is either of Nobility, that is, a Lord of Parliament of the upper Houſe, or under the degree of Nobility, amongſt the Commons, as Knights, Eſquires, Citizens and Burgeſſes of the lower Houſe of Parliament, commonly called the Houſe of Commons, and he that is not of the Nobility is by intendment of Law amongſt the Commons.

¶ *Come apiert per le Regiſt.* Which book in the Statute of W. 2. cap. 24. is called Regiſtrum de Cancellaria, becauſe it containeth the forms of Writs at the Common Law that iſſue out of the Chancery, tanquam ex officina Juſticiæ. There is a Regiſter of originall Writs, and a Regiſter of judiciall Writs; but when it is ſpoken generally of the Regiſter, it is meant of the Regiſter originall. For the antiquity and excellency of this Book, ſee in my Preface to the eighth part of my Commentaries. This excellent Book our Author voucheth divers times in theſe Books, and ſo doth he divers other Authorities in Law of ſeveral kinds, but with this obſervation, that he citeth no Authority; but when the caſe is rare, or may ſeem doubtful, which appeareth in this, that he putteth no Caſe in all his three Books, but hath warrant of good Authority in Law: For he knew well the rule, that Perſpicua vera non ſunt probanda. And the like obſervation is made of Juſtice Fitzherbert in his Book of Natura Brevium, that he never citeth Authority, but when the caſe is rare, or was doubtful to him. The Authorities which our Author hath cited in his three Books, I have collected.

Lib. 6. fol. 52, 53. Counteſs of Rutlands caſe.
8 H. 6. 10. 48 E. 3. 30.
35 H. 6. 46. Pl. Com. 223.

(d) 35 H. 6. 46.
48 E. 3. 30. b.
48. Aſſ. p. 6. 22. Aſſ. p. 24.
Regiſt. 287.
11 E. 3. breve 472.
20 E. 4. 6.

(e) Lib. 6. fol. 52, 53. Counteſs de Rutlands caſe.
2 H. 5. 11. 12. Aſſ. 24.
12 E. 3. breve 254.
8 H. 4. 19. 11 H. 4. 15.
Vide Fleta lib. 6. cap. 10.

(f) Lib. 4. fol. 118. Actons caſe, Tempore Mariæ Reginæ. Brooke nomine de dignity 69.
14 H. 6. 18. 2 H. 6. 11.

(g) 22 H. 6. 52.

(h) Lib. 9. fol. 97, 98. Sir George Reynels caſe.

Vide Sect. 88. 94. 96. 101. 157. 234. 318. 383. 412. 420. 433. 514. 643. 644. 697. 660. 692. 702. 729.

## Sect. 10.

¶ Et de tiels choſes de ſur hõe poit aver un manuel occupation poſſeſſion ou reſceit, ſicõe des terres, tenements, rents, & hujuſmodi, la home dirẽ en count countaut, & en plee pledont, que un tiel fuit ſeiſie en ſon demeſne come de fee. Mes de tiels choſes que ne giſont en tiel Manuel occupation, &c. ſicome de advowſon deſgliſe, & hujuſmodi, la, il dirra que il fuit ſeiſie come de fee, & nemy en ſon demeſne come de fee, & en Latin il eſt en lun cas, Quod talis ſe ſitus fuit, &c. in dominico ſuo ut de feodo & en lauter caſe, quod talis ſeiſitus fuit &c. ut de feodo.

And of ſuch things whereof a man may have a Manuel occupation, poſſeſſion or receipts, as of lands, Tenements, Rents, and ſuch like, there a man ſhall ſay in his Count Countant and Plea Pleadant, that ſuch a one was ſeiſed in his demeſne as of fee: but of ſuch things which do not lye in ſuch Manual occupation, &c. as of an advowſon of a Church, and ſuch like, there he ſhall ſay, that he was ſeiſed as of fee, and not in his Demeſne as of fee. And in Latine it is in one Caſe, *Quod talis ſeiſitus fuit, &c. in dominico ſuo ut de feodo*, and in the other Caſe, *Quod talis ſeiſitus fuit, &c. ut de feodo.*

¶ IN Count Countant. Count, i. narratio commeth of the French word Conte, which in Latine is Narratio, & is vulgarly called a Declaration. The original writ is according to his name Breve, brief and ſhort, but the Count which the Plaintiff or Demandant make is more narrative & ſpacious, and certain both in matter & in circumſtance of time and place, to the end, the defendant may be compelled to make a more direct anſwer; ſo as the Writ may be compared to Logick, and the Count to Rhetorick; and it is that which the Civilians call a Libel. And in that ancient book of the Mirrour of Juſtices, Lib. 2. cap. des Loiers, Contors are Serjeants ſkilfull in Law, ſo named of the Count as of the principal part, and in W. 2. cap. 29. he is called Serjeant Counter. Mirrour de des Juſtices. W. 2. cap. 29.

¶ *En plea pleadant.* Placitum, Here Littleton teacheth good pleading in this point, of which in his third Book and Chapter of Confirmation, Sect. 534. he thus ſaith, Et ſachez non ſits que eſt un des pluis honorables, laudables, & profitable choſes en noſtre Ley, de aver le ſcience de bien pleade, en actions reals & perſonels, & pur ceo, jeo toy counſaile eſpecialment de mettera non courage, & cure de ceo apprender. And for this cauſe this Word Placitum is derived à placendo, quia bene placitare ſuper omnia placet; and it is not, has ſome have ſaid, ſo called per Antiphraſin, quia non placet.

¶ *Seiſie*; Seiſitus cometh of the French word ſeiſin i. poſſeſſio, ſaving that in the Common law ſeiſed, or ſeiſin, is properly applyed to Freehold, and poſſeſſed or poſſeſſion properly to goods and chattels; although ſometime the one is uſed in ſtead of the other. Bract. lib. 4. fol. 263. Idem lib. 5. fol. 372. Britton fol. 205, 206. Fleta, lib. 5. cap. 5. Stantf. prær. S. Pl. Com. fol. 191. Wrotesleyes caſe.

¶ *En ſon demeſne come de fee*, In Dominico ſuo ut in feodo. Dominicum is not only that inheritance, wherein a man hath proper dominion or ownerſhip, as it is diſtinguiſhed from the lands which another doth hold of him in ſervice, but that which is manuall occupied, manured, and poſſeſſed for the neceſſary ſuſtentation, maintenance and ſupportation of the Lord and his houſhold, and ſavoureth de domo, of the houſe, either ad menſam, for his or their board and ſuſtentation, or manually received (as rents) for bearing and defraying of neceſſary charges publick or private. Of theſe (ſaith our Author) he ſhould plead, that he is ſeiſed in dominico ſuo ut de feodo, i. de feodo dominicali, ſeu terra dominicali, ſeu reddita dominicali, which is as much to ſay as Demeyne or Demaine, of the hand, i. manured by the hand, or received by the hand, and therefore he calleth it manual occupation, poſſeſſion, or receit. And in Domeſday, Demeane-land is called Inland, as for example, 4. bovatas terræ de Inland, and 10. bovatas in ſervitio. Domeſday.

¶ *En tiel manuel occupation, &c.* There is nothing in our Author but is worthy of

of obſervation, here is the firſt (&c.) and there is no (&c.) in all his three Works (there being as you ſhall perceive very many) but it is for two purpoſes. Firſt, it doth imply ſome other neceſſary matter. Secondly that the Student may together with that which our Author hath ſaid, inquire what authorities there be in Law that treat of that matter, which will work three notable effects: Firſt, it will make him underſtand our Author the better: Secondly, it will exceedingly add to the Readers invention. And laſtly, it will faſten the matter more ſurely in his memory; for which purpoſe, I have for his eaſe in the beginning ſet down in theſe Inſtitutes, the effect of ſome of the principal authorities in Law, as I conceive them concerning the ſame. In this place the (&c.) implyeth poſſeſſion or receipt, and ſuch other matter as appeareth by my notes in this Section. As for the Authorities of Law, you ſhall find the effect of them in this Section, and the like of the reſt of the (&c.) which you ſhall find in the Sections hereafter mentioned, omitting thoſe (for avoiding of tediouſneſſe) that either are apparent, or which are explained in ſome other places. viz. Sect. 20. 48. 102. 108. 120. 125. 136 137. 146. 149. 154. 164. 166. 167, 168. 177. 179 183, 184. 194 200. 202. 219. 211. 217. 220, 226 233. 240, 242. 244. 245. 248. 262. 264 269. 270. 271. 279. 320. 322 323, 325. 326, 327, 329, 330. 335, 336 341. 347, 348, 349. 352, 353. 356, 339 364 395. 374 375. 377. 381. 384. 389. 393. 595. 396, 397. 399. 401, 402. 410. 417. 428 433. 447. 449 464. 470. 471. 477. 483. 489. 500. 501, 522. 532. 552. 533, 556 558 562. 578. 591, 592 593, 594. 603 613. 624. 625, 630. 632. 634 637 638. 648. 659. 660, 661. 669. 687. 693. 700. 718. 745. 748, 749. All which I have obſerved and quoted here once for all for eaſe of the ſtudious Reader.

Britton 205. 200. optime. Fleta lib. 6. cap. 5. Idem lib. 3. cap. 15.

¶ *Ut de feodo.* Where (ut) is not by way of ſimilitude, but to be underſtood poſitively that he is ſeiſed in fee. And ſo it is where one pleads a deſcent to one ut filio & hæredi, that is, to Jo. S. that is, ſon and heir, & ſic de cæteris, where (ut) denotat ipſam veritatem.

(i) 7 E. 3. 63. 24 E. 3. 74. 34 H. 6. 34. 19 E. 3. Quar. imp. 154. Mirrour cap. 2. ſect. 17.

¶ *Sicome de advowſon.* Of an Advowſon (i) wherein a man hath as abſolute ownerſhip and property, as he hath in Lands or Rents; yet he ſhall not plead, that he is ſeiſed in Dominico ſuo ut feodo, becauſe that inheritance, ſavouring not de domo, cannot either ſerve for the ſuſtentation of him and his houſhold, nor any thing can be received for the ſame for defraying of charges. And therefore he cannot ſay, that he is ſeiſed thereof in dominico ſuo de feodo, whereby it appeareth how the Common Law doth deteſt Simony, and all corrupt bargains for preſentations to any Benefice, but that (k) idonea perſona, for the diſcharge of the Cure ſhould be preſented freely without expectation of any thing; nay, ſo cautious is the Common Law in this point that the Pl. in a Quare impedit ſhould recover no damages for the iſſue of his preſentation, until the ſtatute of W. 2. cap. 5. And that is the reaſon that Gardian in Socage (l) ſhall not preſent to an Advowſon, becauſe he can take nothing for it, and by conſequent he cannot account for it. And by the Law he can meddle with nothing that he cannot account for it. (m) And in a writ of right of Advowſon, the Patron ſhall not alleage the arrerages, or taking of the profits in himſelf, but in his Incumbent. And hereby the old Books ſhall be the better underſtood, viz. Bract. lib. 4. tract. 3. cap. nu. 5. Eſt autem Dominicum quod quis habet ad menſam, & proprie ſicut ſunt Demeſnes Anglicè. And Fleta lib. 5. cap. 5. Eſt autem dominicum proprie terra ad menſam aſſignata. Dominicum etiam dicitur, ad differentiam ejus, quod tenetur in ſervitio. But of an Advowſon and ſuch like he ſhall plead, that he is ſeiſed de advocatione ut de feodo & jure.

(k) Lib. 6. fol. 51. Bowels caſe.

(l) 8 E. 2. Preſentment all Engliſe 10. 7 E. 3. 39. 27 E. 3. 89. 29 E. 3. 5. 31 E. 3. Bitoppel 249.

(m) 7 E. 3. 93. Bracton 263. 372. Fleta lib. 5. cap. 5.

¶ *Advowſon.* Advocatio, ſignifying an advowing or taking into protection, is as much as jus patronatus. Sir William Herle in 7 E. 3. fol. 4. ſaith, that it is not long paſt, that a man did know what an Advowſon was; but when a man would grant an Advowſon, he granted Eccleſiam the Church, and thereby the Advowſon paſſed, Vide 45 E. 3. 5. But ſurely the word is of greater antiquity; for in the Regiſter there is an original Writ de recto Advocationis, & in the original Writ of Aſſiſe de darreine preſentment, the Patron is called Advocatus. (n) Vide W. 2 ca. 5. And ſo doth (o) Bracton call him. Advocatus autem dici poterit ille ad quem pertinet jus advocationis alicujus, ut ad Eccleſiam præſenter nomine proprio & non alieno. And (p) Fleta lib. 5. cap. 14. agreeth herewith almoſt totidem verbis: Advocatus eſt ad quem pertinet jus advocationis alterius Eccleſia, ut ad Eccleſiam nomine proprio non alieno poſſit præſentare. And (q) Britton cap. 92. The Patron is called Avow, and the Patrons are called Advocati, for that they be either Founders, or Maintainers, or Benefactors of the Church either by building, donation, or increaſing of it, in which reſpect they were alſo called Patroni, and the advowſon Jus patronatus.

7 E. 3. 4. 45 E. 3. 2.

(n) W. 2. cap. 5.
(o) Bract. lib. 4. fol. 240.
(p) Fleta lib. 5. cap. 14.
(q) Britton cap. 92.
(r) 33 H. 6. 11. b. per Priſot. 14 H. 6. 15. per Newton. 22 E. 1. droit 68, 69. F. N. B. 31. b. Lib. 10. 135, 136. R. Smiths caſe. 45 E. 3. Fines 416. 45 E. 3. 12. 17 E. 3. 78. 17 E. 2. Dower. 163.

And it is to be underſtood that there is a great (r) diverſity inter advocationem medietatis Eccleſiæ, &c. & medietatem advocationi Eccleſiæ. And of their ſeveral remedies for the ſame. For the advowſon of the moytie is when there be ſeveral Patrons, and two ſeveral Incumbents in one Church, the one of the one moytie thereof, & the other of the other moytie, and one part

part aſwell of the Church as of the Town allotted to the one, and the other part thereof to the other, and in that caſe each Patron if he be diſturbed ſhall have a Quare impedit, quod permittat ipſum præſentare idoneam perſonam ad medietatem Eccleſiæ.

But if there be two Coparceners, and they do agree to preſent by turn, each of them in truth hath but a moytie of the Church, but for that there is but one Incumbent, if either of them be diſturbed, ſhe ſhall have a Quare impedit, &c. preſentare idoneam perſonam ad Eccleſiam; for that there is but one Church, and one Incumbent, and ſo of the like. But in (ſ) the ſaid caſe of two Coparceners, one of them ſhall have a writ of right of Advowſon, de medietate advocationis, for in truth ſhe hath but a right to a moytie; but in the other caſe, where there be two Patrons and two Incumbents in one Church, each of them ſhall have a writ of right of Advowſon, De advocatione medietatis.

(ſ) Britton, fol. 235. 21 E. 1. droit. 68, 69. F. N. B. 31. b. c. 33. a. 5 H. 7. 8. 17 E. 3. 38. 75, 76. 7 E. 3. 327. 8 E. 3. 425. 22. Aſſ. p. 33. 14 H. 4. 10. 33 E. 3. Quar. imp. 296.

And as there may (as hath been ſaid) be two ſeveral Parſons in one Church, ſo there may be two that may make but one Parſon in one Church. (t) Britton ſaith, Si aſcun Egliſe ſoit done a divers perſons per un ſole avowe nul ne ſe pura pleadre per aſſiſe de juris utrum ne nul eſtre implede ſauns lautre, &c. And therewith agreeth Fleta, (u) Item licet aliqua Eccleſia diviſa fuerit inter duos, ſive bona ſua habeant communia ſive ſeparata, dum tamen unicum habeant advocatum nullus eorum ſine alio agere poterit vel implacitari. And Fitzh. ſaith, that two Prebendaries may be one Parſon of a Church, who ſhall joyn in a Juris utrum, ſo as one Rectory may be annexed to two ſeveral Prebends, and both of them make but one Parſon. But where one is Parſon of the one moytie of a Church, and another of the other moytie, as hath been ſaid, there one of them ſhall have a Juris utrum againſt the other, and in the writ ſhall name him perſona medietatis Eccleſiæ, &c. But for avoiding of ſuſpition of curioſity, if we ſhould proceed any further herein, we will attend what Littleton will further teach us.

(t) Britton, fol. 235.
(u) Fleta, lib. 5. cap. 19.

F. N. B. 49. p.

F. N. B. 49. p.

## Sect. 11.

ET nota que hõe de poſt aſi pluis ample ou pluis griender eſtate den- heritance, que ſimple.

AND note, that a man cannot have a more large or greater eſtate of inheritance then Fee ſimple.

THis doth extend as well to Fee ſimples conditional & qualified, as to Fee ſimples pure & abſolute. For our Author ſpeaketh here of the ampleneſſe and greatneſſe of the eſtate, and not of the perdurableneſſe of the ſame. And he that hath a Fee ſimple conditional or qualified, hath as ample and great an eſtate as he that hath a Fee ſimple abſolute, ſo as the diverſity appeareth between the quantity and quality of the eſtate. From this ſtate in Fee ſimple, eſtates in tail, and all other particular eſtates are derived, and therefore worthily our Author beginneth his firſt Book with Tenant in Fee ſimple, for à principalioribus ſue dignoribus eſt inchoandum.

¶ *Ne poit aver pluis ample ou griender eſtate, &c.* For this cauſe two (a) Fee ſimples abſolute cannot be of one and the ſelf-ſame land. If the King make a gift in tail, & the Donee is attainted of treaſon, in this caſe the King hath not two ſimples in him, viz. the antient reverſion in Fee, and a fee ſimple determinable upon the dying without iſſue of Tenant in tail, but both of them are conſolidated and conjoyned together; and ſo it is if ſuch a Tenant in tail doth convey the land to the King, his Heirs and Succeſſors, the King hath but one eſtate in fee ſimple united in him, & the Kings grant of one eſtate is good, & ſo was it adjudged in the Court of Common Pleas. And yet in ſeveral perſons by act in Law, a reverſion may be in fee ſimple in one, and a fee ſimple determinable in another by matter, Ex poſt facto; as if a gift in tail be made to a Villain, and the Lord enter, the Lord hath a fee ſimple qualified, and the Donor a reverſion in fee; but if the Lord infeoff the Donor, now both fee ſimples are united, and he hath but one fee ſimple in him: but one fee ſimple cannot deſcend upon another by the grant of the party; as if lands be given to H. ſo long a B. hath Heirs of his body, the remainder over in fee, the remainder is void.

(a) Pl. Com. 149. & 248. 19 H. 8. Dier 4. 29 H. 8. Dier 33. 16 Eliz. Dier 330. 2 Mary Dier 1. 7. Auſtens caſe. Pa. 38 Eliz. Rot. 108. In Quar. imp. between the Queen) Pl. and the Biſhop of Lincoln, Huſſey and others Def. 15 E. 4. 6. 8.

## Sect. 12.

ITem purchaſe eſt appel la poſſeſſion de terres ou

ALſo purchaſe is called the poſſeſſion of lands or tene-

PUrchaſe in Latine is either acquiſitum, of the verb acquiro, for ſo I find it in the original Regiſter 243. In terris vel tenementis quæ

viri

viri & mulieres conjunctim acquisiverunt, &c. Bracton calleth it perquisitum; and by (b) Glanvil, it is called quæstus or perquisitum.

tenements que home ad p̄ son fait, ou per agreement, a quel possessiō il ne avieut per title de discent de nul de ses ancesters, ou de ses cousins mes per son fait de meine.

ments that a man hath by his Deed or Agrement, unto which possession he commeth not by title of descent from any of his Ancestors, or of his Cousins, but by his own Deed.

Bracton, lib. 2. fol. 65.
(b) Glanvil, lib. 7. cap. 1.
Britt. c. 33. fol. 84. & 121.

A purchase is alwayes intended by title, and most proper by some kind of conveyance either for money or some other consideration, or freely of gift: for that is in Law also a purchase. But a descent, because it commeth merly by act of Law, is not said to be a purchase, & accordingly the makers of the act of Parliament in 1 H. 5. cap 5 speaketh of them that have lands or tenements by purchase, or descent of inheritance. And so it is of an Escheat, or the like, because the inheritance is cast upon, or a little vested in the Lord by act in Law, and not by his own deed or agreement, as our Author here saith. Like Law of the state of Tenant by the Courtesie, Tenant in Dower, or the like. But such as attain to lands by mar injury & wrong, as by disseisin, intrusion, abatement, usurpation, &c. cannot be said to come in by purchase, no more than Robbery, Burglary, Pyracy, or the like, can justly be termed purchase.

Pl. Com. Wimbishes case 47. b.
1 H. 5. cap. 5.

If a Nobleman, Knight, Esquire, &c. be buried in a Church, & have his Coat armor and Pennions with his arms, & such other ensigns of honour as belong to his degree or order set up in the Church, or if a grave-stone or tomb be laid or made, &c. for a monument of him. (c) In this case, albeit the freehold of the Church be in the Parson, & that these be annexed to the freehold; yet cannot the Parson, or any take them or deface them but he is subject to an action to the heir, & his heirs in the honour & memory of whose Ancestor they were set up. And so it was holden, Mic. 10. Ia. & herewith agreeth the Laws (d) in other Countries. Note this kind of inheritance: and some hold, that the wife or Executors that first set them up may have an action in that case against those that deface them in their time. And note, that in some places chattels, as heir-looms (as the first best bed, table, pot, pan, cart, and other dead chattels moveable) may go to the heir, & the heir in that case may have an action for them at the Common Law, and shall not sue for them in the Ecclesiastical Court, but the heir-loom is due by Custom, and not by the Common Law. And the (e) ancient jewels of the Crown are heir-looms, and shall descend to the next Successor, and are not devisable by testament.

(c) 9 E. 4. 24.

Mich. 10 Jac. Obiter in Com. Banc. in Pyms case.
(d) B. Castanæus fol. 13. Conc. 29.
30 E. 3. 29 & 3.
39 E. 2. 6. 9 10.
1 H. 5. tit. Executors 108. tit. Decent. Br. 43.
9 E. 15. Madam Wiches case.
(e) Vide 28 H. 8. 24.

And heir-loom is called principalium or hæreditarum.

Consuetudo hundredi de Stretford in Com' Oxon est quod hæredes tenitorum infra hundredum prædictum existen post mortem antecessorum suorum habebunt, &c. principalium, Anglice an heirs loom, viz. De quodam genere catallor, utensilium, &c. optimum plaustrum, optimum carucam, optimum ciphum, &c.

Int. adjudicata coram Rege Tr. 41 E. 3. lib. 2. fol. 104. in Thesaur. Sect. 241, 242. &c.

Our Author hath not spoken of parceners in this Chapter, for that he hath particular Chapters of the same.

*Gradus Parentelæ, &c.*

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# CHAP. 2. Sect. 13.

Mirrour cap. 2. sect. 15. & cap. 1. sect. 5.

¶ *Tenant en Fee tail.* Tallium, or Feodū talliarū, is derived of the French word tailler, scindere, for so Littleton himself in this Chapter, Sect. 18. saith.

¶ Tenant in Fee taile est p̄ force de le statute de West. 2. cap. 2. Car devant l' dit statute, touts Enheritāces fuer Fee simple; car touts les dones q̄ sont specifies deins

¶ Tenant in Fee Taile is by force of the Statute of *W.* 2. *Cap.* 1. for before the said Statute, all inheritances were Fee simple; for all the gifts which be specified in that statute were fee simple

m̄l' stat

m̃ l' ſtat, ſuer fee ſimple conditional al cõmon ley, cõe appiert p l' rehearſal d̃ m̃ l' ſtatute. Et oze per cel ſtat tenãt en le taile eſt en deux mañs, ceſtaſcavoir, tenant en taile general, & tenãt en taile ſpecial.

conditional at the Common Law, as appeareth by the rehearſall of the ſame Statute. And now by this Statute, tenant in taile is in two manners, that is to ſay, Tenant in tail general, and tenant in tail ſpecial.

holden at Weſtminſter, and hath the name of the ſecond, becauſe another Parliament was formerly holden at Weſtminſter in the third year of the ſame Kings reign, which was called Weſtminſter the firſt. And albeit many Parliaments were after holden at Weſtminſter beſides theſe, yet were they two onely, propter excellentiam, called the Statutes of Weſtminſter. And the Act intended by Littleton, is W.2.cap.1. Upon which ſtatute our Author in the Inner Temple did learnedly read, whoſe reading I have. Of King Edw. 1. and of this ſtatute, Sir William Herle chief Juſtice of the Court of Common Pleas, in 5.E.3.14. ſaith, That King E.1. was the wiſeſt King that ever was: and the cauſe of the making of this ſtatute, was to preſerve the Inheritance in the blood of them to whom the gift was made: And in 9 E.3. 22. he ſaith, That they were ſage men that made this ſtatute. See more of this in the Chapter of Warranties, Sect. 746.

5 E.1.14.

9 E.3.22.

Of this eſtate Tail it is ſaid, (a) Modus legem dat donationi, & tenend' eſt etiam conventio, quia Modus & Conventio vincunt legem: Ut ſi alicui cum uxore ſua donatio, habendum & tenendum ſibi & hæredibus, quos inter eos legitimè procreabunt, ecce quod donator vult tales hæredes in hæreditate paterna & materna ſuccedant, aliis hæredibus eorum remotioribus penitus excluſis: Et quod voluntas donatoris obſervari debet manifeſtè apparet per hæc Statuta: quia autem dudum Regi durum videbatur, &c.

(a) Fleta lib.3. cap.9. Bract.lib.2. cap.35&c. Brit.ca.24 & 36.

¶ *Devant le dit Statute* (b) *touts Inheritances fueront Fee ſimple.* Here Fee ſimple is taken in his large ſenſe, including as well conditional or qualified, as abſolute, to diſtinguiſh them from eſtates in tail ſince the ſaid ſtatute. Before which ſtatute of Donis conditionalibus, If land had been given to a man, and to the heirs males of his body, the having of an iſſue female had been no performance of the Condition, but if he had iſſue male, and died, and the iſſue male had inherited, yet he had not had a Fee ſimple abſolute: (c) for if he had died without iſſue male, the Donor ſhould have entred as in his reverter. By having of iſſue, the Condition was performed for three purpoſes: Firſt, to alien: Secondly, to forfeit, Thirdly, to charge with Rent, Common, or the like. But the courſe of deſcent was not altered by having iſſue: for if the Donee had iſſue and died, & the land had deſcended to his iſſue, (d) yet if that iſſue had dyed (without any alienation made) without iſſue, his collateral heir ſhould not have inherited, becauſe he was not within the form of the gift, viz. heir of the body of the Donee. (f) Lands were given before the ſtatute in Frankmarriage, and the Donees had iſſue and died, and after, the iſſue died without iſſue, it was adjudged that his collateral iſſue ſhall not inherit, but the Donor ſhall re-enter. So note, that the heir in tail had no Fee ſimple abſolute at the Common Law, though there were divers deſcents.

(b) Vid.ſect. 18. Brit.ca.36.fol.93. Pl.Com.235.562. Shelleys Caſe, lib.1.fol.103.

(c) 44 E.3.3. 30 E.1. Formedon 66. 7 E.3.657. 7 H.4.31.12 H.4.2.

(d) 18 E.3.46. 18 Aſſ.p.5. 12 E.4.3.

(f) 4 H.3.Formedon 34. 18 Aſſ.5. 12 E.4.3. Pl.Com.247.b. 18 E.2.tit. Formedon 589 59.

If lands had been given to a man and to his heirs males of his body, and he had iſſue two ſons, and the eldeſt had iſſue a daughter, the daughter was not inheritable to the Fee ſimple, but the younger ſon per formam Doni. And ſo if land had been given at the Common Law to a man and the heirs Females of his body and he had iſſue a ſonne and a daughter, and died, the daughter ſhould have inherited this Fee ſimple at the Common Law, for the ſtatute of Donis conditionalibus createth no eſtate tail, but of ſuch an eſtate as was fee ſimple at the Common Law & is deſcendable in ſuch form as it was at the Common Law. If the Donee in tail had iſſue before the ſtatute, and iſſue had dyed without iſſue, the alienation of the Donee at the Common Law, having no iſſue at that time had not barred the Donor.

(g) If Donee in tail at the Common Law had aliened before any iſſue had, and after had iſſue, this alienation had barred the iſſue, becauſe he claimed a fee ſimple, yet if that iſſue died without iſſue, the donor might re enter for the alienation before any iſſue at what time he had no power to alien to bar the poſſibility of the Donor. (h) But if Feme tenant in tail had taken husband, and had iſſue, and the husband and wife had alienated in fee by deed before the ſtatute yet the iſſue might have had a Formedon in deſcender, for the alienation was not lawful: but otherwiſe it is, if it had ben by fine. And theſe things though they ſeem ancient are neceſſary notwithſtanding to be known, aſwel for the knowledg of the Common Law, as for Annuities and ſuch like Inheritances as cannot be intailed within the ſaid ſtatute, and therefore remain at the Common Law. (i) If the King before the ſtatute of Donis con-

(g) 30 E.1. Formedon 65. Temps E.1.ibid.62. 19 E.2.Formedon 61. Pl.Com.146.

(h) 4 E.2.Formedon 30.

(i) 6 E.3.56.Io.of Eltham's caſe.

conditionalibus had made a gift to a man, and to the heirs of his body begotten, the Donr Post prolem suscitatam, might have alienedaswel as in the case of a common person. (k) But if the Donée had no issue,and before the Statute had alened with Warranty, and died, and the Warranty had descended upon the King, this should not have bound the King of his reverſion without assets:but otherwise it was in the case of a common person. (l) On the other side, if lands had ben given to the King and to the heirs of his body, he could not before issue have alened in Fée, but only to have barred his issue as a common person might have done, but not have barred the reverſion, for that should have bn a wrong in the case of a Subject: and the Kings Prerogative cannot alter his case, nor make it greater than the Donor gave unto him: & it is a Maxim in Law, That the King can do no wrong. When all Estates were Fée simple, then were purchasers sure of their purchases, Farmors of their leases, Creditors of their debts, the King and Lords had their Escheats, Forfeitures, Wardships, and other profits of their Seigniories: and for these and other like cases,by the wisdom of the Common Law all Estates of inheritance were Fée simple, and what contentions and mischiefs have crept into the quiet of the Law,by these tettered inheritances, daily experience teacheth us. But see more of this matter in the aforesaid Chapter of Warranty Sect.746.

(k) 45 Ass.p.6.

(l) Pl.Com.246.b.

Lib.10.f.38,in Port.case.

¶ *Common ley.* See for explication hereof, Sect.170.

Dost, & Stud. lib.2. ca.55.

¶ *Come appiert per le rehersall de meſme leſtatute.* Here, by the authority of our Author, The rehearsal or preamble of a Statute is to be taken for truth, for it cannot be thought that a Statute that is made by authority of the whole Realm, as well of the King, as of the Lords Spiritual and Temporal, and of all the Commons, will recite a thing against the Truth.

¶ *Et ore per cel ſtatute tenant en taile eſt en* 2. *Manners*, s. *tenant en taile generall, & tenant en taile eſpeciall.*

This division of an estate tail is perfect and sound, For the membra dividentia, viz. general and special are converted properly with the thing defined, and they are proved by many Authorities of Law, and approved of all learned men, and so are all the divisions thorow all his three Books,which the studious and diligent Reader will observe. And how excellent and difficult a thing it is to divide rightly and properly, especially in the law, the learned do know.

(r) 24 H.8.tit. Feoffments all uses 4.27 H.8.fo.

By this Statute the land is as it were appropriated to the Tenant in tail, and to the heirs of his body, and therefore (r) if an estate be made, either before or since the Statute of 27 H.8.c.10. to a man & the heirs of his body, either to the use of another and his heirs, or to the use of himself and his heirs, this limitation of use is utterly void. For before the said Statute of 27 H.8.he could not have executed the estate to the use,and so was it adjudged (ſ) in an Ejectione firmæ, between John Cowper Plaintiff,and Thomas Franklin,&c. Defendant.

(ſ) Pasch.14.Ja.in the Kings Bench.

## *Sect.* 14, 15.

Vid.Sect.2.

¶ *TErres*, Terra, in his general and legall signification (as hath ben said before) includeth not onely all kinde of grounds, as meadow, pasture, wood, &c. but houses and all edifices whatsoever. In a more restrained sense it is taken for arable ground.

¶ *Tenements*, Tenementa. This is the onely word which the said Statute of W. 2. that created Estates tail, useth, and it includeth not onely all corporate Inheritances, which are or may be holden, but also all Inheritances issuing out of any of

Although tht Advowson may be contained by force of this Statute as included in the word Tenements, yet under an Advowson will not pass by a Grant of the word Tenem, but it ought to be mentioned Browne of Trinity ca. fo. 22.

¶ TEnant en taile generall, eſt lou tres ou tenemts ſont dones a un hõe & a ſes heires de ſon corps engendres: En ceo caſe eſt dit general taile, pur ceo q̃ quelcunqz feme q̃ tiel tenant eſpousa (ſil avoit pluſors femes, & p cheſcun de eux il ad iſſue) uncore cheſcun de les iſſues

TEnant in taile generall, is where Lands or Tenements are given to a man, and to his heires of his body begotten. In this case it is said generall tail, because whatsoever woman that such tenant taketh to wife (if he hath many wives and by every of them hath issue) yet every one of these issues by pol-

er poſsibilitie poit inheriter les tenements per force del one, pur ceo que heſcun tiel iſſue eſt de ſ corps engendre.

poſſibilitie may inherit the Tenements by force of the gift; becauſe that every ſuch iſſue is of his body ingendred.

F. M̃ le maner eſt lou terres ou tenements ſont dones a un feme, & a les heires de ſa corps iſſuants, coment que el avoit divers baſons, uncore iſſue que el poit aver per heſcun baron, poit inheriter come iſſue en le taile per force de tiel done, & pur ceo tielr dones ſont appelles generall tailes.

IN the ſame manner it is where lands and Tenements are given to a woman, and to the heirs of her body, albeit that ſhe hath divers husbands; yet the iſſue which ſhe may have by every Huſband may inherit as iſſue in taile by force of this gift. And therefore ſuch gifts are called generall tailes.

thoſe inheritances, or concerning, or annexed to, or exerciſible within the ſame, though they lye not in tenure: therefore all theſe without queſtion may be entailed. As (c) Rents, Eſtovers, Commons, or other profits whatſoever granted out of land, or Iſles, Offices, Dignities, which concerne Lands or certain places may be entailed without the ſaid Statute, becauſe all theſe ſavour of the Realty. But if the grant be of an inheritance meer perſonall, or to be exerciſed about Chattels, and is not iſſuing out of land, nor concerning any land, or ſome certain place, ſuch inheritances cannot be entailed, becauſe they ſavour nothing of the realty. But examples will illuſtrate & make this learning clear.

(c) 7 E.3.363. 18 E.3.27. 7 H.6.8.32 H.28. 5 E.4. 3.1 H.7.28.4 H.7.9. 1 H.5.1 H.8.fol.3. Nevils caſe, lib.fol.33.34. Pl.Com.in Manxels caſe, fol.2 & 3.

The Writ of Aſſiſe (u) was De libero tenemento, and made his pleint of the Office of the fourth part of the Serjeant of the Common Place, and the Writ adjudged good, and ſeing that

(u) 7 Aſſ.p.12.7 E.6.1.

a man hath a Freehold, Liberum tenementum in it, by conſequent it may be intailed.

The Office of the keeping of the Church of our Lady of Lincoln, was entailed, and a Forfeiture there brought upon the gift of the Office by the iſſue in tail. The (x) Office of the Marſhal of England entailed. The (y) Office of one of the Chamberlains of the Exchequer intailed, 1 H.7.28. The Office of a Foreſtſhip intailed, 4 H.7.10.9 E.4.56.b. Charters intailed, 19 H 8.3. Uſe intailed. (z) Nomination to a Benefice intailed.

18 E.3.27.
(x) 5 E.4.3. 10 E.4.14.
(y) 11 E.4.1.
1 H.7.28.
4 H.7.10. 9 E.4.528.
19 H.8.3. 1 H.5.1.
(z) Lib.7.fol.33.34. Nevils caſe,

Alſo a name of dignity may be intailed within the Statute, (a) as Dukes, Marqueſſes, Earls, Wiſcounts, and Barons, becauſe they be named of ſome County, Mannor, Town, or place. If the iſſue in tail (b) in a Formedon in the Deſcender be barred by a falſe verdict, his releaſe is no bar to his iſſue, albeit the action is at the Common Law.

28 H.6. Lord Veſcyes caſe.
(b) 14 Aſſ.2.
3 Eliz. Dyer 188.

The like Law is of a Writ of Error, 3 Eliz. Dyer, 188. If a gift in taile be made with Warranty, the Done releaſes the Warranty, this ſhall not bind the iſſue in tail, for to all theſe caſes and the like the ſaid Statute doth extend. But if I grant to a man & to the heirs of his body to be Keeper of my Hounds, or Maſter of my Hoyſe, or to be my Faulconer, or ſuch like, with a fee therefore, yet theſe cannot be intailed within the ſaid Statute, for that they be not iſſuing out of Tenements, nor annexed to, or exerciſible within or concerning Lands or Tenements of Freehold or Inheritance, but concerning Chattels, and ſavour nothing of the Realty. And ſo it is if I by my deed for me and my heirs grant an annuity to a man, and the heirs of his body, for that this only chargeth my perſon and concerneth no Land, nor ſavoureth of the Realty.

Pl.Com.in Manxels caſe.

In all theſe caſes he hath a fee conditional, as they were before the ſtatute, and the Grantee by his grant or releaſe may bar his heir, as he might have done at the Common Law, for in theſe caſes he is not reſtrained by the ſaid ſtatute.

¶ *Et a ſes heirs de ſon corps engendres.* In gifts in taile theſe words (heirs) are as neceſſary, as in Feoffments and Grants; for ſeing every eſtate tail was a Fee ſimple at the Common Law, and at the Common Law no fee ſimple could be in Feoffments and Grants without theſe words (heirs) and that an eſtate in Fee tail is but a cut or reſtrained Fee. It followeth that in gifts in a mans life time, no Eſtate can be created without theſe words (heirs) unleſs it be in caſe of Frankmarriage, as hereafter ſhall be ſhewed. And where Littleton ſaith (heirs) yet (heir) in the ſingular number in a ſpeciall

39 Ass.p.20. 20 H.6.35.5 H.4.7.b. 24 H.4.15.

case may create an Estate tail, as it appeareth by 39 Ass. p. 20. hereafter mentioned. And yet if a man give lands to A. & hæredibus de corpore suo, the remainder to B. in forma prædicta, this is a good Estate tail to B. for that in forma prædicta do include the other. If a man letteth lands to A. for life, the remainder to B. in tail, the remainder to C. in forma prædicta, this remainder is void for the incertainty. But if the remainder had bin, the remainder to C. in eadem forma, this had bin a good Estate tail, for Idem semper proximo antecedenti refertur. If a man give lands or tenements to a man & semini suo, or exitibus vel prolibus de corpore suo, to a man and to his seed, or to the issues or children of his body, he hath but an estate for life, for albeit that the statute provideth that Voluntas Donatoris secundum formam in charta doni sui manifestè expressam de cætero observetur, Yet that will and intent must agree with the

Vid. Shelleys case, lib. 1. f. rules of Law. And of this opinion was our Author himself, as it appeared in his learned reading aforementioned upon this statute: where he holdeth if a man giveth land to a man & exitibus de corpore suo legitimè procreatis, or semini suo, he hath but an estate for life, for that there wanteth words of Inheritance.

¶ *De son corps.* These words are not so strictly required, but that they may be expressed by words that amount to as much: for the example that the statute of W. 2. putteth, hath not these words (de corpore suo) but these words (hæredibus), viz. Cum aliquis dat terram suam alicui viro & ejus uxori & hæredibus de ipsis viro & muliere procreatis. If lands be given to B.

(c) 3 E.3. tit. breve 743. 3 E.3, tit. Estates. (c) & hæredibus quos idem B. de prima uxore sua legitimè procrearet. This is a good estate in especial tail (albeit he hath no wife at that time) without these words (de corpore). So if it

(d) 12 H.4.2. (e) 37 H.6.15. (f) 5 H.5.6. (d) if lands be given to a man, and to his heirs which he shall beget of his wife: (e) or to a man & hæredibus de carne suâ, or to a (f) man & hæredibus de se. In all these cases these be good estates in tail, and yet these words de corpore are omitted.

(g) 12 H.4.2. per Horton. It is holden (g) by some opinion, that if there be grandfather, father, and son, and lands are given to the grandfather, and to his heirs begotten by the faher, the father dieth, the grandfather dieth, the son is in as heir to the grandfather begotten upon the body of his father, and the wife of the grandfather in that case shall be endowed. But certain it is, that in some cases one shall have the land per formam doni that is not issue of the body of the Donee, which see Sect. 30.

¶ *Engendres.* This word may in many cases be omitted or expressed by the like, and yet the state in tail is good: as, Hæredibus de carne, hæredibus de se, hæred' quos sibi contigerit, &c. as is aforesaid, and where the word of Littleton is, ingendred, or begotten, procreatis, yet if

18 E.2. tit. Bre. 836. 24 E.3.28. the word be procreandis, or quos procreaverit, the estate in tail is good; and as procreatis shall extend to the issues begotten afterwards, so procreandis shall extend to the issues begotten before.

## *Sect.* 16.

¶ *Aun home & sa feme.* (a) Then put the case that lands be given to a man and a woman unmarried, and the heires of their two bodies: for the apparant possibility to marry, they have an estate taile in them presently. (b) So it is where lands be given to the husband of A. and to the wife of B. and to the heires of their bodies, they have presently an estate in tail, in respect of the possibility. If a feme sole doe enfeoffe a married man causa Marrimonii prælocuti, it is good for the possibility. But put the case that the premises and the Habendum be in other manner than Littleton hath put, and let us see

(a) 5 H.7.10.11 E.3. Formedon 30. Pl.Com.35.

(b) Lib.1, fo, 120. Chudleys case, 40 Ass.pl.13.34 Ass.pl.1. Fleta lib.5.c.34.

TEnant en taile speciall ẽ lour ters ou Tenements sont dones a un home & a sa feme, & a les heires de lour deux corps engendres, en tiel case nul poet inherit p force de le dit done, forsqz ceux q̃ sont ingendres perentẽ eux deux. Et est appel le speciall Taile, pur ceo q̃ si la feme devy, & il prent auk feme, & ad issue, issue del se-

TEnant in tail special is where Lands or Tenements are given to a man and to his wife, and to the heirs of their two bodies begotten; In this case none shall inherit by force of this gift, but those that be engendered betweene them two: and it is called especiall taile, because if the wife dye, and he taketh another wife, & have issue, the

cond

cond feme ne ſerra tammes inheritable p force de tiel doae, ne aury iſſue del ſecond baron, ſi le prim Barou deuie.

iſſue of the ſecond wife ſhall not inherit by force of this gift, nor alſo the iſſue of the ſecond husband, if the firſt husband die.

what the Law is in theſe caſes. (c) As if a man in the premiſſes give lands to another and the heirs of his bodie, habendum to him and his heirs for ever, It hath been holden that in this caſe he hath an eſtate tail, and a fee ſimple expectant: And ſo (it is ſaid) via verſa, if lands be given to a man & to his heirs in the premiſſes, habendum to him & to the heirs of his body, that he hath an eſtate tail, & a fee ſimple expectant. But vid. lib. 8. fol. 154. b. otherwiſe reſolved, ut patet ibi. (d) If lands be given to B. and to his heirs, to have & to hold to B. and to his heirs, if B. have heirs of his body, and if he dye without heirs of his body, that it ſhall revert to the Donor, this is adjudged an eſtate tail, and the reverſion in the Donor. (e) For, Voluntas donatoris in charta doni ſui manifeſtè expreſſa obſervetur; and therefore in the caſe next precedent, if theſe or the like words be added (& if he die without heirs of his body, that the lands ſhall revert to the Donor) that then the Habendum ſhall by authority of divers books be conſtrued upon the whole deed, to be a limitation or a declaration, what heirs are meant in the premiſſes, to inherit, & p in that caſe the reverſion is in the Donor.

(c) 21 H. 6. 7.

(d) 30 Aſſ. p. 47. 35 Aſſ. p. 14. 37 Aſſ. 15. 5 H. 5, 6.

(e) W. 2. ca. 21.

(f) If a man make a Charter of feoffment of an acre of land to A. and his heirs, and another deed of the ſame acre to A. and the heirs of his body, and deliver ſeiſin according to the form and effect of both deeds, in this caſe he cannot take a fee ſimple only, as ſome hold, for that livery was made according to the deed in tail, as well as the Charter in fee, neither can the livery enure only to the deed of eſtate tail with a fee ſimple expectant, for that livery was made as well upon the deed in fee ſimple, as the deed in tail. Therefore others hold, That in p caſe it ſhall enure by moyties, that is, to have an eſtate tail in the one moyty, with the fee ſimple expectant, and a fee ſimple in the other moyty: And ſo the livery ſhall work immediately upon both deeds.

(f) 2 H. 5. 25. 45 E. 3. 20.

## Sect. 17.

¶ En meſme le maner eſt lou tenements ſont dones per un home a un auter oue un Feme, que eſt la file ou couſin al Donour en Frankmarriage, le quel doñe ad un enheritance per ceux paroir (frankmarriage) a ceo, annexe, coment que ne ſoit expreſſement dit, ou reherce en le done, ceſtaſcaboir, que les Donees averont les tenemẽts a eux & a lour heires perenter enx deux engendres. Et ceo eſt dit eſpecial tail, pur ceo que iſſue del ſe-

¶ In the ſame manner it is, where Tenements are given by one man to another, with a wife (which is the daughter or couſin to the giver) in frankmarriage, the which gift hath an enheritance by theſe words (frankmarriage) annexed unto it, although it be not expreſſly ſaid or rehearſed in the gift (that is to ſay) that the Donees ſhall have the Tenements to them and to their heires between them two begotten. And this is called eſpeciall taile, becauſe

¶ *A un home oue un feme.* Albeit the gift is made of the land to the man with his daughter, &c. yet is the gift good to them both in ſpecial tail, and therefore that of Stephan de la More in (g) 5 E. 3. is very remarkable, where the caſe was, that Robert gave the reverſion of lands which Agnes his wife did hold for her life to Stephan de la More, Habendum poſt mortem dictæ Agnetis in liberum maritagium cum Johanna filia ejuſdem Roberti, and it is adjudged that it is a good eſtate tail: wherein three things are to be obſerved; First, that Joane the daughter took with her husband an eſtate in eſpecial taile, albeit ſhe were named but under a cum, viz. cum Johanna, &c. 2. That that cum doth come after the Habendum, for that it is but all one ſentence. 3. That theſe words, in liberum Maritagium, do create an eſtate of inheritance in eſpeciall taile as Littleton

Vid. ſect. 19. 22.

5 E. 3. 17.

(g) This caſe is vouched in Pl. Com. 158. to be in 4 E. 3. which being not found in that year it is there ſo left without any further reference, but you ſhall find it as aboveſaid in 5 E. 3. 17.

tleton ſaith, Le Donee ad un inheritance per reaſon de ceux parolx (frankmarriage) a ceo annexe coment que ne ſoit expreſſement dit &c.

cond feme ne poit interiter, &c.

the iſſue of the ſecond wife may not inherit.

W.2.ca.1.
19 E.3.tit.tail.1.

But this had need of ſome interpretation, for if lands be given by theſe words (in frankmarriage) according to the rules of the Law, then do theſe words create an eſtate of inheritance in ſpecial tail: for the conſideration of mariage is in that caſe more favoured in Law than any other conſideration: But though the gift be in theſe words, yet if it be not conſonant to the rules of the Law in other things requiſite thereunto, there they create but an eſtate for life. And therefore to ſpeak once for all. Four things be incident to a frankmarriage: Firſt, that it be given for conſideration of marriage either to a man with a woman, or, as ſome have held, to a woman with a man: For in (h) 6 E.3.33. in Peirs de Saltmarſh his caſe, a man gave land to his ſon in frankmarriage, and Fitz.N.B.172. taketh the Law ſo alſo. And 7 E.4.12. per Moyle againſt a new opinion in temps H.8 Br.tit. Frankmarriage the former books being not remembred. Secondly, that the woman or man, that is the cauſe of the gift (i) be of the blood of the Donor: but it may be made alſwell after marriage as before: it may be made with a widdow, &c. Thirdly, if the gift be made of ſuch a thing as lyeth in tenure, that the Donees hold of the Donor at the time of the eſtate in frankmarriage made. A rent ſervice (k) may be given in frankmarriage becauſe it may be holden. And ſo may a Rent charge or Rent ſeck as Fitz.N.B. holdeth: it appeareth in our books that a Common was granted in frank marriage. Fourthly, that the Donees ſhall hold freely of the Donor till the fourth degree be paſt. And therefore if land be given to a woman, with a ſon of the Donor in frankmarriage, there paſſeth an inheritance, but if the Donee that is the cauſe of the gift be not of the blood of the Donor, then there paſſeth but an eſtate for life if livery be made. Alſo if (l) lands be given to a man with a woman of the blood of the Donor in liberum maritagium, the remainder in fee either to a ſtranger or to the Donees, they have no eſtate tail, becauſe there is no tenure of the Donor, but if (m) in that caſe, the remainder had been limited to another in tail, reſerving the reverſion in fee to the Donor, there the ſaid words (in liberum maritagium) create an inheritance, becauſe the Donees hold of the Donor. And this is the cauſe that it is holden, That a man cannot deviſe land in frankmarriage becauſe the Donee cannot hold of the Donor. And Ceſte que uſe before the ſtatute of 27 H.8. could not have made a gift in frankmarriage, becauſe the reverſion was in the Feoffees. (n) And if the Donor doth give lands in liberum maritagium reſerving a rent, this reſervation ſhall take no effect till the fourth degree be paſt, but the frankmarriage is good; for if the reſervation ſhould be good, then could not the Donees have an Eſtate tail for want of words of the heirs of their bodies.

(h) 6 E.3.33.
Fitz.N.B. 172.
7 E.4.12.
15 E.2.Cui in vita. Sect.24.
(i) 4 E.3.8.
31 E.1.tail 30.
Bracton lib.2.cap.7.
(k) 22 R.2.tit.deſcent.50.
Fitz.N.B.212.
9 H.6.35.b.
W.2.cap.1.ac.

(l) Temps H.8.Br. Frankmar. 11.13 E.1. Formedon 62.
Vid.32 E.1. tail 26.
2 E.2.Feoffment & faits.9.
17 E.3.5, 2.43 E.3.20.
(m) 60 E.2.aid 174.
31 E.2. Gard.216.

(n) Bract.lib.8. cap.7.
32 E.1.tail 31.
13 H.4.74.A.6.17.
28 Aſſ.31 E.3.gar.29.

*En Frankmarriage.* Liberum Maritagium, Free marriage. Maritagium is taken for Fee tail, and divideth maritagium into liberum & ſervitio obligatum: and herewith agreeth Bracton (o) lib. 2. cap. 34. & 39. Maritagium eſt aut liberum aut ſervitio obligatum, & lib.2. cap. 7. num. 3. & 4. Liberum maritagium dicitur, ubi Donator vult quod terra ſic data quieta ſit & libera ab omni ſeculari ſervitio. And ſo, before Bracton, ſaid Glanvil, lib.7. cap. 18. Maritagium autem aliud nominatur liberum, aliud ſervitio obnoxium; liberum dicitur maritagium quando aliquis liber homo aliquam partem terræ ſuæ dat cum aliqua muliere in maritagium, ita quod ab omni ſervitio terra illa ſit quieta, &c. And after both of them, Fleta that followeth them both, lib. 3. cap. 4. ſaith, Eſt autem quoddam maritaginm liberum ab omni ſervitio ſolutum donatori vel jus hæredi, &c. Et eſt ſimiliter maritagium ſervitio obligatum & oneratum, &c. And theſe words (in liberum maritagium) are ſuch words of art, and ſo neceſſarily required, as they cannot be expreſſed by words equipollent, or amounting to as much. As if a man give lands to a man with his daughter in connubio ſolute ab omni ſervitio, &c. Yet there paſſeth in this caſe but an eſtate for life, for ſeeing that theſe words (in liberum maritagium) create an eſtate of inheritance againſt the general rule of law, the law requireth they ſhould be legally purſued. But then it may be demanded if a man had given lands at the Common Law, in libero maritagio, whether had the Donees a fee ſimple without theſe words (heirs) for that it appeareth by that which hath been ſaid before, that all gifts in tail were fee ſimple at the Common Law, and that the ſtatute of W.2. did not create any eſtate in fee tail, but out of an eſtate in fee ſimple. To this it is anſwered, that theſe words (in liberum maritagium) did create an eſtate in fee ſimple at the Common Law: and it is holden in 31 E.3. gard.116. Per ceux parolx in frankmarriages les donees averont les terres a eux & a lour heirs parenter eux engendres, & ceo eſt dit eſpecial tail. But yet between Donees in Frankmarriage and other Dontes in ſpecial tail there be many notable diverſities. If the King give land to a man and a woman, and the heirs of their two bodies, and the woman dyes without iſſue, yet ſhall the man be tenant in tail apres poſſibilitie. But if the King give land to a man with a woman of his kindred in a frankmarriage, & the woman dieth without iſſue, the man in the Kings caſe ſhal not hold it for his life, becauſe the woman was the cauſe of the gift, but otherwiſe

(o) Bract.lib.2.ca.34. 39. & lib.2.ca.7.nu.3. & 4.
Glanvil.lib.7.ca.1.& ca.18.

Fleta lib.3.ca.1.

30 E.1.tit. Formdon 66. adjudg.acc.

31 E.3.tit.Gard.116.
Mirror.cap.2.ſect.15.acc.

9 H.3.Dower,202.

wiſe it is in the caſe of a common perſon If lands be given to a man and a woman in eſpecial tail, and they are divorced cauſa præcontractus, both ſhall hold the lands for their lives. But in (p) caſe of frankmarriage, if they be ſo divorced, the woman ſhall enjoy the whole land, becauſe ſhe was the cauſe of the gift. If lands holden in Socage, (q) be given in eſpecial tail, and the Donees die, the iſſue being within the age of 14 years, (r) the next of kin of the part of the father, or of the part of the mother which can hap the cuſtody ſhall have it; but in caſe of frankmarriage, the heir of the part of the mother ſhall have it, becauſe, as it hath been ſaid, ſhe was the cauſe of the gift.

7 H. 4. 16.

(p) 13 E. 3. tit. Aſſ. 19 E. 3. Aſſ. 83. 12. Aſſ. 22. 19. Aſſ. 2. 8 E. Aſſ. 45.
(q) Pl. Com. Carrils caſe.
(r) 17 H. 3. tit. Gard. 146. 27 E. 3. 79.

## *Sect.* 18.

¶ ET nota, quod hoc verbum (Talliare) idem eſt quod ad quandam certitudinem ponere, vel ad quoddam certum hæreditamentum limitare. Et p̄ ē q̄ē limit & mis en certaine, quel iſſue enheritera per force de tiels dones, & come longement ienheritance endurera, il eſt appell' ē Latin, Feodum talliatum, i. hæreditas in quandam certitudinem limitata. Car ſi tenant in generall taile moruſt ſans iſſue, l' Donor ou ſes heirs poient entrer cōe en lour reverſion.

AND note, that this word (*Talliare*) is the ſame as, To ſet to ſome certainty, or, to limit to ſome certain inheritance. And for that it is limited and put in certain, what iſſue ſhall inherit by force of ſuch gifts, and how long the inheritance ſhall endure, it is called in Latine, *Feodum talliatum, i. hæreditas in quandam certitudinem limitata.* For if tenant in generall taile dieth without iſſue, the donor or his heirs may enter, as in their reverſion.

¶ *Et nota.* This, in our Author throughout his three Bookes, betokens ſome notable point of inſtruction worthy of more ſpecial obſervation, which is often (ſ) uſed by him, as you may perceive by the Sections noted in the margent.

(ſ) Sect. 18. 37. 42, 43. 49. 50. 64. 72. 89, 90. 104. 108. 114. 116. 147. 158. 168. 170. 183. 254. 279. 346. 387. 452. 467. 618, 619. 637. 942. 970. 682. 684. 711. 717. 719. 738.

¶ *Feodum talliatum i. hæreditas in quandam certitudinem limitata.* Here our Author doth interpret what Feodum talliatum is. Of all the eſtates taile moſt coarcted or reſtrained that I find in our Books, is the eſtate tail in 39. Aſſ. Pl. 20. where lands were given to a man and to his wife, and to one heir of their bodies lawfully begotten, and to one heir of the body of that heir only. This caſe being adjudged in the point is an exception (ſome ſay) out of the general rule put before by Littleton, *Sect.* 13. that all eſtates tails were Fee ſimple at the Common Law, for (ſay they) by this limitation (hæredi) in the ſingular number, the Donees had not had a Fee ſimple at the Common Law. Vide regiſtrum judiciale, fol. 6. a gift made to a man, & hæredi maſculo de corpore ſuo.

Weſt. 2. cap. 3. Pl. Rom. 251. a.

39. Aſſ. Pl. 29.

Sect. 13. Vide Pl. Com. fol. 29. b.

Regiſt. Indict. fol. 2.

## *Sect.* 19.

¶ EN meſm l' maner eſt del tenant in ſpecial taile, &c. Car en cheſcun done en le taile ſauns pluis ouſter dire, le reverſion del Fee ſimple eſt en le donor. Et les donees &

IN the ſame manner it is of the Tenant in eſpeciall Taile, &c. For in every gift in taile without more ſaying, the reverſion of the Fee ſimple is in the Donor. And the Donees and

¶ *EN cheſcun done en tail ſans pluis ouſter dire, le reverſion del fee ſimple eſt en le donor.* This is wrought by the conſtruction of the Stat. of W. 2. cap. 1. which hath turned the Fee ſimple of the Donee into a particular eſtate of inheritance, and the poſſibility of the Donor to a reverſion in him expectant upon the eſtate tail, ſo

(c) 12 E. 4. 23. 5 H. 7. 14. Welt. 2. cap. 13. Pl. Com. 247, 448. 251. 562. 2 E. 2. tit. reſcrit. 147. 33 N. 6. 27. 39 E. 3. 18. 45 E. 3. 20.

ſo as there be two inheritances of one land, yet this was doubted in our Books, (c) and there reſolved according to Littleton. But I ſee no cauſe wherefore that point ſhould be drawn in queſtion, for at the ſame Seſſion of Parliament (in which the Statute de donis conditionalibus was made) viz. cap. 3. it is expreſſly ſaid, Vel per Donum, in quo reſervatur reverſio, ſo as by the judgment of the ſame Parliament a reverſion was ſetled in the Donor.

lour iſſues ferront al Donor & a ſes heires autielx ſervices, come le Donor fait a ſon Seignior prochein a luy Paramount, forſprise les Donees in Frankmarriage, les queux tiendront quietment de chelcun manner de ſervice, ſinon que ſoit per fealtie tanque le quart degree ſoit paſſe, & apres ceo que le quart degree ſoit paſſe liſſue en le cinqz degree, & iſſint ouſter lauters des iſſues apres luy, tiendront deldoñ ou ſes heirs come ils teignōt ouſter, cōe el ē avātdit.

their iſſue ſhall doe to the donor, and to his heires the like ſervices, as the donor doth to his Lord next Paramount except the donees in Frankmarriage, who ſhall hold quietly from all manner of ſervice, (unleſſe it be for fealty) untill the fourth degree is paſt, and after the fourth degree is paſt, the iſſue in the fifth degree, and ſo forth the other iſſues after him, ſhall hold of the donor or of his heirs as they hold over, as before is ſaid.

¶ *Le reverſion del fee ſimple eſt en le donor.* A reverſion is where the reſidue of the eſtate alwayes doth continue in him that made the particular eſtate, or where the particular eſtate is derived out of his eſtate, as here in the caſe of Litt. Tenant in Fee ſimple, maketh gift in tail; ſo it is of a leaſe for life, or for years. If a man extend lands by force of a Statute Merchant, Staple, Recognizance or Elegit, he leaveth a reverſion in the Conuſor. But ſince Littleton wrote, the deſcription muſt be more large upon the Stat. of (a) 27 H. 8. for at this day, if a man ſeiſed of lands in fee, make a feoffment in fee, (and depart with his whole eſtate) and limit the uſe to his daughter for life, and after her deceaſe, to the uſe of his ſon, in tail, and after to the uſe of the right heirs of the Feoffor: In this caſe, albeit he departed with the whole fee ſimple by the feoffment, and limited no uſe to himſelf, yet hath he a reverſion: (b) for whenſoever the Anceſtor takes an eſtate for life, and after a limitation is made to his right heirs, the right heirs ſhall not be purchaſors. And here in this caſe when the limitation is to his right heirs, and right heir he cannot have during his life (for, non eſt hæres viventis) the Law doth create an uſe in him during his life, untill the future uſe cometh in eſſe, and conſequently the right heirs cannot be purchaſors, and no diverſity when the Law creates the eſtate for life, and when the party. And all this was adjudged between (c) Fenwick and Mitford in the Kings Bench; and if the limitation had been to the uſe of himſelf for life, and after to the uſe of another in tail, and after to the uſe of his own right heirs, the reverſion of the fee had been in him, becauſe the uſe of the fee continued ever in him: and the Statute doth execute the poſſeſſion to the uſe in the ſame plight, quality, and degree, as the uſe was limited.

(a) 27 H. 8. cap. 10.

(b) 38 E. 3. 26. 27 E. 3. pave 118. 24 E. 3. 36. 40 E. 3.

(c) Tr. 31. Eliz. inter Fenwick & Mitford. 32 H. 8. grad. 93. 28 H. 8. Dier 89, 10, &c. Buckenhams caſe. 5 Mary Dier 163.

(d) If a man make a gift in tail, of a leaſe for life, the remainder to his own right heirs, this remainder is void, & he hath a reverſion in him: for the Anceſtor during his life, beareth in his body (in judgment of Law) all his heirs, and therefore it is truly ſaid, that Hæres eſt pars anteceſſoris. And this appeareth in a common caſe, that if land be given to a man and his heirs, all his heirs are ſo totally in him, as he may give the lands to whom he will.

(d) (d) 1 H. 5. 84 H. 6. 20. 9 Ellz. Dier Bromleyes caſe.

(e) So it is if a man be ſeiſed of lands in fee, and by indenture make a leaſe for life, the remainder to the heirs males of his own body, this is a void remainder: for the Donor cannot make his own right heir a purchaſer of an eſtate tail, without departing of the whole fee ſimple out of him: as if a man make a feoffment in fee to the uſe of himſelf for life, and then to the uſe of the heirs males of his body, this is a good eſtate tail executed in himſelf, and the limitation is good by way of uſe, becauſe it is raiſed out of the ſtate of the Feoffees, which the Feoffor departed with, and that is apparant, for a limitation of uſe to himſelf had without queſtion been good.

(e) Dier, 5 Mary 156. Groſwolds caſe adjudged. Bendlowes Serjeant in his report agreeth.

(f) If a man make a feoffment in fee to the uſe of himſelf in tail, and after to the uſe of the Feoffee in fee, the Feoffee hath no reverſion, but in nature of a remainder, albeit the Feoffor have the eſtate tail executed in him by the Statute, and the Feoffee is in by the Common Law, which is worthy of obſervation.

(f) 20 Eliz. Dier.

To

To conclude this point, (g) whosoever is seised of land, hath not only the estate of the land in him, but the right to take profits which is in nature of the use; and therefore when he makes a Feoffment in fee, without valuable consideration to divers particular uses, so much of the use, as he disposeth not, is in him as his ancient use in point of reverter. As if a man be seised of two Acres the one holden by Knights-service, by priority, and the other by Knights-service holden by posteriority, and maketh a feoffment in fee of both Acres, to the use of himself and his heirs, the old use continued in him, and the priority and posteriority remain. So it is of lands of part of the mother, the use shall go to the heir of the part of the mother, which could not be, if it were not the old use, but a thing newly created: the like law of lands, of the custom of Borough-english, Gavelkind, &c.

(g) 12 H. 7. 6. 28 H. 8. Dyer 12.

5 E. 4. 7. Lib. 1. 76. 84, 85. 100, &c. Chudley. Lib. 2. 56. 57, 58. 77, 78. Lib. 4. 22. Lib. 6. 34. 43.

¶ *Les dones, & lour issues ferront al donor & a ses heires autiels services come le donor fait a son Seignior procheine a luy paramount.* The reason of this is, that when by construction of the said Statute, there was a reversion setled in the Donor, for that the Donee had an estate of inheritance, the Judges resolved, that he should hold of his Donor, as his Donor held over: as if the Tenant had made a Feoffment in Fee at the Common Law, the Feoffee should have holden of the Feoffor as he held over, and before the Statute of W. 2. the Donee had holden of the Donor as of his person, and now of him as of his reversion: but if a man make a lease for life, or years, and reserve nothing, he shall have fealty only, and no rent, though the Lessor hold over by rent, &c. And this that Littleton saith, is regularly true, if the Donor maketh no special reservation, for then the special reservation excludes the tenure which the Law would create. As if Tenant by Knights-service maketh a gift in tail, reserving fealty and rent; the Donee shall hold in Socage, by fealty and rent, and not by Knights-service. But if a man hold land of the King in Grand Serjeanty, and maketh a gift in tail generally, in this case the Donee shall not hold of the Donor by Grand Serjeanty, because no man can hold by Grand Serjeanty, but of the King only, as hereafter shall be said; and therefore seeing Grand Serjeanty doth include Knights-service, he shall in that case hold of the Donor by Knights-service. If a man seised of land in the right of his wife holden by Knights-service, giveth the same lands in tail generally, the Donee shall not hold of him by Knights-service, because his wife held the land, and he had nothing but in her right. And in that case the Baron hath gained a new reversion by wrong, and therefore such a Donee shall do fealty only.

A. seised of two acres of land, holdeth the one of B. by Knights-service, and twelve pence rent, and the other of C. in Socage, and one penny rent, and makes a gift in tail of both acres without any express reservation of any tenure: In this case the Donor hath but one reversion. And yet he shall make several avowries, because there be several tenures created by law in respect of the several tenures over: and the avowry is made in respect of the tenures.

Lord, Mesne and Tenant, the Tenant holdeth by four pence, and the Mesne by twelve pence, the Tenant makes a gift in tail, without reserving any thing, by reason whereof he holdeth by four pence, in respect of the tenure over. Afterwards the reversion escheat, now shall the Donee hold by twelve pence, for the Mesnalty which was four pence is extinct, and the Law reserved the tenure upon the gift in tail, in respect of the Mesnalty, and when the Mesnalty is extinct, the former rent between the Donor and Donee is extinct also, and then by the same reason that the Donee shall take advantage, if the Donor by release or confirmation had holden by lesser Services, by the same reason he shall be prejudiced, when he holdeth by greater services.

49 E. 3. 19.

¶ *Forspriſe les Donees en Frankmarriage.* It is to be understood, that although the land be given in liberum maritagium, in free marriage generally, yet first the law doth make a limitation of this word (free) viz. till the fourth degree be past, for the reason that our Author here yieldeth. And 2. albeit it be free marriage, yet the Donees and their issues until the fourth degree be past, shall do fealty, for that is incident to every tenure (except Frankalmoigne) and cannot be separated from it; and therefore the Donees and their issues shall hold it as freely, till the fourth degree be past, as the Donor can make it. See more of this in the Chapter of Frankalmoigne.

Bracton lib. 2. fol. 22. Britton cap. 119. Fleta lib. 3. cap. 11. & lib. 6. cap. 2. Vide sect. 17. 20.

## *Sect.* 20.

¶ Et les degrees en Frankmariage serront accõtes en tiel manner, S. de

And the degrees in frankmarriage shall be accounted in this manner, *viz.* from

¶ Where Littleton saith, (a) that the Donees in Frankmarriage shall hold by fealty only until the fourth degree

(a) Vide Sect. 17. 19. 138. 268, 269. 271. 733.

degrée be paſt, & then the iſſue in the fifth degrée ſhall hold of the Donor as the Donor holdeth over, (b) Vide Bracton ubi ſupra, ita quod ille cui terra ſic data fuit, nullum inde faciat ſervitium uſque ad tertium hæredem & uſque quartum gradum, ita quod tertius hæres ſit incluſus. And herewith alſo agreeth Fleta ubi ſupra. And the (c) learning of Degrées ſet out in the Civil and Canon Law (wherein I find ſome difference) is worth the knowledge, to the end that Littleton and the Law in this caſe may the better be underſtood, which I will divide into certain rules: whereof the firſt is, That a perſon added to a perſon in the line of Conſanguinity maketh a degrée. And it is to be underſtood, that a line is threefold, viz. the line aſcending, deſcending, and collateral. And firſt for example of the aſcending line, take the Sonne and add the Father, and it is one degrée aſcending: add the Grandfather to the Father, and it is a ſecond degree aſcending.

(b) Glanvil lib. 7. cap. 18. Bract. lib. 2. fol. 21. Britton cap. 119. Fleta lib. 3. cap. 11. & lib 6. cap. 2.

(c) Vide 10 E. 3. tit. Avowry 157. 31 E. 3. ceſſavit. 22. 21 E. 3. gard. 116. 21 H. 7. 30.

1. Rule.

2.

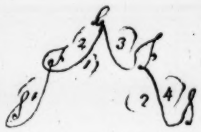
So as how many perſons there be, take away one, and you have the number of degrees. If there be four perſons, it is the third degree, if five the fourth: for one muſt exceed, and then you have the degree. Likewiſe by the deſcending take the Father, and add the Sonne, and it is one degrée; then take the Sonne and add the Grandchild, and it is the ſecond degree, and ſo likewiſe further. Wherein obſerve, that the Father, Son and Grandchild: albeit there are three perſons, yet they make but two degrees, becauſe (as it hath been ſaid) one muſt exceed for making a degree.

3.

It is to be noted, that in every line the perſon muſt be reckoned from whom the computation is made. And there is no difference between the Canon and Civil Law in the aſcending & deſcending line: for thoſe whom the Civilians do reckon in the ſecond degree, the Canoniſts do reckon in the firſt; and thoſe whom they place in the fourth, theſe place in

le donor a les donees en frankmarriage, le nees in Frankmarriage primer degree, pur the firſt dgree, beceo q̄ la feme que eſt cauſe the wife, that is un des donees coviēt one of the donees, eſtre file, ſoer, ou aut ought to be daughter, couſin a le donor. Et ſiſter, or other coſen to de les donees tanque the donor, & from the a lour iſſue il ſerra donees unto their iſſue accompt le ſecond ſhall be accounted the degree, & de lour iſſue ſecond degree, & from tanque a ſon iſſue, le their iſſue unto their tierce degree, & iſſint iſſue the third degree, ouſter, &c. Et la cauſe and ſo forth. And the eſt, pur ceo que apres reaſon is, becauſe that chelcun tiel done les after every ſuch gift, iſſues queux veignoñ the iſſues of the Dode le donor, & les iſ- nor, and the iſſues of ſues queux veignont the Donees, after the de les donees apres fourth degree paſt of le quart degree paſſe both parties in ſuch de ambideux parties form to be accounted, en tiel forme deſſt ac- may by the Law of the compt, poyent enter holy Church, enter- eux per la ley de ſaint marry. And, that the Egliſe enternarry. donee in Frankmarriage ſhall be ſaid to be Frankmarriage ſerra the firſt degree of the dit le prime degree de four degrees, a man les quart degrees may ſee in a plea upon home poit veier en un a Writ of Right of plee ſur un breve de Ward, P. 31 *E.* 3. Droit de Garde P. where the Pl. plea- 31 E. 3. Lou le Pl. deth, that his great counta, que ſon tre- Grandfather was ſeiſaiel fuit ſeiſie de cert ſed of certain lands, terre, &c. & ceo tenuſt &c. and held the ſame dun autre per ſervice of another by Knight- de chivaler, &c. quel ſervice, &c. who gave dona la terre a un the land to one *Ralph* Rafe Holland oveſq̄ *Holland*, with his ſiſa ſoer en Frank- ſter in Frankmarriage, marriage, &c. &c.

in the ſecond. Therefore if we will know in what degree two of kindred do ſtand according to the Civil Law; we muſt begin our reckoning from one, by aſcending to the perſon from whom both are branched, and then by deſcending to the other to whom we do count, and it will appear in what degree they are. For example, In brothers and ſiſters ſons, take one of them and aſcend to his father, there is one degree from the father to the grandfather, that is the ſecond degree; then deſcend from the grandfather to his ſon, that is the third degree; then from his ſon to his ſon, that is the fourth. But by the Common Law there is another computation, for the Canoniſts do ever begin from the ſtock, namely, from the perſon of whom they do deſcend; of whoſe diſtance the queſtion is; For example, if the queſtion be, In what degree the ſons of two brothers ſtand by the Canon Law? we muſt begin from the grandfather, and deſcend to one ſon, that is one degree; then deſcend to his ſon, that is another degree; then deſcend again from the grandfather to his other ſon, that is one degree; then deſcend to his ſon, that is a ſecond degree: ſo in what degree either of them are diſtant from the common ſtock, in the ſame degrees they are diſtant between themſelves: And if they be not equally diſtant, then we muſt obſerve another rule. In what degree the moſt remote is diſtant from the common ſtock, in the ſame degree they are diſtant between themſelves, and ſo the moſt remote maketh the degree. And albeit the Donee be a Couſin in the third or fourth degree from the Donor, yet in this computation it maketh the firſt degree: Gradus dicitur à gradiendo, quia gradiendo aſcenditur & deſcenditur. And thus much of the Civil and Canon Law is neceſſary to the knowledge of the Common Law in this point: And herewith agreeth our Author in the words following.



¶ *Les iſſues queux veignont de le donor, & les iſſues queux veignont de les donees apres le* 4. *de gree paſſe dambideux parties in tiel forme deſte account poient enter eux per le Ley de Saint Eſgliſe entermarrier.* (De Saint Eſgliſe) (d) So as hereby it appeareth, That the computation of the degrees in this caſe, muſt be according to the Canon Law. But it is neceſſary to be known concerning marriages between perſons of kindred one to another, that it is enacted (e) by the Statute of 32 H. 8. that no reſervation or prohibition (Gods Law except) ſhall trouble or impeach any marriage without the Levitical degrees.

(d) Brit. cap. 119. Accord. Flet. lib. 3. cap. 11. & lib. 6. c. 2.
(e) 32 H. 8. cap. 38.

The caſe vouched by Littleton in 31 E. 3. you ſhall find abridged in Fitzh. tit. grad. 116. And albeit this year of 31 E. 3. was never in print till Fitzherbert did abridge it and publiſh it in print anno 11 H. 8. and goeth under the name of broken years; yet here it appeareth by our Author, that the ſame is of authority in Law, as hereafter alſo in other places ſhall be obſerved.

## *Sect.* 21.

¶ ET touts ceux tailes avandits ſont ſpecifies en le dit eſtatute de W. 2. Auſy ſont divers auſs eſtates en le taile, coment q̄ ne ſont ſpecifies per expreſſe parols in le dit eſtatute, mes ils ſont priſes per le equity de le dit Statute. Sicome Terres ſont dones a un home & a ſes heires males de ſon corps engendres, en

AND all theſe Entailes aforeſaid be ſpecified in the ſaid Statute of *W.* 2. Alſo there be divers other eſtates in taile, though they be not by expreſſe words ſpecified in the ſaid Statute, but they are taken by the equity of the ſame Statute. As if lands be given to a man, and to his heirs males of his body begotten; in this caſe his iſſue male ſhall

¶ *ET touts ceux Tailes avauntdits ſont ſpecifies en le dit Statute de weſtminſter.* 2. And ſo it appeareth by the ſaid Statute, Auſy ſont divers auters eſtates en le taile, &c. And herewith agreeth, Carbonels Caſe, 33 Edw. 3. titulo Taile 5.

That the caſes of the ſtatute are ſet down but for examples of eſtates tail, generall and ſpecial, and not to exclude other eſtates taile. 3 E. 3. 32. 18. Aſſ. p. 5. 18 E. 3. 46. 1. Mar. Dyer 46. Pl. Com. Seignior Barkleys caſe, fol. 251. For, Exempla illuſtrant, non reſtringunt legem.

3 E. 3. 32. 18 E. 3. 46. 18. Aſſ. p. 5. 1. Mar. D. Pl. Com. 251.

¶ *Equity*

¶ *Equity* is a conſtruction made by the Judges, that caſes out of the letter of a Statute, yet being within the ſame miſchief, or cauſe of the making of the ſame, ſhall be within the ſame remedy that that Statute provideth: And the reaſon hereof is, for that the Law-maker could not poſſibly ſet down all caſes in expreſſe terms, Æquitas eſt convenientia rerum quæ cupita coæquiparat, & quæ in paribus rationibus paria jura & judicia deſiderat. And again, Æquitas eſt perfecta quædam ratio, quæ jus ſcriptum interpretatur & emendat, nulla ſcriptura comprehenſa, ſed ſolum in vera ratione conſiſtens. Æquitas eſt quaſi æqualitas: Bonus Judex ſecundum æquum & bonum judicat, & æquitatem ſtricto juri præfert. Et jus reſpicit æquitatem.

¶ *Si come terres ſont done a un home & ales* (b) *heires males de ſon corps engendres, en tiel caſe ſon iſſue male inheritera, & iſſue female ne unques inheritera, &c.* This ſhall be explained afterwards, Sect. 24.

Bract. lib. 4. fol. 186.
(b) 18. Aſſ. p. 5. 18 E. 3. 46. 33 E. 3. tit. Tail 5. 3 E. 3. 32. Pl. Com. Seignieur Berkleys caſe. 1 Mar. Lyer 46. Vide Sect. 24.

## *Sect.* 22, & 23.

¶ Theſe two Sections, or any thing therein, do need no explanation, in reſpect they ſhall be alſo explained hereafter in the next Section, ſaving only theſe words, (queux doient inheriter) are very obſervable, for they imply a diverſity between a deſcent and a purchaſe. For when a man giveth lands to a man and his heires females of his body, and dieth having iſſue a ſon and a daughter, the daughter ſhall inherit; for the will of the Donor (the Statute working with it) ſhall be obſerved. But in caſe (g) of a purchaſe, it is otherwiſe: For if A. have iſſue a ſonne and a daughter, and a leaſe for life be made, the remainder to the heirs females of the body of A: A. dieth, the heir female can take nothing, becauſe ſhe is not heir; for ſhe muſt be both heir and heir female, which ſhe is not, becauſe the brother is heir, and therefore the will of the giver cannot be obſerved, becauſe here is no gift, and therefore the Statute cannot work thereupon. And ſo it is if a man hath a ſonne and a daughter, and dieth, and lands be given to the daughter, and the heires females of the body of her father, the daughter ſhall take

(g) 9 H. 6. 24. 21 H. 6. 13. 14. 37 H. 8. Br. tit. Done 42. Tit. noſme. 1. & 40. Dyer. 23 El. 374. Shelleys caſe, lib. 1. 10.

¶ Iñ le manner eſt, ſi trees ou tenements ſoint dones a un home & a ſes hees females de ſon corps engendres, en tiel caſe ſon iſſue female luy inheritera p force & form de le dit done, & nemy iſſue male, pur ceo que en tiels caſes de dones faits en le tail, queux doient enheriter, & q̃r nemy la volunt del donor ſerr̃ obſerve.

IN the ſame manner it is, if Lands or Tenements be given to a man, and to his heires females of his body begotten; In this caſe his iſſue female ſhall inherit by force and forme of the ſaid gift, and not his iſſue male. For in ſuch caſes of gifts in taile, the will of the Donor ought to be obſerved, who ought to inherit, and who not.

¶ Et en le caſe q̃ terrs ou tenements ſont dones a un home, & a ſes heires males d̃ ſ̃ corps iſſuants, & ſi ad iſſue deux fils, & devy, & leign filz entra come hĩ male, & ad iſſue file & devy, ſ̃ treſ aſſa la tr̃, & nemy la file, pur

AND in caſe where lands or tenements be given to a man, and to the heirs of his body, and he hath iſſue two ſonnes, and dieth, and the eldeſt ſon enter as heire male, and hath iſſue a daughter, and dieth; his brother ſhall have the land, and

ceo

ceo que le frere eſt heire male. Mes autermẽt ſerra ẽ auters tailes q̃r ſont ſpecifies en le dit Statute.

not the daughter, for that the brother is heire male. But otherwiſe it is in the other entails, which are ſpecified in the ſaid Statute.

nothing but an eſtate for life, becauſe there is no ſuch perſon ſhe being not heir. But where a gift is made to a man, and to the heirs female of his body, there the Donee being the firſt taker is capable by purchaſe, and the heir female by deſcent, ſecundum formam doni; and therefore Littleton purpoſely added theſe words, Queux doient inheriter.

## *Sect.* 24.

¶ AUxy ſi terres ſoient dones a un hõe, & a les heires males d̃ ſon corps engendres & il ad iſſue file, q̃l ad iſſue fils & devy, & puis apres le donee devy, ẽ ceſt caſe le fils de la file ne inheritera paſſe p force de le taile, pur ceo que quecunque que ſerra inherit per force dun done en le taile fait as heires males, covient conveyer ſon diſcent tout per les heires males. Mes en tiel caſe le Donor poet entrer pur ceo q̃ le donee eſt mort ſans iſſue male en la Ley, entaunt que le iſſue del file ne poet conveyer a luy meſme le diſcent per heire male.

ALſo if lands be given to a man and to the heirs males of his body, and he hath iſſue a daughter, who hath iſſue a ſon, and dieth, and after the donee dy: In this caſe, the ſon of the daughter ſhall not inherit by force of the intail, becauſe whatſoever ſhall inherit by force of a gift in tail made to the heires males, ought to convey his deſcent wholly by the heirs males. Alſo in this caſe the Donor may enter, for that the donee is dead without iſſue male in the law, inſomuch as the iſſue of the daughter cannot convey to himſelf the deſcent by an heir male.

¶ *Quecunque ſerra enheriter per force dun done en Taile, &c.* Vide Tr. (h) 28 H.6. tit. Deviſe 18. (which is not in the book at large, but written verbatim out of Statham.) If a man deviſe lands to a man, and to the heirs males of his body, & hath iſſue a daughter, which hath iſſue a ſon, this ſon ſhall be inheritable, and notwithſtanding in a gift in tail the Law is otherwiſe, and that by the opinion of all the Judges in the Exchequer Chamber. But I hold this caſe to be ill reported, unleſs you will referr the opinion of the Judges to the gift in tail laſt mentioned. For firſt, albeit a Deviſe may create an Inheritance by other words than a gift can, yet cannot a Deviſe direct an inheritance to deſcend againſt the rule of Law. Secondly, there is no intent of the Deviſor appearing, that the ſon of the daughter ſhould againſt the rule of Law, inherit, & the Statute provideth, that Voluntas Donatoris, &c. obſervetur. And I have heard this caſe often denied to be Law, both in the Kings Bench, and in the Common Pleas, vid. Pl. Comment. 414.b. And ſo it is

Vide ſect. 719.
(h) 1 H. 6. 24. 11 H. 6. 13. 14. 28 H. 6. tit. Deviſe 18. Statham tit. Deviſe. Pl. Com. in Scholaſt. caſe 414.b. 20 H. 6. 43. 37 H. 8. Br. tit. Done & Rem. 61. tit. Noſme 1. & 40.

(i) mutatis mutandis, when a gift in tail is made to a man, and to his heirs females of his body, and he hath iſſue a ſon, who hath iſſue a daughter, this daughter ſhall never inherit, becauſe ſhe muſt convey by deſcent from females. And for the reaſon hereof ſee a notable caſe in 15 E. 2. tit. Corone 385. where it is adjudged (as before it had been), That the ſon of a female ſhould have an appeal of the death of a Couſin, and yet the daughter her ſelf ſhould never have had it. But there it is agreed, That the ſon of a female (k) in a Libertate probanda, ſhould be no witneſs or proof againſt the iſſue of the male. And the reaſon of this diverſity is very obſervable: for by the Common Law the female might have had an appeal as heir to any of

(i) 11 H. 6. 13.

15 E. 2. tit. Cor. 366.

(k) Mirror c. 2. ſect. 7. vid. Glanvil lib. 14. cap. 3.

her Anceſtors, as well as the male. But by the ſtat. of Magna Charta, c.24. Nullus capiatur aut impriſonetur propter appellam fœminæ de morte alterius quam viri ſui, which reſtraineth not the ſon of the female. And there Scrope ſaith, Per tout le Serjeant d'Angleterre, that is, by all the Judges of the Coif of England, it was awarded that the iſſue of the female ſhould have an appeal for the death of his Couſin. But in a liberate probanda, the iſſue of the blood female ſhall not be received to prove Villenage in the iſſue of the blood male, for the mother was diſabled by the Common Law, and the mother might be a neife Deen & trenc, that is, of the Water and Whip of three lords (meaning ſuch a bondwoman as is uſed to ſervile works and correction) and enfranchiſed by her husband. All which appeareth in the ſaid book. And it is holden in 17 E.4.1. that if a man be ſlain which hath no heir of the part of his father, that his uncle of the part of his mother ſhall have an appeal, and yet he muſt of neceſſity make his conveyance by a woman, Vid. 20 H.6.fo.33. the queſtion ſuddenly demanded and debated, and no conſideration or mention had of the ſaid former judgements and authorities; there it is compared to a gift in tail to a man and to his heirs males of his body, that the heir male of the daughter ſhall not inherit which hath no affinity to it, and yet the authority of the Book is great, for it is by the aſſent of all the Juſtices of the one Bench and of the other in the Exchequer Chamber, and therefore I leave the learned and judicious Reader to his own judgment. (l) Vide Stanf.58.b.15 E.2.384. If a man give lands to a man and to his heirs males of his body begotten, remainder to him and to his heirs females on his body begotten, the Donee hath iſſue a ſon who hath iſſue a daughter, who hath iſſue a ſon, this ſon is not inheritable to either of both theſe eſtates tail, becauſe, as Littleton ſaith, The male muſt make his conveyance onely by males, and ſo muſt the females by females. But in this caſe the land ſhall revert to the Donor. And therefore the ſafeſt way when a man will entail his lands to the heirs males and females of his body, is to limit the firſt eſtate to him and the heirs males of his body, the remainder to him and to the heirs of his body, and then all his iſſues whatſoever are inheritable. But if A. hath iſſue a ſon and a daughter and dieth, and the ſon hath iſſue a daughter and dieth, and a leaſe for life is made, the remainder to the heirs females of the body of A. In this caſe the daughter of A. ſhall not take, cauſa qua ſupra. But albeit the daughter of the ſon maketh her conveyance by a male, ſhe ſhall take an eſtate tail by purchaſe for ſhe is heir and a female, but if lands be deviſed to one for life, the remainder to the next heir male of B. in tail, and B. hath iſſue two daughters, and each of them hath iſſue a ſon, and the father and daughters die, ſome ſay this remainder is void for the uncertainty, ſome ſay that the eldeſt ſhall take it becauſe he is worthieſt, and others ſay that both of them ſhall take for that they both make but one heir. If lands be given to a man and to his heirs males or females of his body he hath an eſtate in general tail in him.

Vid. Seignior de la Wares caſe, lib.11.fol.1.

15 H.4.1.

20 H.6.43.

(l) Stanford.58.b. 15 E.2.tit.Coron.38.

11 H.6.13. 9 H.6.23.

## Sect. 25.

*Et ux homie, & a ſa feme.* But what if Tenements be given to a man and to a woman not being his wife, and to the heirs males of their two bodies, they have alſo an eſtate tail, albeit they be not married at that time. And ſo it is if lands be given to a man which hath a wife, and to a woman which hath a husband, and the heirs of their two bodies, they have preſently an eſtate tail (m) for the poſſibility that they may marry. But if lands be given to two husbands and their wives, and to the heirs of their bodies begotten, (n) they ſhall take a joynt eſtate for life and ſeveral inheritances, viz. the one husband and his wife the one moyty, and the other husband and wife the other moyty, and no croſs remainder or other poſſibility ſhall be allowed by Law, where it is once ſetled and take effect. But if lands be given to a man and two women and the heirs of their bodies begotten, (o) In this caſe they have a joynt-eſtate for life and every of them ſeveral inheritance, becauſe they cannot have one iſſue of their bodies, neither ſhall there be by any conſtruction a poſſibility upon a poſſibility, viz. that he ſhall marry the one firſt and then the other. And the ſame Law it is (p) when land is given to two men and one woman, and to the heirs of their bodies begotten.

*Et meſme le manner eſt, lou tenements ſont done a un hõe, & a ſa feme, & a les heires males de lour deux corps engendres, &c.*

In the ſame manner it is, where lands are given to a man and his wife, and to the heires males of their two bodies begotten, &c.

11 E.3. Formedon 20.

(m) 15 H.7. 10.lib.1. Dilon and Frems caſe. 40 Aſſ.p.13.

(n) 24 E.3.23.a.

(o) 7 H.4.18. 16 E.3.78. Little.on fol.46. 13 Eliz.Dyer 326.

(p) 44 E.3.tit.31.f.13.

*Sect.*

## Sect. 26, 27.

26, 17. These two Sections need no explanation at all.

¶ Item ſi teñts ſoient dones a un home & a ſa feme, & a les heires del corps del home engendres, en ceo caſe le baron ad eſtate en le taile generall, & la feme forſqz eſtate pur terme de vie.

ALſo if Tenements be given to a man and to his wife, and to the heires of the body of the man; In this caſe the husband hath an eſtate in generall taile, and the wife but an eſtate for terme of life.

¶ Item ſi terres ſoient dones a le baron & ſa feme, & a les heires le baron, queux il engendra de corps ſa feme, en ceo caſe le baron ad eſtate en le tail ſpecial, & la feme forſque pur terme de vie.

ALſo if Lands be given to the husband and wife, and to the heires of the husband which he ſhall beget on the body of his wife, In this caſe the husband hath an eſtate in eſpeciall tail, and the wife but an eſtate for life.

## Sect. 28.

¶ FEt ſi le done ſoit fait al baron & a ſa feme, & a les heires la feme de ſa corps per le baron engendres, donque la feme ad eſtate en eſpeciall taile, & le baron forſqz pur terme de vie: Mes ſi terres ſont dones a le baron & a la feme, & a les heires que le baron engendra de corps la feme, en ceo caſe ambideux ont eſtate en la taile, pur ceo que ceſt parol (heires) neſt limit a lun pluis que a lauter.

AND if the gift be made to the husband and to his wife, and to the heirs of the body of the wife by the husband begotten, there the wife hath an eſtate in ſpeciall taile, and the husband but for term of life: but if lands be given to the husband and the wife, and to the heirs which the husband ſhal beget on the body of the wife, in this caſe both of them have an eſtate tail, becauſe this word (heirs) is not limited to the one more than to the other.

¶ *Heires.* This word (heires) is Nomen operationum, to which of the Dones it is limited, it createth the eſtate tail, but if it incline no more to the one than to the other, then both do take, as here Littleton putteth the caſe. And therewith accordeth the caſe of (q) 3 E. 3. where it appeareth; Quod Robereus de S. dedit Johanni de Ripariis & Matildæ uxori ejus, & hæredibus quos idem Johannes de corpore ipſius Matildæ procrearet, &c. and this adjudged to be an eſtate in eſpecial tail in them both, becauſe the ſtate is equally entailed to the heirs of the baron as to the heirs of the wife. If lands be given to the husband and the wife, and to the heirs of the body of the ſurvivor, the gift is good, and the ſurvivor ſhall have an eſtate in tail general, but the eſtate tail veſteth not till there be a ſurvivor. And hereby it appeareth (r) that a gift made to a man and to the heirs of his body, is as good as to his heirs of his body.

19 H. 6. 75. a. Regiſt. 239.
17 E. 2. tit. Taile 23.
3 E. 3. 32. 4 E. 3. 43. 5 E. 3. 29. b. & 34. 2. 21 E. 3. 43. 12 M. 4. 1.
(q) 3 E. 3. 32. 21 E. 3. 43. 19 H. 6. 75. per Hody.
Regiſt. 239.
(r) 20 E. 3. Br. 377.

## Sect. 29.

¶ This is evident by that which hath bén said and needeth no explanation. But it hath bén said, (f) that if a man gibe land to another and to his heirs of the body of such a woman lawfully begotten, that this is no estate tail for the uncertainty by whom the heirs shal be begotten, for that the brother of the Doné or other cousin may have issue by the woman which may be heir to the Doné, and estates in tail must be certain. Therefore our Author to make it plain in all his cases added to these words (his heirs) which he shall engender. But that opinion is since our Author wrote overruled, and that estate adjudged to be an estate tail, and begotten shall be necessarily intended begotten by the Doné.

20 H.6.36.
(f) Lib.1. fol.140.b. Cheuleighs case adjudge.

¶ Item si terre soit done a un home & a ses heires que il engendra de corps sa feme, en ceo case le baron ad estate en especial taile, & la feme nad riens.

ALso if land be given to a man and to his heirs which he shall beget on the body of his wife, In this case the husband hath an estate in especial tail, and the wife hath nothing.

## Sect. 30.

¶ *Si home ad issue fits & devie, &c.* John de Mandevile by his wife Roberge had issue Robert and Mawd, Michael de Morevill gave certain lands to Roberge and to the heirs of John Mandevile her late husband on her body begotten, and it was adjudged that Roberge had an estate but for life, and the fée tail vested in Robert (heirs of the body of his father being a good name of purchase) and that when he died without issue, Mawd the daughter was Tenant in tail as heir of the body of her father per formam doni, and the Formedon which she brought supposed, Quod post mortem præfatæ Robergiæ & Roberti filii & hæredis ipsius Johannis Mandevile, & hæredi ipsius Johannis de præfata Robergia per præfatum Johannem procreat' præfat' Matildæ filiæ prædict. Johannis de præfata Robergia per præfatum Johannem procreatæ sorori & hæredi prædicti Roberti descendere debet per formam donationis prædict'. And yet in truth the land did not descend unto her from Robert, but because she could have no other Writ, it was adjudged to be good. In which case it is to be observed, that albeit Robert being heir took an estate tail by purchase, and the daughter was no heir of his body at the time of the gift, yet she recovereth the land per formam doni, by the name of heir of the body of her father, which notwithstanding her brother was, and he was capable at the time of the gift; and therefore when the gift was made she took nothing, but in expectancy, when she became heir per formam doni. But where a man by déed gave lands to Emme late wife of John Master, habendum & tenendum prædict. Emme & hæredibus Johannis Master de corpore ejusdem Emme procreat'. In that case the son and heir of John Master begotten on the body of Emme took no estate with Emme in the lands, because he was named after the habendum.

17 E.2. Taile 23. 2 E.3.1. tit. Taile 7.4. & 5 Ph. & Mar. Dyer 156. 12 H.4.1. 15 H.7.19.

5 H.4.3.2.

¶ Item si home ad issue fits, & devie, & terre est done al fits, & a les heires de corps son pier engendres, ceo est bone tail, & uncore le pier fuit mort al temps de la done. Et mults autres estates en taile y sont per le equitie del dit estatute que icy ne sont specifies.

ALso if a man hath issue a son and dieth, and land is given to the son, and to the heirs of the body of his father begotten, this is a good entail, and yet the father was dead at the time of the gift. And there be many other estates in the tail by the equity of the said Statute, which bee not here specified.

If a man hath issue two daughters, and dieth seised of two acres of land in Fée simple, and the one Copartener giveth her part to her sister, and to the heirs of the body of her father. In this case the Doné hath an estate tail in the moity of the Donors part, for the Doné is not entire heir, but the Donor is heir with the Doné, and she cannot give to the heirs of her own body, and the Doné hath the other moity of her sisters part for life. If a man hath issue a son and a daughter, and dieth, and land is given to the daughter and to the heirs females of

of the body of the father, ſhe taketh but an eſtate for life, becauſe ſhe is not heir female to take by purchaſe as before hath been ſaid.

¶ *Et a les heires de corps le pier.* Theſe words (les heires) are obſervable, for if they were (ſes heires) it clearly altereth the caſe. And therefore if lands be given to the ſon and to his heirs of the body of his father, the ſon cannot take as heir of the body of his father, becauſe the grant is to him and to his heirs, &c. and conſequently he hath a Fee ſimple. But if there be grandfather, father, and ſon, and the father dieth, and lands be given to the ſon, and to the heirs of the body of the grandfather, this is a good eſtate Tail in the ſon, ſo as Littleton did put his caſe of the father but for an example.

¶ *Et mults auters eſtates en le taile y ſont, &c.* This needeth no explanation.

## *Sect.* 31.

¶ Mes ſi home done terres ou tenements a un auter, a avez & tener a luy & a ſes heires males, ou a ſes heires females, il a que tiel done eſt fait ad Fee ſimple, pur ceo que neſt my limit per le done de quel corps iſſue male ou female iſſera, & iſſint ne poit en aſcun maner eſtre priſe per lequitie del dit eſtatute & pur ceo il ad Fee ſimple.

¶ But if a man give Lands or Tenements to another to have and to hold to him and to his heires males, or to his heirs females, he to whom ſuch a gift is made hath a Fee ſimple, becauſe it is not limited by the gift, of what body the iſſue male or female ſhall be, and ſo it cannot in any wiſe be taken by the equity of the ſaid Statute, and therefore he hath a Fee ſimple.

¶ *Terres ou Tenements.* This rule extendeth but to Lands or Tenements, and not to the Inheritance that Noblemen and Gentlemen have in their Armories or Arms. For where the Nobleman or Gentleman hath a Fee ſimple in his Armories or Arms, yet is the ſame deſcendible to the heirs males lineal or collateral. For albeit a female be heir at the Common Law, yet the Shield, Armories, and Arms deſcend unto them that are able to bear them (farr exceeding the nature of Gavelkinde, but with ſeverall differences.) And all the females of that family in reſpect that they be of the ſame blood may in a Loſenge or under a Kurtain manifeſt of what family they be by expreſſing the Armories and Arms belonging to that family, and the husband of them may unpale them or quarter them with their own as the caſe ſhall require. And for diſtinction and better explanation hereof. If the King by his Letters Patents giveth lands or tenements to a man, and to his heirs males, the grant is void, for that the King is deceived in his grant, inaſmuch as there can be no ſuch inheritance of lands or tenements as the King intended to grant. But if the King for reward of ſervice granteth Armories or Arms to a man, and to his heirs males without ſaying (of the body) this is good, and as hath been ſaid, they ſhall deſcend accordingly. 18 H.8.tit.Parents.Br. 104.

If a man by his laſt will devile lands or tenements to a man and to his heirs males, this by conſtruction of Law is an eſtate tail, the Law ſupplying theſe words (of his body.) Vide the Princes (i) Caſe, where it appeareth that an Act of Parliament may limit an Inheritance of lands or tenements, otherwiſe than Common Law would do, & create a new eſtate of Inheritance, and many authorities in Law there cited worthy of note and obſervation. Rot. Parl. anno 1 E.4. nu. 26. The (u) Dutchy of Lancaſter is entailed to King Edw.4. and his heirs Kings of England. And King Hen.6. did by his Letters Patents grant Johanni filio Johannis Talbot quod ipſe & hæredes ſui Domini manerii de Kingſton Lyſle in comitatu Berk. ex nunc Domini & Barones de Liſle Nobiles & Proceres regni habeantur, teneantur, & reputentur, &c. by this he had a Fee ſimple qualified in the Dignity. 27 H.8.27. (i) Lib.8.fo.1. The Princes caſe. 21 E.3.4. 22 E.3.3. 24 E.3.53. 9 H.5.25. 9 E.4.15. 1 Mar. Dier 94. (u) Per literas patentes authoritate Parliamenti.

2 H.5. fol.1. A grant was made to a man, and to his heirs Tenants of the Mannor of Dale. A man ſeiſed of lands in Gavelkind, give or devile the ſame to a man and to his eldeſt heirs, he cannot hereby alter the cuſtomary Inheritance, but as in the caſe of our Au-

thoz, Ut res magis valeat, the Law rejecteth (Males) ſo in this caſe the Law rejecteth this Adjective (eldeſt). And ſo it is if lands be given to a man, & to the eldeſt heirs females of his body, yet all his daughters ſhall inherit as it hath been reſolved.

Mich. 26. & 27 Eliz. in Com. Banco. Leonard Lovelace caſe.

¶ *Et iſſint ne poet eſte priſe per lequitie del dit ſtatute, &c.* Foz it is a certain rule in Law, that in every eſtate in tail within the ſaid Statute, it muſt be limited either by expreſs words oz by words equipollent of what body the heir inheritable ſhall iſſue. And it was (x) adjudged in Parliament, that where lands were given to a man, and to his heirs males, that this was a Fee ſimple, and that as well the heirs females as heirs males ſhould inherit, foz the grant of a ſubject ſhall be taken moſt ſtrongly againſt himſelf.

(x) 18 Aſſ. p. 5. 18 E. 3. 46. 6. 9 H. 6. 23. 25. lib. 8. fol. 1. The Princes caſe. Antient tenures, fol. 3.

¶ *Et pur ceo il ad Fee ſimple.* Littletons reaſon being thoztly collected is this. Whoſoever hath an eſtate of inheritance, hath either a Fee ſimple oz a Fee tail, but where lands be given to a man and his heirs males, he hath no eſtate tail, & therefoze he hath a fee ſimple.

What actions Tenant in Tail may have and cannot have, vide Sect. 595. What great alterations have been made ſince Littleton wzote concerning not onely leaſes to be made by Tenant in Tail, but bars alſo of the eſtate Tail it ſelf by foꝛce of certain Acts of Parliament made ſince Littletons time, you ſhall read Sect. 56. and 708.

## CHAP. 3. Sect. 32.

*Tenant in taile apres poſſibility diſſue extinct.*

LIttleton having ſpoken of Eſtates of Inheritance, viz. Fee ſimple, & Fee tail, now he treateth of Tenants of freehold tantum, that is, foz term of life, and therein firſt of Tenant in tail after poſſibility of iſſue extinct, & he giveth unto him the firſt place, becauſe this Tenant hath eight qualities and privileges, which Tenant in Taile himſelfe hath, and which Leſſee foz life hath not. (a) As firſt he is diſpunishable foz waſte. Secondly, he ſhall not be compelled to attorn. Thirdly, he ſhall not have aid of him in the reverſion. Fourthly, upon his alienation, no Writ of entry in conſimili caſu, lieth. Fifthly, after his death no Writ of intruſion doth lie. Sixthly, he may joyne the miſe in a Writ of right, in a ſpecial manner. Seventhly, In a Præcipe brought by him he ſhall not name himſelf Tenant foz life. Eighthly, In a Præcipe brought againſt him he ſhal not be named barely Tenant foz life. And yet he hath four other qualities which are not agreeable to an

(a) Temps E. 1. waſt. 125. 29 E. 3. 16. 31 E. 3. aid 35. 42 E. 3. 42. 43 E. 3. 1. 45 E. 3. 22. 28 E. 3. 96. 46 E. 3. 13. 27. 2 H. 4. 17. 7 H. 4. 10. 11 H. 4. 15. 21 H. 6. 56. 10 H. 6. 1. 26 H. 6. aid. 77. 3 E. 4. 11. 13 E. 3. Entre Conge 56. Fitz. N. B. 203. Lewes Bowkes caſe, lib 11. fol. 8.

¶ TEnant en Fee taile apres poſſibilitie diſſue extinct eſt, lou tenements ſont dones a un home & a ſa feme en eſpecial taile, ſi lun de eux devy ſans iſſue, celuy que ſurveſquiſt eſt Tenant en taile apres poſſibilitie diſſue extinct. Et fils avoient iſſue, & lun devy, coment que durant la vie, iſſue celuy que ſurveſquiſt ne ſerra dit tenant en taile apres poſſibilitie diſſue extinct, uncore ſi iſſue devy ſans iſſue, iſſint que ne ſoit aſcun iſſue, en vie que poit enheriter p force de le taile, donque celuy que ſurveſquiſt

TEnant in Fee tail after poſſibility of iſſue extinct is, where Tenements are given to a man and to his Wife in eſpeciall taile, if one of them die without iſſue, the ſurvivor is Tenant in Tail after poſſibility of iſſue extinct, and if they have iſſue, and the one die, albeit that during the life of the iſſue, the ſurvivor ſhall not be ſaid Tenant in Taile after poſſibility of iſſue extinct, yet if the iſſue die without iſſue, ſo as there be not any iſſue alive which may inherit by force of the Taile, then the ſurviving party of the do-

de

de les donees eſt tenant en le taile apres poſſibility diſſue extinct.

nees is tenant in taile, after poſſibility of iſſue extinct.

Eſtate in tail, but to a bare Leſſee for life. (b) Firſt, if he maketh a feoffment in fee this is a forfeiture of his Eſtate. Secondly, If an Eſtate in fee, or in fee tail in re-

(b) 13 E. Intre Cong. 55. 45 E. 3. 22. 28 E. 3. 96. 27. Aſſ. p. 60. F. N. B. 159. 32 E. 3. tit. pag. 55. 55 E. 3. 4. 9 E. 4. 17. 2 R. 2. Reſceit. 147. 41 E. 3. 12. 20 E. 3. Reſceit. 38 E. 3. 33. Lewes Bowles caſe ubi ſupra.

verſion, or remainder, deſcend or come to this Tenant, his Eſtate is drowned, and the fee or fee tail executed. Thirdly, he in the reverſion or remainder ſhall be received upon his Tenant, as well as upon bare tenant for life. Fourthly, an exchange between a bare tenant for life, and him is good, for their eſtates in reſpect of their quantity are equal, ſo as the difference ſtandeth in the quality, & not in the quantity of the Eſtate. And as an eſtate tail was originally carved out of a fee ſimple, ſo is the eſtate of this tenant out of an eſtate in ſpecial tail. And he is called tenant in tail after poſſibility of iſſue extinct, becauſe by no poſſibility he can have any iſſue inheritable to the ſame eſtate tail. But if a man giveth land to a man and his wife, & to the heirs of their two bodies, & they live ſtill each of them be C. year old, and have no iſſue, yet do they continue tenant in tail, for that the law ſeeth no impoſſibility of having children. But when a man and his wife be tenant in eſpecial tail, and the wife dieth without iſſue, there the law ſeeth an apparant impoſſibility, that any iſſue that the husband can have by any other wife ſhould inherit this eſtate. And let this tenant keep his eſtate, for he hath theſe privileges in reſpect of the privity of his eſtate, and of the inheritance that was once in him. (c) For in the caſe of Evens, Mic. 28 & 29 Eliz. it was adjudged, that where tenant in tail, after poſſibility of iſſue extinct, granted over his eſtate to another, that his Grantee was compelled to attorn in a Quid juris clamat, as a bare tenant for life, and to be named in the Writ, for by the aſſignment, the privity of the eſtate being altered, the privileges was gone, and this judgment was affirmed in a Writ of Error, and herewith agreeth 27 H. 6. tit. aid Statham. 29 E. 3. 1. b.

(c) Lib. 11. fol. 83. Lewes Bowles caſe. 27 H. 6. tit. aid, Statham. 29 E. 3. 1. b.

27 H. 6. tit. aid. 29 E. 3. 1. b.

## *Sect.* 33.

¶ Item ſi tenemẽts ſont donees a un home, & a ſes heires que il engendra de corps ſa feme, en ceſt cas ſa feme nad reyn en les tenements, & le baron eſt iſſue come Donee en ſpeciall taile. Et en ceo cas, ſi la feme devy ſans iſſue de ſon corps engendres per ſon baron, donques le baron eſt tenant en taile apres poſſibility diſſue extinct.

ALſo if tenements be given to a man and to his heirs, which he ſhall beget on the body of his wife; In this caſe the wife hath nothing in the Tenements, and the husband is ſeiſed as Donee in eſpecial tail. And in this caſe, if the wife die without iſſue of her body begotten by her husband, then the husband is Tenant in tail, after poſſibility of iſſue extinct.

¶ *Si la feme de vie ſans iſſue.* So as the eſtate of this tenancy muſt be altered by the act of God, and that by dying without iſſue; for if a feoffment in fee be made to the uſe of a man and his wife for tearm of their lives, and after to the uſe of their next iſſue male to be begotten in tail, and after to the uſe of the husband and wife, and of the heirs of their two bodies begotten, they having no iſſue male at that time; In this caſe the husband and wife are Tenants in ſpecial tail executed; and after they have iſſue a ſon in this caſe, they are become tenants for life, the remainder to the ſonne in tail, the remainder to them in ſpecial taile, for albeit their Eſtate

Lewes Bowles caſe. lib. 2. fol. 8.

tail is turned to an eſtate for life; yet they have but a bare eſtate for life: but if the iſſue dye, and the husband dye having no other iſſue, and then the ſon dye without iſſue, the wife ſhall have the privileges belonging to a tenant in tail after poſſibility of iſſue extinct, as it appeareth in Lewes Bowles Caſe ubi ſupra, where it is ſaid, that the ſtate of this Tenant muſt be created by the act of God, and not by limitation of the party, ex diſpoſitione Legis, and not ex proviſio e hominis. (d) If land be given to a man and to his wife, and to the heirs of their two bodies, and after they are divorced cauſa præcontractus or conſanguinitatis, or affinitatis, their eſtates of inheritance is turned to a joint eſtate for life. And albeit they had once an inheritance in them; yet for that the eſtate is altered by their own act, and not by the act of

(d) 7 H. 4. 16. 8 E. 2. Aſſ. p. 415. 12. Aſſ. 22. 19. Aſſ. 2. 13 E. 3. Aſſ. 91. in fine.

of God, viz. by the death of either party without iſſue, they are not tenants in tail after poſſibility of iſſue extinct. Lands are given to the husband and wife, and to the heirs of the body of the husband, the remainder to the husband and wife, and to the heirs of their two bodies begotten; the husband die without iſſue, the wife ſhall not be tenant in tail after poſſibility, for the remainder in ſpecial tail was utterly void, for that it could never take effect: for ſo long as the husband ſhould have iſſue, it ſhould inherit by force of the general tail; and if the husband die without iſſue, then the ſpecial eſtate tail cannot take effect, in as much as the iſſue which ſhould inherit the ſpecial, muſt be begotten by the husband, and ſo the general, which is larger and greater, hath fruſtrated the ſpecial, which is leſſer. And the wife, in that caſe, ſhould be puniſhed for waſte.

## Sect. 34.

DIſ Lands be given to a man with a woman in Frankmarriage, albeit the woman (which was the cauſe of the gift) dieth without iſſue, yet † husband ſhall be tenant in tail, apres poſſibility, &c. for that he and his wife were Donees in eſpecial tail, and ſo within the words of Littleton. The reſidue of this Section is evident.

† But

¶ ET nota, q̄ nul poit eſtre tēt en le taile aps poſſibility diſſue extinct, forſq̄ un des donees, ou le donee en le ſpecial taſl. Car l' donee en general tail ne poit eſtr̄ unq̄ dit tēt en tail aps poſſibility diſſue extinct, p̄ ceo q̄ touts tēps durant ſa vie, il poit per poſſibility aver iſſue que poit inheriter per force de meſme le tail. Et iſſint en m̄ le mañ, iſſue q̄ eſt heire a les donees en un ſpecial tail, ne poit eſtr̄ dit teñt en tail aps poſſibility diſſue extinct, cauſa qua ſupra.

AND note, that none can be tenant in tail after poſſibility of iſſue extinct; or Donee in eſpeciall tail. For the Donee in generall tail cannot be ſaid to be Tenant in tail after poſſibility of iſſue extinct; becauſe alwayes during his life, he may by poſſibility have iſſue, which may inherit by force of the ſame entail. And ſo in the ſame manner the iſſue which is heir to the Donees in eſpeciall tail, cannot be Tenant in tail after poſſibility of iſſue extinct, for the reaſon aforeſaid.

* This and that which follows, is not in the firſt Edition (which I have.) And therefore (that I may ſpeak it once for all) it was wrong to the Author to add any thing, eſpecially in one context to his words.

* Et nota, que tenant en tail apres poſſibility diſſue extinct ne ſerra unq̄ puny de waſt, pur lenheritance que fuit un foits en luy, 10 H. 6. 1. Mes ceſtuy en le reverſion poit entrer ſil alien en fee, 45 E. 3. 22.

And note, that tenant in tail, after poſſibility of iſſue extinct, ſhall not be puniſhed of waſte, for the inheritance that once was in him, 10 *H.* 6. 1. But he in the reverſion may enter, if he alien in Fee, 45 *E.* 3. 32.

CHAP.

# CHAP. 4. Sect. 35.

*Curteſie Dengleterre.*

¶ TEnant p la Curteſie Dengletre eſt, lou home pɼent feme ſeiſie en Fee ſimple, ou en fee taile general, ou ſeiſie come heire de le taile ſpecial, & ad iſſue per meſme la feme male ou female, oyes ou vife, ſoit iiſſue apres mort ou en vie, ſi la feme devie, le baron tiendra la terre durant ſa vie, per la ley Dengleterre. Et eſt appel tenant per le Curteſie Dengleterre, pur ceo que ceo eſt uſe en nul auter realm, forſque tantſolement en Engleterre.

Et alcuns ont dit, que il ne ſerra tenant per le Curteſie, ſi non q̄ lenfant quil ad p ſa feme ſoit oye crie, car per le erie eſt, pve q̄ le enfant fuit nee vife: ideo Quære.

TEnant by the Curteſie of *England* is where a man taketh a wife ſeiſed in Fee ſimple, or in Fee tail general, or ſeiſed as heir in tail eſpecial, and hath iſſue by the ſame wife, male or female born alive, albeit the iſſue after dieth or liveth; yet if the wife dies, the husband ſhall hold the land during his life by the Law of *England*. And he is called Tenant by the Curteſie of *England*, becauſe this is uſed in no other Realm but in *England* only.

And ſome have ſaid, that he ſhall not be Tenant by the Curteſie, unleſſe the child which he hath by his wife be heard cry; for by the Cry it is proved, that the child was born alive. Therefore Quære.

¶ *Priſt feme ſeiſie.* And firſt of what ſeiſin a man ſhall be Tenant by the Curteſie. (e) There is in Law a twofold ſeiſin, viz. a ſeiſin in Deed, and a ſeiſin in Law, whereof more ſhall be ſaid, Sect. 468. and 681. And here Littleton intendeth a ſeiſin in Deed, if it may be attained unto. (f) As if a man dieth ſeiſed of lands in Fee ſimple or Fee tail general, and theſe lands deſcend to his daughter, and ſhe taketh a husband and hath iſſue, and dieth before any entry, the husband ſhall not be Tenant by the Curteſie, and yet in this caſe ſhe had a ſeiſin in Law, but if ſhe or her husband had during her life entred, ſhe ſhould have been Tenant by the Curteſie. (g) A man ſeiſed of an Advowſon or rent in Fee, hath iſſue a daughter, who is married, and hath iſſue, and dieth ſeiſed; the wife before the rent became due, or the Church became void, dieth, he had but a ſeiſin in Law, and yet he ſhall be Tenant by the Curteſie, becauſe he could by no induſtry attain to any other ſeiſin, Et impotentia excuſat legem. But a man ſhall not be Tenant by the Curteſie of a bare right, title, uſe, or of a reverſion or remainder expectant upon any eſtate of Freehold, unleſs the particular eſtate be determined, or ended during the coverture.

(e) F. N. B. 19.

(f) 1 Mar. Dyer 55.

(g) 7 E. 3. 66. 3 H. 7. 5. 2.

poſt. 120. a

At the Coronation of King R. 2. ſaith the Record, (h) Johannes Rex Caſtilliæ & Legionis, Dux Lancaſtriæ, coram dicto domino rege & conſilio ſuo comparens clamavit ut Comes Leiceſtriæ officium Seneſchalciæ Angliæ, & ut Dux Lancaſtriæ ad gerendum principale gladium Domini Regis vocat. Curtana die coronationis ejuſdem regis, & ut Comes Lincoln. ad ſcindendum & ſecandum coram ipſo Domino Rege ſedente ad menſam dicto die coronationis, & quia fact' diligenti examinatione coram peritis & conſilio regis de præmiſſis ſatis conſtabat eidem conſilio, quod ad ipſum ducem tanquam tenentem per legem Angliæ poſt mortem Blanchiæ quondam uxoris ſuæ pertinuit officia prædict. prout ſuperius clamabat exercere, conſideratum fuit per ipſum regem & conſilium ſuum prædictum, quod idem Dux officia prædicta per ſe & ſufficientes deputatos ſuos faceret & exerceret, & feoda debita in hac

(h) Proceſſ. fact. ad Coronationem R. 2. Anno regni ſui primo Rot. clauſum 45.

hac parte obtineret, Qui quidem Dux officium Seneſchalciæ prædict. perſonaliter adimpleuit, &c. And every man that claimed to hold by Grand Serjeanty to do any ſervice to the King at his Coronation, exhibited his petition to the ſaid Duke as Steward of England, who upon hearing the proofs either allowed or diſallowed the ſame.

Rot. Patent. Ann. 10 H. 6. In Letters Patents made by K. H. 6. to Richard Earl of Saliſbury, you ſhall find this clauſe, Quod chariſſimus conſanguineus noſter Richardus nunc comes Sarum, qui Aliciam filiam & hæredem Thomæ nuper comitis Sarum adhuc ſuperſtitem duxit in uxorem, & cum eadem Alicia prolem tempore mortis prædict, Thomæ habuit & habet ſuperſtitem de præſenti, eoque prætextu idem Richardus nunc comes Sarum nomen, ſtatum, & honorem comitis Sarum, &c. habet, & pro tempore vitæ ſuæ de jure prætextu præmiſſorum habere debet. The name of the iſſue which the ſaid Richard Earl of Saliſbury had by the ſaid Alice was Richard, who married with Anne the ſiſter and heir of Henry Beauchamp Earl of Warwick, who was Earl of Warwick, to him and to his heirs, and Duke of Warwick to him and to the heirs males of his body. And Richard the ſon having then no iſſue by his wife, King H. 6. in the 27. year of his reign granted to him that he ſhould be Earl of Warwick, Licet ipſe & prædicta Anna exitum inter eos ad præſens non habent. Theſe and many more I have read concerning this matter, and only ſay to the Reader, Uterè tuo judicio; nihil enim impedio.

Rot. Patent. de Ann. 27 H. 6. 7.

(i) Vide 1 E. 3. 6. 5 E. 2. (i) If an eſtate of Freehold in Seigniories, Rents, Commons, or ſuch like be ſuſpended, a man ſhall not be Tenant by the Curteſie; but if the ſuſpenſion be but for years, he ſhall be Tenant by the Curteſie. As if a Tenant make a Leaſe for life of the Tenancy to the Seignior, who taketh a husband, and hath iſſue, the wife dieth, he ſhall not be Tenant by the Curteſie; but if the Leaſe had been made but for years, he ſhall be Tenant by the Curteſie.

¶ *En Fee ſimle ou en Fee taile general, ou ſeiſie come heire de la taile ſpecial & ad iſſue per la feme male ou female.* Secondly, of what eſtate. If lands be given to a woman, and to the heirs males of her body, ſhe taketh a husband, and hath iſſue a daughter, and dieth, he ſhall not be Tenant by the Curteſie, becauſe the daughter by no poſſibility could inherit the mothers eſtate in the Land; and therefore where Littleton ſaith, iſſue by his wife male or female, it is to be underſtood, which by poſſibility may inherit as heir to her mother of ſuch eſtate. Littleton himſelf explaineth this by expreſs words, Cap. Dower fol. 10. ſect. 52. And therefore if a woman, tenant in tail general, maketh a Feoffment in Fee, and taketh back an eſtate in Fee; and take a husband, and hath iſſue, and the wife dieth, the iſſue may in a Formedon recover the land againſt his father, becauſe he is to recover by force of the eſtate Tail as heir to his mother, and is not inheritable to his father.

W. 2. cap. 1. Litt. cap. Dower fol. 10. ſect. 52. Paines caſe, lib. 8. fol. 34.

¶ *Et ad iſſue.* 3. The time of having the iſſue. 4. What kind of iſſue. If a man ſeiſed of lands in Fee, hath iſſue a daughter, who taketh husband and hath iſſue, the father dieth, the husband enter, he (a) ſhall be Tenant by the Curteſie, albeit the iſſue was had before the wife was ſeiſed. And ſo it is. albeit the iſſue had died in the life time of her father, before any deſcent of the land, yet ſhall he be Tenant by the Curteſie. If a woman (b) ſeiſed of lands in Fee, taketh husband, and by him is big with child, and in her travell dieth, and the child is ripped out of her body alive, yet ſhall he not be Tenant by the Curteſie, becauſe the child was not born during the marriage, nor in the life time of the wife, but in the mean time the land deſcended, and in pleading he muſt alleage, That he had iſſue during the marriage.

(a) Old Tenures 21 H. 3. tit. Dower 198.
(b) Vide Paines caſe, ubi ſupra.

(c) Bract. lib. 5. 437. 438. Brit. cap. 66. & cap. 87. Fleta lib. 1. c. 5. & lib. 6. c. 54. If the wife be (c) delibered of a Monſter, which hath not the ſhape of mankind, this is no iſſue in the Law, but although the iſſue hath ſome deformity in any part of his body, yet if he hath humane ſhape, this ſufficeth. Hi qui contra formam humani generis converſo more procreantur (ut ſi mulier monſtruoſum vel prodigioſum fuerit enixa) inter liberos non computentur. partus tamen cui natura aliquantulum ampliaverit vel diminuerit non tamen ſuper abundanter, ut ſi ſex digitos vel niſi quatuor habuerit, ber è debet inter liberos commemorari. Similitudo naturæ reddidit membra, ut ſi curvus fuerit aut gibboſus vel membra tortuoſa habuerit, non tamen eſt partus monſtruoſus. Item puerorum alii ſunt maſculi, alii fœminæ, alii hermophroditæ: hermophrodita tam maſculo quam fœminæ comparatur, ſecundum prævaleſcentiam ſexus incaleſcentis.

If the iſſue be born deaf, or dumb, or both, or be born an Ideot, yet it is lawful iſſue to make the husband Tenant by the Curteſie, and to inherit the land.

(d) 28 H. 8. 25. Dy. r. Paines caſe ubi ſupra. ¶ *Oyes ou vive.* If it be born alive (d) it is ſufficient, though it be not heard cry, for peradventure it may be born dumb. And this is reſolved clearly in Paines caſe, ubi ſupra. For the pleading (as hath been ſaid) is, That, during the marriage, he had iſſue by his wife; and upon that point the triall is to be had, and upon the evidence it muſt be proved, that the iſſue was alive, for mortuus exitus, non eſt exitus, ſo as the crying is but a proof that the child was born alive, and ſo is motion, ſtirring, and the like. And it is ſaid by an ancient Author, (e) that it was ordained in the reign of King H. 1. Que touts que ſurvesquiſ-

(e) Mirrour cap. 1. ſect. 3.

ſent

ſent lour femes deuant ils uſſent conceive tenuiſſent les heritages lour femes pur lour vies.

By the cuſtom of Gauilkind (f) a man may be Tenant by the Curteſie without having of any iſſue.

(f) 9 E 3.38. 16 E.3.aid 129. Stat. de Conſuetudinibus Kanciæ.

¶ *Soit liſſue apres more ou en vit.* And therefore (g) if a woman Tenant in tail general take an husband, and hath iſſue, which iſſue dieth, and the wife dieth without any other iſſue; yet the husband ſhall be Tenant by the Curteſie, albeit the eſtate in tail be determined, becauſe he was entituled to be Tenant Per legem Angliæ before the eſtate in tail was ſpent, and for that the land remaineth. But if a woman maketh a gift in tail, and reſerve a rent to her and to her heirs, and the Donor taketh husband, and hath iſſue, and the Donée dieth without iſſue, the wife dieth, the husband ſhall not be Tenant by the Curteſie of the rent, for that the rent newly reſerved is by the Act of God determined, and no ſtate thereof remaineth. But (h) if a man be ſeiſed in fee of a rent, and maketh a gift in tail general to a woman, ſhe taketh husband and hath iſſue, the iſſue dieth the wife dieth without iſſue, he ſhall be Tenant by the Curteſie of the rent, becauſe the rent remaineth. The diverſity appeareth.

(g) 21 H.3.tit. Dower 198. Paines caſe ubi ſupra.

(h) Brook tit. per le Curteſie 86. 10 E. 3. 27.

¶ *Sila feme de vie, le laron tiendra la terre, &c.* Four things do belong to an eſtate of Tenancy by the Curteſie, viz. Marriage; Seiſin of the wife; Iſſue, and Death of the wife. But it is not requiſite, that theſe ſhould concur all together at one time: And therefore if a man taketh a woman ſeiſed of lands in fee, and is diſeiſed, and then hath iſſue, and the wife die, he ſhall enter and hold by the Curteſie. So if he hath iſſue, which dieth before the deſcent, as is aforeſaid.

And albeit the ſtate be not conſummate untill the death of the wife, yet the ſtate hath ſuch a beginning after iſſue had in the life of the wife, as is reſpected in Law for divers purpoſes.

First, after the iſſue had, he ſhall do homage alone, and is become Tenant to the Lord, and the avowry ſhall be made only upon the husband in the life of the wife, as ſhall be ſaid hereafter when we come to the apt place. Secondly, if after iſſue (i) the husband maketh a feoffment in fee, and the wife dieth, the Feoffee ſhall hold it during the life of the husband, and the heir of the wife ſhall not during his life recover it in Sur cui in vita; for it could not be a forfeiture, for that the eſtate at the time of the feoffment, was an eſtate of Tenancy by the Curteſie initiate and not conſummate. And it is adjudged in 29 E. 3. that the Tenant by the Curteſie cannot claim by a Deviſe, and waive the ſtate of his Tenancy by the Curteſie, becauſe, ſaith the Book, the Freehold commenced in him before the Deviſe for term of his life.

(i) 34 E.2. Cui in via 13. 2 E. 2. Cui in via 26. 10 E. 3. 12. Dyer 21 Eliz. 363.

29 E. 3. fol. 27.

¶ *Et eſt appel tenant per le Curteſie Dengleterre, pur ceo que neſt uſe en auter realm forſque tantſolement en Engleterre.*

¶ *Per le Curteſie.* In Latine Per legem Angliæ.

¶ *Tantſolement en Engleterre.* It is alſo uſed within the Realm of Scotland, and there it is called Curialitas Scotiæ. And ſo it is in the Realm of Ireland.

¶ *Et aſcuns dunt dit, que il ne ſerra Tenant per le Curteſie, ſi non que lenfant que il ad per ſa feme ſeit eye cry, car per le cry eſt prove que le enfant fuit nec vife.* Our Author having delivered his own opinion before, viz. Oyes ou vife, now he ſheweth the opinions of others: for ſo it is ſaid in the (k) Statute De tenentibus per legem Angliæ: and of that opinion is Glanvil (l) lib. 7. cap. 8. Bracton lib. 5. tract. 5. ca. 30. Britton c. 50. fol. 132. Fleta lib. 6. cap. 50, &c. But the reaſon is againſt their opinion; for by the cry it is proved, &c. ſo as it is but an evidence to prove the life of the Infant.

(k) Vet. mar. car. par. 1. fol. 76.
(l) Glanvil lib. 7. cap. 8. Bract. lib. 5. tract. 5. cap. 30. Britton cap. 50. fol. 132. Fleta lib. 6. cap. 54.

¶ *Aſcuns ont dit.* By theſe and the like ſpeeches our Author intendeth, that the point had been controverted, but thereby except it be in this Section where formerly he delivered his opinion, as hath been ſaid he tacitely inſinuateth his own judgment, which in all the reſt holdeth for good Law, and warranted by good Authority throughout his three Books, which kind of ſpeech and the like I have collected together, as appeareth by the Sections in (m) the margent.

(m) Sect. 40. 119. 132. 146. 137. 138. 141. 145. 188. 156. 170. 179. 192. 202. 227. 234. 269. 336. 339. 357. 400. 435. 446. 440. 443. 460. 462. 478. 501. 503. 506. 523. 523. 524. 534. 576. 601. 633. 634. 640. 642. 643. 644. 646. 658. 675. 689. 721. 723. 726. 730. 731. 733. 734. 7 E. 3. 6.

¶ *Ideo quære.* This Quære is not in the original edition of Littleton, and therefore to be rejected.

And ſome have ſaid, that in divers caſes a man ſhal by having of iſſue be tenant by the Curteſie, where a woman ſhall not be endowed. And therefore they ſay if lands be given to two women, and to the heirs of their two bodies begotten, and one of them take husband and have iſſue, and die; the inheritances being ſeveral, the husband ſhall be tenant by the Curteſie, as it is adjudged 7 E. 3. and in other Books (n) this judgment is cited and allowed But certain it is, That if land be given to two men, and to the heirs of their two bodies begotten, and the one taketh wife and dieth, ſhe ſhall not be endowed, for no eſtate in the land is altered by that marriage. But I leave the Reader to his own opinion, or rather to ſuſpend it until he come

(n) 17 E. 3. 51.

to

to the proper place in the next Chapter. If lands holden of the King by Knights-Service in capite, descend to a woman, and after office found, she intrude and taketh husband and hath issue, In this case the husband shall be Tenant by the Curtesie; and yet if the heir male after office in the like case intrudeth and taketh wife, his wife shall not be endowed, for so it is provided by the Stat. of Prærog. regis, cap. 13. that in that case there accrue to the heir no Freehold nor Dower to the wife, which by interpretation is as much to say, that the heir shall have no Freehold as to this respect to give any Dower to his wife. If a man marry the niet of the King by licence, and hath issue by her, and after lands descend to the niet and the husband enter, the neif dieth, he shall be Tenant by the Curtesie of this land, and the King upon any office found shall not evict it from him, because by the marriage, the neif was enfranchised during the coverture. But if a free woman marry the Villain of the King by license, and lands descend to the Villain, the Villain dieth, the wife shall not be endowed; but, upon an office found, the King shall have the land, for the Villain remained still a Villain to the King. A woman (n) taketh husband, and hath issue, lands descend to the wife, the husband enters, and after the wife is found an Ideot by office, the lands shall be seised by the King, for the title of the Tenancy by the Curtesie, and of the King, begin at one instant, and the title of the King shall be preferred. A man shall be Tenant by the curtesie of the Castle (o) which serveth for the publick defence of the Realm, but a woman shall be endowed thereof, as shall be said more at large hereafter.

Prærog. Regis, cap. 13.

33 E. 3. tit. Travers. 36.

(n) Pl. Com. Dame Hales case 263.

(o) Magna Charta 30 E. 1. Dower 81. b. 17 H. 3. Dower. Bract. lib. 2. fol. 46. & 314.

A man shall be Tenant by the Curtesie of a Common sauns nombre, but a woman shall not be endowed thereof, because it cannot be divided. A man shall be Tenant by the Curtesie (p) of a house that is Caput Baroniæ, or Comitatus: But it appeareth by 4 H. 3. Dower 180. that a woman shall not be endowed of it: For the Law respecteth Honour and Order. A man is entitled to be Tenant by the Curtesie, and maketh a feoffment in fee upon condition, and entreth for the condition broken, and then his wife dieth, he shall not be Tenant by the Curtesie, because albeit the state given by the feoffment, be conditional, yet his title to be Tenant by the Curtesie was inclusively, absolutely extinct by the feoffment, for the condition was not annexed to it. As if the Lord disseise the Tenant, and maketh a feoffment in fee of the land upon condition, and entreth for the condition broken; yet the Seignory is extinct, for that was inclusively extinct by the feoffment. See more of Tenant by Curtesie, Sect. 52.

(p) 4 H. 3. Dower 180. Bract. fol. 93. Fleta lib. 5. cap. 23. 2 E. 2. Dower 123. 3 E. 3. Dower 8. 192. 9 H. 7. 1. 30 E. 3.

## CHAP. 5. Sect. 36.

## *Dower.*

*Tenant en Dower:* Tenens in dote. Dos, Dower, in the Common Law (q) is taken for that portion of Lands or Tenements which the wife hath for terme of her life of the Lands or Tenements of her husbands after his decease for the sustenance of her self, and the nurture and education of her Children. Propter onus matrimonii & ad sustentationem uxoris & educationem liberorum cum fuerint procreati, si vir præmoriatur: & hoc proprè dicitur Dos mulieris secundum consuetudinem Anglicanam. And Dos is derived ex donatione, & est

(q) Lib. rub. cap. 76. Glanvil lib. 6. cap. 1. Bract. lib. 2. fol. 92. Britt. cap. 101. Fleta lib. 5. cap. 20.

Tenant en Dower est lou home est seisie de certaine terres ou Tenements en fee simple, taile generall, ou come heire de le taile speciall, & prent feme, & devie, la feme apres le decesse de la baron serra endow de la tierce part de tiels terres & tenements que fueront a sa Baron en ascun temps durant

Tenant in Dower is where a man is seised of certain lands or tenements in Fee simple, Fee tail generall, or as heir in Special taile, and taketh a wife, and dieth, the wife after the decease of her husband shall be endowed of the third part of such lands and tenements as were her husbands at any time during the coverture

rant le coverture, a aver & tener a meſme la feme en ſeveraltie per metes & bounds pur terme de ſa vie, le quel el avoit iſſue per ſa baron ou nemy, & de quel age que la feme ſoit, iſſint que el paſſe lage de neuf ans al temps de le mort ſa baron, car il covient que el ſoit paſſe lage de neuf ans al temps del mort ſa baron, ou autrement el ne ſerra my endow.

To have and to hold to the ſame wife in ſeveralty by metes and bounds for terme of her life whether ſhe hath iſſue by her husband or no, and of what age ſoever the Wife be, ſo as ſhe be paſt the age of nine yeares at the time of the death of her husband, for ſhe muſt be above nine yeares old, at the time of the deceaſe of her husband, otherwiſe ſhe ſhal not be endowed.

quaſi donarium, becauſe either the Law it ſelf doth (without any gift) or the husband himſelf giveth it to her, as ſhall be ſaid hereafter. And at this day Dos or Dower is not taken by the profeſſors of the Common Law, either for the land which the wife bringeth with her in marriage to her husband, for then it is either called in Frankmarriage or in marriage, as hath been ſaid, nor for the portion of money or other goods or chattels which ſhe bringeth with her in marriage, for that is called her marriage Portion. And yet of ancient time (r) Dos mulieris, the Dower or Dowry of the woman was alſo applied to them. But it is commonly taken for her third part which ſhe hath of her husbands lands or tenements.

(r) Britton, cap. 101. Bracton, lib. 2. fo. 92. Glanvil, lib. 6. c. 1. lib. 7. ca. 1. lib. 2. fo. 13. Binghams caſe. 4 H. 3. Dower 179.

In Domeſday, Dos is called Maritagium.

To the confirmation of this Dower three things are neceſſary, viz. marriage, ſeiſin, and the death of her husband.

Dos (ſ) the very name doth import a freedome, for the Law doth give her therewith many freedoms: Secundum conſuetudinem regni mulieres viduæ, &c. debent eſſe quietæ de tallagiis, &c. And Tenant in Dower ſhall not be diſtrained for the debt due to the King by the husband in his life time in the lands which ſhe held in Dower. And other privileges ſhe hath; Of all which Ockam yields the reaſon, Doti ejus parcatur quia præmium pudoris eſt.

(ſ) Clauſ. 11 H. 3. nu. 17. Regiſt. 142, 143. F.N.B. 150. Ockam fo. 40.

¶ *Lou home.* If the husband be an Alien (t) that wife ſhall not be endowed. So if the husband be the Kings Villain, the wife ſhall not be endowed (as hath been ſaid), but if the husband be a Villein to a common perſon, the wife ſhall be endowed if ſhe be intitled to Dower before the entry of the lord. And ſo if a free man take a Neife to wife and dieth ſhe ſhall be endowed. The wife of an Idiot, non compos mentis, outlawed or attainted of felony or treſpaſs, attainted of hereſy, Præmunire, or the like, ſhall be endowed. But if the husband be attainted of treaſon, albeit it be treaſon done after the title of Dower, ſhe ſhall not be endowed, as ſhall be ſaid hereafter.

(t) Bract. fo. 298. 19 E. 2. Dower 171. Dame Hales caſe. 15 E. 3. Dower. Statham, 13 E. 1. tit. Dower.

¶ *Seiſie.* Here this word (ſeiſed) extendeth it ſelf as well to a ſeiſin in law, or a civil ſeiſin, as to a ſeiſin in deed, which is a natural ſeiſin: but ſeiſed he muſt be either the one way or the other during the Coverture. For a woman ſhall be endowed of a ſeiſin in law. As where lands or tenements deſcend to the husband, before entry, he hath but a ſeiſin in law & yet the wife ſhall be endowed, albeit it be not reduced to an actual poſſeſſion, for it lieth not in the power of the wife to bring it to be an actual ſeiſin, as the husband may do of his wives land when he is to be tenant by Curteſy, which is worthy the obſervation. And yet of every ſeiſin in law, or actual ſeiſin of lands or tenements, a woman ſhall not be endowed. For example, If there be grandfather father, and ſon, and the grandfather is ſeiſed of three acres of land in fee, and taketh wife and dieth, this land deſcendeth to the father, who dieth either before or after entry now is the wife of the father dowable. The father dieth & the wife of the grandfather is endowed of one acre and dieth, the wife of the father ſhalbe endowed only of two acres reſidue for the Dower of the grandmother is paramount the title of the wife of the father, and the ſeiſin of the father which deſcended to him (be it in law or actual) is defeated, and now upon the matter the father had but a reverſion expectant upon a freehold, and in that caſe, Dos de dote peti non debet; although the wife of the grandfather dieth living the fathers wife. And here note a diverſity (w) between a Deſcent and a Purchaſe. For in the caſe aforeſaid, if the grandfather had infeoffed the father, or made a gift in tail unto him, there in that caſe abovesaid; the wife of the father, after the deceaſe of the grandfathers wife ſhould have been endowed of that part aſſigned to the grandmother, and the reaſon of this diverſity is, for that

(u) 43 E. 3. 32. 45 E. 3. 13. 9 E. 3. 4. F.N.B. 149. 8 E. 3. tit. Aſſ. 393. 19 E. 2. Dower 170. 23 E. 3. Dower 30.

(w) 5 E. 3. tit. Voucher 249. Paris caſe, 9 E. 3. 4.

the ſeiſin that deſcended after the deceaſe of the grandfather to the father is avoided by the endowment of the grant mother, whoſe title was conſummate by the death of the grandfather. But in the caſe of the purchaſe or gift that took effect in the life of the grandfather (before the Title of Dower of the grandmother was conſummate) is not defeated but only quoad the grandmother, and in that caſe there ſhall be Dos de dote. And yet there is another diverſity (x) where the wife of the father is firſt endowed, and where the wife of the grandfather, for in the ſame caſe after the deceaſe of the grandfather and father the ſon entreth and endoweth his mother of a third part, againſt whom the grandmother recovereth a third part and dieth, the mother ſhall enter again into the land recovered by the grandmother, becauſe ſhe had in it an eſtate for term of her life, and the eſtate for the life of the grandmother is leſſer in the eye of Law, as to her, than her own life. Alſo the husband, (y) may be ſeiſed in his Demeſn, as of Fee abſolutely, yet the woman ſhall not be endowed, as ſhe ſhall not be endowed both of the land given in exchange, and of the land taken in exchange, and yet the husband was ſeiſed of both, but ſhe may have her election to be endowed of which ſhe will.

(x) 8 E. 3. tit. Aſſ. 393. 13 R. 2. Dower 55. 22 E. 3. 5. 8 E. 33. 7 H. 6. 4.

(y) 6 E. 3. 50. F. N. B. 149.

Alſo of a ſeiſin for an inſtant a woman ſhall not be endowed. As if Ceſtuy que uſe (z) after the ſtatute of 1 R. 3. and before the ſtatute of 27 H. 8. had made a feoffment in fee, his wife ſhould not be endowed.

(z) 27 H. 8. 23. F. N. B. 17 H. 3. Dower 192.

Likewiſe if two Joyntenants be in Fee, and the one maketh a feoffment in fee, his wife ſhall not be endowed. And ſo if the Conuſee of a fine doth grant and render the land to the Conuſor, the wife of the Conuſee ſhall not be endowed; for it is not poſſible that the husband could have endowed his wife of ſuch an eſtate as the uſual pleading is, Lib. intr. 225. Quia dicit quod W. quondam vir ſuus nunquam fuit ſeiſitus de tenementis prædictis de tali ſtatu, ita quod eandem A. inde dotaſſe potuit.

¶ *Des terres ou tenements.* Of a Caſtle that is maintained for the neceſſary defence of the Realm a woman ſhall not be endowed; becauſe it ought not to be divided, and the publick ſhall be preferred before the private. But of a Caſtle that is onely maintained for the private uſe and habitation of the owner, a woman ſhall be endowed. And ſo it was adjudged in the Court of (a) Common Pleas, where in a Writ of Dower the demand was, De tertia parte Caſtri de Hilderke in Comitatu Northumb. And the ſtatute of Magna Charta c. 7. whereby it is prohibed, niſi domus illa ſit Caſtrum, is to be underſtood, a Caſtle maintained for the neceſſary and publick defence of the Realm. And this agreeth with ancient Records, (b) (albeit in the argument of the ſaid caſe they were not vouched) the effect whereof be, Non debent mulieribus aſſignari in dotem caſtra quæ fuerunt virorum ſuorum, & quæ de guerra exiſtunt, vel etiam homagia & ſervicia aliquorum de guerra exiſtunt. Wherein it is to be obſerved That the Law is not ſatisfied with the names of things, or nominatives; but with things reall and ſubſtantial. But of the principal Manſion or capital Meſſuage, the wife ſhall be endowed, (c) ſi non ſit caput Comitatus, ſive Baroniæ, for the honour of the Realm, or (as hath been ſaid) a Caſtle for the publick defence of the Realm. And ſo are the old Books to be intended, as it was reſolved Tr. 17 Eliz. in the Court of Common Pleas, which I heard and obſerved. And of an eſtate tail in lands determined, a woman ſhall be endowed in the like manner and form as a man ſhall be Tenant by the Curteſy, mutatis mutandis.

Vide Sect. 242.

(a) Paſc. 23 Eliz. in Com. Banco. Bract. fo. 96. Brit. ca. 103. Flet. l. 5. c. 23. 30 E. 1. tit. Dower 81. b. 30 E. 1. Vouch. 298. 17 H. 3. 192. 8 H. 3. Dower 196. 8 H. 3. ibid. 194.

(b) Pat. 1 E. 1. part 1. m. 17. Mich. 4 E. 1. nu. 88.

(c) Bract. l. 2. f. 93. Brit. c. 103. Fleta lib. 5. c. 22. Trin. 17 El. In Com. Banco.

¶ *En Fee ſimple, Fee taile general, &c.* If a man be Tenant in Fee taile general, (d) and make a feoffment in fee, and taketh back an eſtate to him and to his wife, and to the heirs of their two bodies, and they have iſſue, and the wife dieth, the husband taketh another wife, and dieth, the wife ſhall not be endowed, for during the Coverture, he who was ſeiſed of an eſtate taile ſpeciall, and yet the iſſue which the ſecond wife may have, by poſſibility may inherit.

(d) 41 E. 3. 30. 44 E. 3. 26. 30 H. 8. Dyer 41.

The ſame Law it is, if in this caſe he had taken back an eſtate in Fee ſimple, and after had taken wife, and had iſſue by her; yet ſhe ſhal not be endowed, for that the Fee ſimple is vaniſhed by the remitter, and her iſſue hath the land by force of the entail. But in that caſe the Tenant cannot plead, that the husband was never ſeiſed of ſuch an eſtate whereof the Demandant might be endowed, but he muſt plead the ſpecial matter.

30 H. 8. Dyer 41.

¶ *Et prent feme.* If a man ſo ſeiſed as is aforeſaid, taketh an Alien to wife, and dieth, ſhe ſhall not be endowed: but if the King take an Alien born and dieth, ſhe ſhall be endowed by the Law of the Crown. And Edmond the brother of King Edward the firſt, married the Queen of Navarre, and died, and it was reſolved (e) by all the Judges, that ſhe ſhould be endowed of the third part of all the lands whereof her husband was ſeiſed in fee.

(e) Rot. Parl. 26 E. 1. Rot. 1.

If a Jew born in England taketh to wife a Jew born alſo in England, the husband is converted to the Chriſtian faith, purchaſeth lands, and infeoffeth another, and dieth, the wife

brought a Writ of Dower, and was barred of Dower, and the Reason yielded in the Record (t) is this. Quia vbi contra Justitiam est, quod ipsa dotem petat vel habeat de Tenemento quod fuit viri sui ex quo in conventione sua noluit cum eo adhærere & cum eo conver.

(t) Dors. claus. 18 H. 3. m. 17.

¶ *Del tierce part de tiels Terres & Tenements per severaltie per metes & bonds.* Albeit of many inheritances that be entire, whereof no division can be made by metes and bonds a woman cannot be endowed of the thing it self, yet a woman (g) shall be endowed thereof in a special and certain manner. As of a Mill a woman shall not be endowed by Meres and Bonds, nor in common with the heir, but either she may be endowed of a third toll dish or de integro molendino per quemlibet 3. mensem. And so of a Villein, (h) either of a third days work, or every third week or moneth. A woman shall be endowed of the third part of the profits of Stallage, of the third part of the profits of a Fair, of the third part of the profits of the office of the Marshalsey of the (i) third part of the profits of the keeping of a Park, of the third part of the profit of a Dove-house, and likewise of the third part of a Piscary, (k) viz. tertium piscem, vel jactum retis tertium Of the third presentation to an Advowson. A Writ of Dower lies de 3. parte exituum provenientium de custodia gaolæ Ab thiæ Westm. And herewith agreeth reverend antiquity. De (l) nullo quod est sua natura indivisibile & secationem sive divisionem non patitur nullam partem habebit, sed fari faciat ei ad valentiam. Of the third part of profits of Courts (m) fines, heriots, &c. Also a woman shall be endowed of tithes. And the surest endowment of tithes is of the third sheaf, for what land shall be sown is uncertain.

(g) Bract. lib. 2. fo. 97. b. 23 d. 3. tit. Ass. 435. F.N.B. 146. 45 E. 3. Dower 50.
(h) 2 H. 6. 11. Bract. lib. 2. fo. 97. Britt. 147. 11 E. 3. tit. Dower 85. 15 E. 3. ibid. 81. 2 E. 3. 57. F.N.B. 8. k.
(i) 4 E. 2. Tr. 233. 26 E. 3. 58. 45 E. 3. Dower 50.
(k) Bract. 98. 208. Brit. 147. Flet. lib. 5. ca. 13. 17 E. 2. Dower 104. 163. 19 E. 3. Quar. Imp. 154. 7 E. 3. 7.
(l) Bract. 97. Brit. 146, 147.
(m) Lib. Intr. Judgm. 18. fo. 230. Eib. 11. fo. 25, 26. Harpers case.

But in some cases of lands and tenements which are divisible, and which the heir of the husband shall inherit, yet the wife shall not be endowed. As if the husband (n) maketh a lease for life of certain lands, reserving a rent to him and his heirs, and he taketh wife and dieth, the wife shall not be endowed neither of the reversion (albeit it is within these words (Tenements) because there was no seisin in Deed or in Law, of the Freehold nor of the Rent, because the husband had but a particular state therein, and no Fee simple. But if the husband make a lease for years, reserving a rent and taketh wife, the husband dieth the wife shall be endowed of the third part of the reversion by metes and bonds, together with the third part of the rent, the execution shall not cease during the years. And herewith agreeth the common experience at this day. But if the husband maketh a gift in tail, reserving a rent to him and to his heirs, and after the Donor taketh wife & dieth, the wife shall be endowed of this rent, because it is a rent in fee, and by possibility may continue for ever.

(n) 28 Ass 3. 8 R. 2. Dower 184. 1 E. 6. Dow. B. 89. acr.

Vid. 1 E. 6. B. 89.

Of a Common certain a woman shall be endowed but of a Common sans nomber en gross she shall not be endowed, as hath been said before. And so of a Rent service, Rent charge, and Rent seek she shall be endowed: but of an annuity that chargeth only the person, and issueth not out of any lands or tenements, she shal not be endowed. But if the Freehold of the Rents, Common, &c. were suspended before the Coverture, and so continue during the Coverture, she shall not be endowed of them. If after the Coverture the husband doth extinguish them by release or otherwise, yet she shall be endowed of them; for as to her Dower they in the eye of the Law have continuance.

Lib. 7. fo. 38. Lillingstons case. Lib. 6. fo. 78. Seig. Aburganies case.

If the Wife be entituled to have Dower of three Acres of Marsh, every one of the value of twelve pence, the Heir by his industry and charge maketh it good Meadow, every Acre of the value of ten shillings, the wife shall have her Dower according to the improved value, and not according to the value as it was in her husbands time: for her title is to the quantity of the land, viz. one just third part.

And the like Law it is, if the Heir improve the value of the Land by building: And on the other side, if the value be impaired in the time of the Heir she shalbe endowed according to the value at the time of the assignment, and not according to the value as it was in the time of her husband.

V. 30 E. 1. Vouch. 298.

¶ *Assuns temps durant le coverture.* For the better understanding whereof it is to be known, that (as hath been said) to Dower three things do belong, viz. Marriage, Seisin and the death of the Husband. Concerning the Seisin, it is not necessary the same should continue during the Coverture, for albeit the husband alieneth the lands or tenements, or extinguisheth the rents or commons, &c. yet the woman shalbe endowed. But it is necessary the marriage do continue, for if it be dissolved, the dower ceaseth, ubi nullum Matrimonium ibi nulla dos. But this is to be understood when the husband and wife are divorced à vinculo matrimonii as in case of precontract, consanguinity, affinity, &c. and not à mensa & thoro only, as for adultery. And yet it is said, that if the assignment of Dower Ad ostium Ecclesiæ be specified, viz. That notwithstanding any shall happen, yet that she shall hold it for her life, this is good.

Bract. 92. Brit. cap. 101. Brit. cap. eodem.

If the Wife clope(o) from her husband, that is, if the Wife leave her Husband, & goeth away & tarrieth with her adulterer, she shall lose her Dower until her Husband willingly without

(o) W. 2. ca. 34. Lib. Intr. 224. Fleta lib. 5. c. 23. Fr. c. 109. Mirror ca. 5. sect. 5.

out coertion eccleſiaſtical be reconciled unto her, & permit her to cohabit with him, all which is comprehended ſhortly in two Hexameters, Sponte virum mulier fugiens, & adultera facta. Dote ſua careat niſi ſponſi ſponte retracta. And (p) if ſhe goeth willingly with or to ſ adowterer, or if ſhe tarrieth with him againſt her will, or if he turn her away, or if ſhe cohabit with her husband, by the cenſures of the Church, in all theſe caſes ſhe loſeth her Dowry. But ſee notable matter hereof in the expoſition upon the Statute of W.2.cap.34.

p) 3 E.3.2.6 E.3.29. 9 E.3.29. 19 E.3.Dower 94. 43 E.3.19. Vid.Fitz.N.B.150.b. 8 E.2.Dower 153.

¶ *En ſeveraltie per metes & bonds.* And yet in ſome caſes where the husband was ſole ſeiſed, the wife ſhall not be endowed in ſeveralty, by metes and bonds. As for example, (q) If a man ſeiſed of lands in Fee, took a wife, and infeoffed eight perſons, a Writ of Dower was brought againſt theſe eight perſons, and two confeſs the Action, & the other ſix plead in bar, and deſcend to iſſue, the Demandant ſhall have judgment to recover the third part of two parts of the land, in eight parts to be divided & after the iſſue being found for the Demandant againſt the ſix, the Demandant ſhall have judgment to recover againſt them the third part of ſix parts of the ſame lands, in eight parts to be divided, which is worthy the obſervation. But of this more ſhall be afterwards ſaid in this Chapter.

q) M.2.& 3 Eliz. Dyer 187.b. 12 Aſſ.p.2. 17 E.3.4. Tr. 10 H.5.Rot.447.

But regularly Littletons words are to be intended, where the husband was ſole ſeiſed, for where he was ſeiſed in Common, there ſhe cannot be endowed by metes and bonds, as it appeareth in this Chapter, Sect.44. Note, ſ endowment by metes & bonds, according to the common right, is more beneficial to the wife, than to be endowed againſt common right, for there ſhe ſhall hold the land charged, in reſpect of a charge made after her title of Dower.

26 E.3. Dower 133. 10 E.3.31. 17 E.2.Dower 164. 19 E.3.Qua.Imp.154. 12 E.4.2. 18 H.6.27. per Paſton.

¶ *Le quel el auoit iſſue per ſa baron ou nemy.* Herein the Tenant in Dower, as in many other, is preferred before the Tenant by the Courteſy: But yet this great diſadvantage the wife hath, that ſhe cannot enter into her Dower by the Common Law, but is driven to her Writ of Dower to recover the ſame, wherein ſometimes great delayes are uſed, & therfore the well adviſed friends of the wife will provide for a Joynture to be made to her, as ſhalbe ſaid hereafter; For by the ſtatute of (r) Magna Carta cap.7. ſhe ſhal tarry in the chief houſe of her husband but by the ſpace of forty dayes after the death of her husband, within which time Dower ſhall be aſſigned unto her, unleſs it were formerly aſſigned, &c. but of little effect was that Act, for that no penalty was thereby provided if it were not done: which term of forty dayes is in Law called Quarentina. But if ſhe marry within the forty dayes ſhe loſeth her Quarentine. But ſome have ſaid that by the ancient Law of England the woman ſhould continue a whole year in her husbands houſe, within which time if Dower were not aſſigned, ſhe might recover it: & this certainly was the Law of England before ſ Conqueſt, (ſ) Mulieres viduæ bis ſenos menſes viduas exigunto, atque tum demum cui velint nubant, ſin quæ ante annum nupſerit, dote mulctata fortunis omnibus à priore marito relictis privator. But for the relief of the widow it was provided by the ſtatute of Merton made in Anno 20 H.3.cap. 1. (which by (t) Bracton is called Nova Conſtitutio) ſ the wife ſhall recover damages in her Writ of Dower from the time of the death of her husband. But herein divers things are obſervable. Firſt, in what kind of Writ of Dower ſhe ſhall recover her damages. In a Writ for a Dower Ad oſtium Eccleſiæ, or Exaſſenſu patris, ſhe ſhal recover no damages, becauſe ſhe may enter, and the words of the ſtatute be, Et dotes ſuas habere non poſſunt ſine placito. Alſo I have read in an ancient and learned reading upon this ſtatute, that it extendeth onely to a Writ of Dower, Unde nihil haber, and not to a Writ of right of Dower, for in no Writ of right damages are to be recovered. 2. She ſhal recover damages only when her husband by ſeiſed, (that is) ſeiſed of the Freehold and Inheritance, (u) for albeit the husband before the title of Dower had made a Leaſe for years reſerving a Rent, ſ wife ſhal recover the third part of the reverſion with a third part of the Rent and damages, for ſ words of the ſtatute be, De quibus viri ſui obierunt ſeiſiti. 3. Some ſay that the Demandant in a Writ of Dower, ſ delayeth her ſelf, ſhal not recover damages; therefore let the Demandant take had therein. 4. It is neceſſary for the wife after ſ deceaſe of her husband as ſoon as ſhe can to demand her Dower before good teſtimony, for otherwiſe ſhe may by her own default loſe the value after the deceaſe of her husband, & her damages for detaining of her Dower. For if ſhe bring a Writ of Dower againſt the Heir, and the Heir commeth into the Court upon the Summons the firſt day, and plead that he hath been always ready and yet is to render Dower, &c. If the wife habe not requeſted her Dower, ſhe ſhal loſe the mean values and her damages, but if ſhe hath requeſted her Dower ſhe may plead it, and iſſue may be thereupon taken.

r) Magna Carta cap.6. Fleta lib.5.cap.23. Bracton lib.2.fol.96. Britton cap.103. 17 H.6.14.6 E.6. Dyer 76. F.N.B. 161. Regiſt. orig.175. 1 Mary Dower 101.

ſ) Lamb.ſect.120.71. and divers ancient Manuſcripts. See the 2 part of the Inſtitutes. cap. 7.

(t) Bract. lib. 4. 312. & lib. 2. 96. Britton cap.103. Fleta lib.5.cap.23.

u) Regiſt.Judic.4. Origin.173. Dyer 11 El.284. Raſt.pl.80.226.&c. 16 E.3. tit. Damages 83. 8 E.2. ibid.11.

But it is holden in ſome Books (w) that a requeſt in pays is not ſufficient, and that it is the folly of the wife, that ſhe brought not her Writ of Dower ſooner. But the Law and many (x) Books be againſt it, and the words of the plea (that he hath been always ready, &c.) prove the ſame, and the words of the Statute alſo prove this. Et dotes ſuas habere non poſſunt ſine placito.

(w) 5 E.3.1. 4. E 3. Dower 46. and note in the book at large.

(x) 16. E. 3. Dower 59. 2 H.4.7. 9. H.4.4. tit. Iſſue 132. 11. H. 4. 6. 33. E. 4. 7. 14 H 8. 25. b.

And

And the reaſon why tout temps priſt is a good plea in a writ of Dower brought againſt the heir to bar her of the mean values and damage, is, becauſe the heir holdeth by title, and doth no wrong till a demand be made. And in a writ of Viel, Couſinage, &c. where the land & damages are to be recovered, there ſuch a plea is not good, for there the tenant of the land hath no title, but holdeth the land by wrong, and the feoffee of the heir cannot at the firſt day plead tout temps priſt, becauſe he had not the land all the time, ſince the death of the Anceſtor. 5. It is to be obſerved that the mean values and damages are to be recovered againſt the tenant in a writ of Dower, as it appeareth in a notable Record (y) between Belfield & Rowſe, the Tenant as to a parcel pleaded Non-tenure, and for the reſidue detainment of Charters, upon which pleas they were at iſſue, and both iſſues found by the Jury againſt the tenant, & found further that the husband died ſeiſed ſuch a day and year, and had iſſue a ſon, and that the demandant and the ſon by ſix years after the deceaſe of the husband together took the profits of the land, and after the ſon ſuch a day and year died without iſſue, after whoſe deceaſe the land deſcended to the Tenant as uncle and heir to him, by force whereof he entred and took the profits until the purchaſing of the original writ, and found the value of the land by the year, and aſſeſſed damages for the detaining of the Dower, and coſts, and upon this verdict, after often debating the Demandant had judgment to recover her damages for all the time from the death of the husband without any defalcation. In which caſe many things apparant therein are obſervable. Let the Tenant therefore take heed how he plead falſe pleas. 6. That this ſtat. of Merton doth extend to Copyholds (z) where the cuſtome is, that women be dowable. 7. That if the wife hath Dower aſſigned to her in Chancery ſhe ſhall have no damages, (a) for the words of the Statute be Et viduæ per placitum recuperaverint, &c. So it is if the heir or his feoffee aſſign Dower, and the wife accepteth it, ſhe loſeth her damages.

(y) Mich. 8. & 9 Eliz. Rot. 904 in Comm. Banc.

(z) Tr. 37 Eliz. lib. 4. fo. 30. b. Shawes caſe.

(a) 43 Aſſ. Pl. 31.

14 H. 8. 28.

A man ſeiſed of lands in fee taketh a wife and granteth a Rent charge, and after maketh a feoffment in fee, & taketh back an eſtate tail and dieth, the wife recovereth Dower againſt the iſſue in Tail by reddition, the wife maketh a ſurmiſe that her husband died ſeiſed, and prayeth a writ to enquire of the damages, and that is granted to her. In this caſe ſhe holds the land charged with the Rent charge, for by her prayer ſhe accepteth her ſelf dowable of the ſecond eſtate, for of the firſt eſtate, whereof ſhe was dowable, her husband died not ſeiſed, and ſo ſhe hath concluded her ſelf, wherefore if the Rent charge be more to her detriment than the damages beneficial to her, it is good for her in that caſe to make no ſuch prayer.

¶ *De quel age que la feme ſoit, iſſint que el paſſe lage de neuf ans al temps del mort ſon baron.* Feme, wife, here Littleton ſpeaketh of a wife generally, and generally it is to be underſtood as well of a wife de facto, as de jure. Therefore if the wife be paſt the age of nine years (b) at the time of the death of her husband, ſhe ſhall be endowed of what age ſoever her husband be, albeit he were but four years old. Quia junior non poteſt do em promereri neque virum ſuſtinere, nec obſtabit mulieri petenti minor ætas viri. Wherein it is to be obſerved that albeit Conſenſus non Concubitus facit Matrimonium, and that a woman cannot conſent before 12. nor a man before 14. yet this inchoate and imperfect marriage (from the which either of the parties at the age of conſent may diſagree) after the death of the husband ſhall give Dower to the wife, and therefore it is accounted in Law after the death of the husband legitimum Matrimonium, a lawful marriage, quoad dotem. If a man taketh a wife of the age of ſeven years, and after alien his land and after the alienation the wife attaineth to the age of nine years, & after the husband dieth, the wife ſhal be endowed, for albeit ſhe was not abſolutely dowable at the time of the marriage, yet ſhe was conditionally dowable, viz. if ſhe attained to the age of nine years before the death of the husband for ſo Littleton here ſaith, ſo that ſhe paſs the age of nine years at the death of her husband, for by his death the poſſibility of Dower is conſummate.

(b) 3 E. 1. Dower 172. 1 rin. North. 8 E. 2. Dower 122. 7 E. 2. Dower 147. 12 E. 2. ibid. 159. 21 E. 3. 28. 15 E. 3. Dower 67. 11 H. 2. Dower 54. 12 H. 4. 1. 35 H. 6. 40. 7 H. 6. 11. 12. 12 H. 4. Doct. & Stud. Fitz. N. B. 149. b. 22 Eliz. Dower 359. Bract. fol. 92. Fleta lib. 5. ca. 21. Lib. Intrat. fo. 123.

And ſo it is if the husband alien his land and then the wife is attainted of Felony, now is ſhe diſabled, but if ſhe be pardoned before the death of the husband, ſhe ſhall be endowed. If the ſon endow his wife at her age of 7 years, ex aſſenſu patris, if ſhe before the death of her husband attain to the age of nine years, the Dower is good. But otherwiſe it is of an originally abſolute diſability; as if a man take an Alien to wife, and after the husband alien the land, and after ſhe is made Denizen, the husband dieth, ſhe ſhall not be endowed becauſe her capacity and poſſibility to be endowed came by the Denization, otherwiſe it is if ſhe were naturalized by Act of Parliament whereof ſee more in the Chapter of Villenage.

And the Biſhop upon an iſſue joyned in a Writ of Dower, Quod nunquam fuerint copulati legitimo Matrimonio, ought to certify that they were coupled in lawful marriage, albeit the man were under fourteen, or the wife above nine, and under twelve. So it is if a marriage de facto, be voidable by divorce, in reſpect of Conſanguinity, Affinity, Precontract, or ſuch like, whereby the marriage might have been diſſolved, and the parties freed à vinculo matrimonii, yet if the husband die before any divorce, then for that it cannot now be avoided, this wife de facto ſhall be endowed (c) for this is legitimum Matrimonium (as in the other caſe

(c) 10 E. 3. 35. Flet lib. 4. cap. 20. Brit. cap. 107.

when the wife is infra annos nubiles) quoad dotem. And ſo in a writ of Dower the Biſhop ought to certify, that they were legitimo Matrimonio copulati, according to the words of the Writ. And herewith agreeth 10 E.3.35. And (d) Bracton: quamdiu duravit matrimonium, duravit dotis exactio, &c deficiente deficit dotis petitio, &c. poterit tamen replicare contra exceptionem illam quod ſi aliquando fuit Matrimonium propter Conſanguinitatem, &c. inter eos accuſatum, nunquam tamen fuit in vita viri ſui ſolutum nec divortium celebratum. But if they were divorced à vinculo Matrimonii in the life of her husband, ſhe loſeth her Dower: Otherwiſe it is if they were divorced (e) Cauſa adulterii, which is but a menſa & thoro, and not à vinculo Matrimonii, as it was adjudged. But ſome do hold that a wife de facto ſhall not have an appeal of the death of her husband, but onely ſhe that is a wife De jure in favorem vitæ. Vide 50 E.3.fol.15. 28 E.3.92. 27 Aſſ.Stamf.Pl.Cor.59. and that there unques accouple in loyal Matrimonie ſhall be taken de jure ſtrictly. And ſo in ſome caſe a wife ſhall have Dower where ſhe cannot have an appeal, (f) and in other Caſes ſhe ſhall have an appeal, where ſhe cannot have a Writ of Dower as if ſhe elope, &c. ſhe is barred of her Dower, but not of her appeal: and the reaſon is for that the ſtatute (g) barreth her of her Dower, but not of her appeal. So if the husband be attainted of treaſon, &c. his wife ſhall not be endowed, and yet if any do kill him the wife ſhall have an appeal, the reaſon of the diverſity ſhall appear hereafter in this Chapter.

(d) Bracton lib.4.fol.304. Britton ibid. Fleta lib.5.cap.22. 32E.1.Dyer 156.

(e) Tr.2.Ja.Rot.185. in Communi Banco. Inter Stowel & Wikes in Dowet.

(f) 50 E.15.b.

(g) W.2.cap.34.

¶ *Apres le mort le baron.* (h) Mortuo viro hinc confirmatur Dos. This is intended of a natural, not of a civil death. For if the husband enter into religion, (i) the wife ſhall not be endowed until he be naturally dead.

(h) Britton cap.106. Bracton lib.4.fol.301.

(i) 31 E.3.tit.Colluſion 26.

And in this Chapter Littleton diviteth Dower into five parts, viz. Dower by the common Law. Secondly, Dower by the Cuſtome. Thirdly, Dower Ad oſtium Eccleſiæ. Fourthly, Dower Ex aſſenſu patris. And fifthly, Dower De la pluis beale. And all theſe Dowers were inſtituted for a competent livelyhood for the wife during her life. (k) Propter onus Matrimonii & ad ſuſtentationem uxoris & educationem liberorum cum fuerint procreati ſi vir præmoriatur.

(k) Bract.lib.2.cap.39. fol.92,&c. Fleta lib.5.cap.22. Britton cap.101.

## *Sect.* 37.

¶ *Nota per le Common ley la feme navera pur ſa Dower forſque (l) la tierce part. &c.* This third part is called rationabilis Dos, or Dos legitima, becauſe it is the Dower that the Common Law giveth, rationabilis autem Dos eſt cujuſlibet mulieris de quocunque tenemento tertia pars omnium terrarum, & tenementorum quæ vir ſuus tenuit in dominico ſuo ut de feodo, &c.

(l) Glanvill lib.6.cap.1. Bracton ubi ſupra. Britton ubi ſupra. Fleta ubi ſupra. Mirror cap.1.ſ.&.3. Magna Charta cap.7.

F.N.B.150.g.

¶ *Mes per Cuſtome daſcun pais el avera le moitie, & per le Cuſtome en aſcun Ville & Burgh el avera lentiertie.* Such a (m) cuſtom may extend to a County, City, or an ancient Burgh without queſtion, and ſo this cuſtome as here it appeareth by Littleton, may extend to upland Towns, which are neither Counties Cities nor Boroughs. But the ſurer pleading in this and the like Caſes, is to lay the cuſtome within a Mannor or Seigniory if the truth of the caſe will ſo bear it. By the cuſteme of Gabelkind (n) the wife ſhall be endowed of the moity, ſo long as ſhe keep her ſelf ſole, and without child, which ſhe cannot wade and take her thirds for her life. For in that caſe, Conſuetudo tollit communem legem.

(m) 21 E.4.53,54. 7 H.6.26.22 H.6.13. 21 H.7.17.40 Aſſ.27.41. 16 E.2. Preſcription 53. 45.E.3.32.45 Aſſ.8. Dyer 363. 39 E.3.2.10. 14 E.3.bar 277. 23 E.3.tit.Dower 65.

(n) Vide le ſtatute de conſuetud.Kanciæ, &c. Trin. 17 E.3.coram rege Kan.in Theſaur. in which record Senentia ſignifieth Widowhood.

And as Cuſtome may enlarge, ſo may Cuſtome abridg Dower, and reſtrain it to a fourth part, &c.

And note, that by the common law, the wife ſhall have for her Dower, but the third part of the Tenements which were her husbands during the Eſpouſals, but by the cuſtome of ſome County ſhe ſhall have the half, and by the cuſtome in ſome Town or Borough, ſhe ſhal have the whole. And in all theſe Caſes ſhe ſhalbe called Tenant in Dower.

*Sect.*

## *Sect.* 38.

This shall be explained by that which shall be said in the two Sections next ensuing.

¶ Auxy sont deux auters maners de dower, cestassavoir, dower que est appelle dowment Ad ostium Ecclesiæ, & dower appelle dowment, Ex assensu patris.

Also there be two other kinds of Dower, *viz.* Dower which is called Dowment at the Church door, and Dower called Dowment by the fathers assent.

## *Sect.* 39.

¶ Dowment Ad ostium Ecclesiæ, est lou home de plein age seisie en Fee simple que serra espouse a un fem, quant il vient al huis del monastery ou desglise desire espouse, & la apres affiance enter eux fait, il endolve la feme de sa entier terre ou de la moytie, ou dautre meindre parcel, & la ovtrmēt declare le quantity, & la certainty de la terre que el avera pur sa Dower, in ceo case la feme apres le mort le baron, poit entrer en le dit quantity de terre dont le baron luy endowa, sans auter assignment de nulluy.

Dowment at the Church door, is where a man of full age seised in Fee simple, who shall be married to a woman; and when he cometh to the Church door to be married, there, after affiance and troth plight between them, he endoweth the woman of his whole land, or of the half, or other lesser part thereof; and there openly doth declare the quantity, and the certainty of the Land, which she shall have for her Dower. In this case the wife, after the death of the husband, may enter into the said quantity of land of which her husband endowed her, without other assignment of any.

¶ If this Dower be made Ad ostium castri sive mesuagii, it is not good; but ought to be made, Ad ostium Ecclesiæ sive Monasterii.

Et sciendum est (n) quod hæc constitutio fieri debet in facie Ecclesiæ, & ad ostium Ecclesiæ, non enim valet facta in lecto mortali, vel in camera, vel a libi ubi clandestina fuêre conjugia. For the Law requires, that this and like matters be done publikely and solemnly.

(n) 10 H. 2. Dower 200. (o) Bract. lib. 2. cap. 18. Mirrour cap. 1. sect. 3. & cap. 5. 10 H. 3. Dower. 201. F. N. B. 150. m, n. Fleta lib. 5. cap. 22, &c. Britton cap. 101, 108, &c.

¶ *Ou home de plein age*, That is, of one and twenty years, Anno 9 H. 3. Dower 197. A man of the age of eighteen years, took a wife, and by assent of his Guardian endowed her, Ad ostium Ecclesiæ; and it was adjudged a good endowment, albeit the husband died before the age of one and twenty years; but I hold Littletons opinion to be good Law.

9 H. 3. Dower 197.

¶ *La apres affiance enter eux.* Affidare est fidem dare. Affiance cz sponsality, and is derived of this word spondeo, because they contract themselves together, & ideo sponsalia dicuntar (p) futurarum nuptiarum conventio, & repromissio. But this Dower is eber after marriage solemnized, & therefore this Dower is good without deed, because he cannot make a deed to his wife. For no assignment of Dower Ad ostium Ecclesiæ, can be made before marriage; for that before marriage, the woman is not entituled to have Dower.

(p) Glanvil lib. 6. cap. 1. 40 E 3. 43. Vide Vernons case lib. 4. fol. 122.

(q) Glanvil lib. 6. cap. 1. Bract. lib. 2. cap. 38. 39. & lib. 4. tract. 6. cap. 1, & 6. Britton cap. 103 &c. Fleta lib. 5. cap. 229 &c.

¶ *De sa entier terre ou de le moity.* In ancient time, (q) as it appeareth by Glanvil

Glanvil lib. 6. cap. 1. It was taken, that a man could not have endowed his wife Ad oſtium Eccleſiæ, of more than a third part but of leſs he might. But at this day (r) the Law is taken as Littleton here holdeth. An aſſignment of Dower (ſ) where the husband was ſole ſeiſed, cannot be made of the third or fourth part in common, but ought to be in ſeveralty.

(r) F. N. B. 150.
(ſ) 20 E. 3. Barre 132. 45 E. 3. 6. Fleta lib. 5. 23.

¶ *Et la overtment'* (t) *declare le quantity & certeinty del terre.* Here be two things that the Law doth delight in, viz. First, to have this and the like openly and ſolemnly done. Secondly, to have certainty which is the mother of quiet and repoſe. And this word (moity) abovelaid is to be extended of the half in certainty, and not of the moity in Common, which clearly (u) appeareth, in that here Littleton ſaith, the quantity and certainty of the land.

(t) Britton cap. 101. Bracton lib. 2. cap. 18.

(u) Vide 14 H. 3. Dower 289. 9 H. 3. Dower 289. 9 H. 3. Dower 190. 8 H. 3. Dower 195. F. N. B. 150. 40 E. 3. 43.

¶ *En ceo caſe la feme poet entrer en le dit quantity del terre.* And afterwards Sect. 43. he ſaith, Nota, que en touts caſes lou le certainty appiert queux terres ou tenements feme avera pur ſa dower, la feme poet enter apres la mort ſon baron. It was inſtituted, in favour and relief of wives; that a man after marriage, might aſſign to his wife certainty of Dower, to the end, that the widow ſhould not be driven to a long and chargeable ſuit, wherein delay might be uſed; and in the mean time her life ſpent, together with her mony alſo. For albeit the (w) Law hath provided, Quod vidua poſt mortem mariti ſui non det aliquid pro dote ſua, & maneat in capitali meſuagio mariti ſui per quadraginta dies poſt obitum mariti ſui, infra quos dies aſſignetur ei dos ſua, niſi prius ei aſſignata fuerit, &c. & habeat rationabile eſtoverium ſuum interim in Communi; yet becauſe there was no penalty or puniſhment inflicted, the Tenant of the land may drive her to ſue for her Dower. And this continuance of the widow in capital Meſſuage, is in Law called a Quarentine, Quarentina, for that it is by the ſpace of fourty dayes, as is afore ſaid. And if the Heir, or other Tenant of the land put her out, ſhe may have her Writ, De quarentina habenda. If the Wife marry within the fourty days, ſhe loſeth her Quarentine; for her habitation in the houſe is perſonal to her, and only given to her in judgment of Law during her widdowhood, albeit the words of the Law be general. And therefore to the end, that Widows might have certainty of eſtate, and that they might enter, and not be driven to ſuit, the Law hath provided Dower Ad oſtium Eccleſiæ, and as it ſhall appear hereafter, Dower Ex aſſenſu patris. And laſtly, by making of a Joynture, of which (being no Dower, but made in ſatisfaction of Dower either before or after marriage) it is neceſſary that ſomething ſhould be ſaid hereafter in his apt place, for that this now falleth out to be the ſureſt way.

(w) Magna Charta cap. 7. See the ſecond part of the Inſtitutes cap. 7. Fleta lib. 5. cap. 23. Britton cap. 103. Bract. lib. 2. cap. 40. Regiſt. 175. Vide Dyer 6 E. 6. 76. b. & 161. a. F. N. P. 161. 1 Mar. Br. 101.

Nota; The ſureſt way.

¶ *En touts caſes quant le certeinty appiert, &c. la feme poet enter apres le mort del baron.* This is to be intended, where the certainty appeareth upon an aſſignment of Dower, Ad oſtium Eccleſiæ, or Ex aſſenſu patris. For if a Woman bring a Writ of Dower of ſix pound Rent charge, and ſhe hath judgment to recover the third part; albeit it be certain that ſhe ſhall have fourty ſhillings, yet ſhe cannot (x) diſtrain for fourty ſhillings, before the Sheriff do deliver the ſame unto her: for whereſoever the Writ demands land, rent, or other things in certain, the Demandant after judgment may enter or diſtrain before any ſeiſin delivered to him by the Sheriff upon a Writ of Habere facias ſeiſinam. But in Dower, where the Writ demandeth nothing in certain; there the Demandant, after the judgment, cannot enter or diſtrain untill execution ſued, by which execution, the Sheriff is by the Kings Writ to deliver the third part in certainty, to the Demandant. And ſo it is when the wife of one Tenant in common, demand a third part of a moity; yet after judgment, ſhe cannot enter, untill the Sheriff deliver to her the third part, albeit the delivery of the Sheriff ſhall reduce it to no more certainty than it was.

(x) 45 E. 3. 26. 48 E. 3. 6, 22. Aſſ. 87. 39 E. 3. 12. 37 H. 6. 38. 39 H. 6. 25. 2 H. 5. 8. Breve 199. 30 E. 3. 30. 21 E. 4. 3. Vide lib. 1. Shelleys caſe. 40 E. 3. 22.

¶ *Sauns auter aſſignment de nulluy.* For as concerning Dower at the Common Law, there muſt be aſſignment either by the Sheriff, (as hath been ſaid) by the Kings Writ, or elſe by the heir or other Tenant of the land, by conſent and agreement between them. To a perfect aſſignment of Dower, eight things are to be obſerved: (a) First, regularly the aſſignment muſt be certain, as our Author here ſaith.

(a) 8 E. 2. Ent. 75. 40 E. 3. 22. 45 E. 3. 5, 16.

Secondly, It (b) muſt be either of ſome part of the Land, whereof ſhe is dowable; or of a rent, or ſome other profit iſſuing out of the ſame, either before judgment or after, which rent may be aſſigned to her by parol. But an aſſignment of other land whereof ſhe is not dowable, or of a rent iſſuing out of the ſame is no bar of her Dower.

(b) 1 Mar. Dyer 91. 1 E. 2. Dower 146. 28 H. 6. 2. Dyer 9 El. 263. 26. Aſſ. 41. 31. 3. Scir. fa. 99. 33 H. 6. 2. Vernons caſe, lib. 4. fol. 1. 5 E. 4. 22.

Thirdly, The aſſignment muſt be abſolute, and not conditionall or ſubject to any limitation.

Fourthly, It muſt be made by him that is Tenant of the land: but herein certain diverſities are to be obſerved.

If two or more be Joynt-tenants of lands, (c) the one of them may aſſign Dower to the wife,

(c) 7 H. 6. 34. 10 E. 2. Dower 169. 10 E. 3. 38.

wife of a third part in certainty; and this shall bind his companions, because they were compellable to do the same by Law. But if one of them assign a rent out of the Land to the wife, this shall not bind his companion because he was not compellable by the Law thereunto. If the husband make several Feoffments of several parcels and dieth, and the one Feoffee assign Dower to the wife of parcel of Land, in satisfaction of all the Dower which she ought to have in the land of the other Feoffees, the other Feoffees shall take no benefit of this assignment, because they are strangers thereunto, and cannot plead the same. But in that case, if the husband dieth seised of other lands in Fee simple, and the same descend to his heir, and the heir endoweth the wife of certain of those lands in full satisfaction of all the Dower that she ought to have as well in the lands of the Feoffees, as in his own lands; this assignment is good, and the several Feoffees shall take advantage of it. And therefore if the wife bring a writ of Dower against any of them, they may vouch the heir and he may plead the assignment which he himself hath made in safety of himself, lest they should recover in value against him, (d) so as as there is a privity in this respect between the heir and the Feoffees, and by this means the same may be pleaded by the heir that made it. And so it is adjudged in our Books, which is a notable case for many purposes.

(d) 33 E. 3. tit. Judg. 254. 8 E. 3. 69. 17 E. 3. 58. b. 2 E. 3. tit. Dower 76. 3 E. 3. vouch. 196. see the second part of the Instit. W. 1. cap. 9.

Fifthly, If assignment be made (e) by any disseisor, abator, intruder, or any wrong-doer, of Lands or Tenements, if they came to that estate by collusion and covin between the widow and them, all eit the widow hath just cause of action, and the assignment be indifferently made after judgment by the Sheriff of an equal third part, yet shall the Disseisee, &c. avoid it, for covin in this case shall suffocate the right that appertained to her, and so the wrongful manner shall avoid the matter that is lawful.

(e) 25. Ass. p. 1. 44. Ass. 29. 44 E. 3. 46. 27. Ass. 74. 11 H. 4. 60. 15 E. 4. 4. 19 H. 8. 12. Li. 83. 151.

Sixthly, An assignment by (f) a disseisor, abator, intruder, &c. if there be no covin, is good, unless it it be prejudicial to the disseisee, &c. As if the husband (g) infeoffeth the younger son with warranty, the eldest son disseise the youngest son, and endow the widow; in this case the younger son shall avoid this assignment, for otherwise he shall lose his warranty: but a disseisor, abator, intruder, &c. cannot assign a rent out of the land to her for her Dower, to bind the disseisee, &c.

(f) 12. Ass p. 20. 21 E. 3. 12.
(g) 3 E. 3. tit. Dower 77. 16 E. 2. tit. Dower. Statham.

Seventhly, No assignment can be made, but by such as have a Freehold, (as hath been said) or against whom a writ of Dower doth lie; and therefore (h) an assignment by a Gardian in Socage is void, but a Gardian in Chivalry may assign Dower, as shall be said hereafter, because a writ of Dower lieth against him, and not against a Gardian in Socage.

(h) 31 E. 1. Dower 150. 29. Ass. 68. 15 E. 2. Dower 69.

Eighthly, And before the Gardian in Chivalry enter, the heir within age (i) may assign Dower, for the Gardian may waive the Wardship. And so briefly have you heard, of what, by whom, and to whom the assignment must be made. But there needeth neither livery of seisin, nor writing to any assignment of Dower, because it is due of common right.

(i) 7 R. 2. Amesurement. 4 F. N. B. 148.

## *Sect.* 40.

¶ DOwment Ex assensu patris est, lou le pier est seisie de Tenements en Fee, & son fits & heire apparēt, quant il est espouse, endowe sa feme al huys del Monasterie ou del Esglise, de parcel de Terres ou Tenements son pier de assent son pier, & assign la quantity & les parcels. En ceo case apres le mort le fits,

DOwment by assent of the father is, where the father is seised of Tenements in fee, and his son and heir apparent when he is married, endoweth his Wife at the Monastery or Church door, of parcell of his fathers Lands or Tenements, with the assent of his Father, and assigns the quantity and parcels. In this case, after the Death of the

¶ *Ou de piere est seisie de tenements en fee.*

Tenant for life of a Carve of Land, the reversion to the father in fee, the son and heir apparent of the father endoweth his wife of this Carve, by the assent of the Father, the Tenant for life dieth, the husband dieth, the reversion was a Tenement in the father, & yet this is no good endowment Ex assensu patris, because the father at that time of the assent had but a reversion expectant upon a freehold, whereof he could not have endowed his own wife: & albeit the Tenant for life died, living the husband, yet quod initio non valet, tractu temporis non convalescet. And

Brit. cap. 109. Fleta lib. 5. cap. 22, 23. Bract. lib. 5. 305. 6 E. 3. 24. F. N. B. 150.

for

for the moſt part, Dower ad oſtium Eccleſiæ, and Ex aſſenſu patris, enſue the nature of a Dower at the Common Law. And for theſe the wife may have a writ of Dower, all eit they be certain, as for the third part at the Common Law.

¶ *Et ſons fits & heire apparent.* It muſt be ſuch a ſon & heir apparent, as muſt continue an heir apparent, and therefore the youngeſt ſon and heir apparent cannot endow his wife Ex aſſenſu patris, of lands whereof the Father is ſeiſed in Fee of the nature of Borough Engliſh, becauſe the father may have another ſon, and then the husband is not heir apparent: and it is in reſpect of the conſtant and perpetuall apparance, that the ſon and heir apparant may endow his wife of his fathers Land. And ſo it is of Lands in Gavelkind: (k) and this is the reaſon that Dower Ex aſſenſu fratris, or Conſanguinei, is not good; for that albeit he is heir apparant at that time, yet for the common poſſibility, that he may have iſſue, and every iſſue that the brother or coſin ſhould have afterwards, ſhall exclude him, he is no ſuch heir apparant as the Law intendeth. (l) But an endowment Ex aſſenſu matris, is as good as Ex aſſenſu patris, becauſe there is an appearance of a conſtant and perpetual heir. And ſome have ſaid, that if the father after his aſſent, be attainted of treaſon or felony, that the wife in that caſe loſeth her Dower, becauſe her husband doth not continue heir.

(k) 8 M. 3. Dower 193. 9 E. 3. Dower 191. 11 H. 3. Dower F. N. B. 150. l. 19 E. 3. Dower 154.

(l) F. N. B. 150. c. Flet. lib. 5. cap. 22. Bract. lib. 4. 305. Ambr. Gorges caſe, lib. 6. fol. 22.

¶ *Quant il eſt eſpouſe, endow ſa feme.* (m) In this caſe, albeit the Freehold and Inheritance is in the father, yet in reſpect (as hath been ſaid) of the conſtant and perpetuall apparance of the Heir, the Heir apparant doth endow, and the father doth but aſſent. And therefore where the father did endow the wife of his ſon and heir apparant, that endowment was holden void, becauſe the husband in that caſe muſt endow, and the father aſſent.

(m) 2 H. 3. Dower 199. 9 E. 3. 34. 8 E. 2. Dower 15.

And it is holden in 2 H. 3. Dower 199. That if the heir apparant be within age, yet the endowment Ex aſſenſu patris, is good. Note, Littleton in the caſe of Dower Ad oſtium Eccleſiæ, doth put the husband of full age, but here of the Dower Ex aſſenſu patris, he ſpeaketh generally.

2 H. 3. Dower 199.

¶ *Et aſſigne le quantity & les parcels.* So as both in Dower Ad (n) oſtium Eccleſiæ, & Ex aſſenſu patris, the certainty muſt be expreſſed. And therefore where books ſpeak of a moity, it is intended (as hath been ſaid) of an half in certain.

(n) 9 H. 3. Dower 190. F. N. B. 150. m. 8 E. 2. Dower 154.

¶ *Apres la mort le fitz ſa feme entera.* In this caſe, after the death of the husband, the wife ſhall enter, or have a Writ of Dower, albeit the father be alive.

¶ *Quæ il covient al feme daver un fait provant ſont aſſent a cel indowment.*

¶ *Un fait.* A Deed, Factum. This word (Deed) in the underſtanding of the Common Law, is an Inſtrument written in parchment or paper (o) whereunto ten things are neceſſarily incident: viz. Firſt, Writing. Secondly in Parchment or Paper. Thirdly, a perſon able to contract. Fourthly, by a ſufficient name. Fifthly, a perſon able to be contracted with. Sixthly, by a ſufficient name. Seventhly, a thing to be contracted for. Eightly apt words required by Law. Ninthly, Sealing. And tenthly, Delivery. A Deed cannot be written upon wood, leather, cloth, or the like, but only upon parchment or paper; for the writing upon them can be leaſt vitiated, altered, or corrupted.

(o) Bract. lib. 2. fol. 33, &c. & lib. 5. fol. 396. Brit. fol. 34. 65, 66. 101. Flet. lib. 3 cap. 14. & lib. 6. cap. 32. & lib. 3. cap. 3, 4, 5, 6.

If a Deed (p) be alleaged in Court or Plea, regularly it muſt be ſhewed to the Court; to the end, the Court may judge whether there be apt words to make it a good contract according to the rule of Law, whereof more ſhall be ſaid in the Chapter of Conditions. But if Non eſt factum be pleaded, becauſe thereby the ſealing, delivery, or other matter of fact is denied it ſhall be tried by the Country. Of Deeds, ſome be indented, and ſome be Deeds poll. Of indented, ſome be bipartite, ſome tripartite, ſome quadripartite, &c. whereof more ſhall be ſaid in the Chapter of Conditions. Alſo of Deeds, ſome be inrolled and ſome (q) be not inrolled; if it be inrolled according to the Statute of 27 Hen. 8. cap. 10. it muſt be inrolled in parchment for the ſtrength and continuance thereof, and not in paper, and ſo it was reſolved in Parliament by the Judges

(p) 4 E. 2. Fines 116. 14 E. 2. Ley 79. 4 E. 2. Ley 78. 27 H. 6. 10. 27 H. 8. 22. F. N. E. 122. I.

(q) Brit. fol. 101. Bract. lib. 2. fol. 33. Fleta lib. 3. cap. 14.

la feme entera en meſme le parcel ſauns auter aſſignment de nulluy. Mes il ad eſte dit en ceſt caſe, que il covient a la feme daver un fait de le pier provant ſon aſſent & conſent de cel endowment. M. 44 E. 3. fol. 45.

ſon, the wife ſhall enter into the ſame parcell without the aſſignment of any. But it hath been ſaid in this caſe, That it behooveth the wife to have a Deed of the father, to prove his aſſent and conſent to this endowment. *M.* 44 *E.* 3. *fol.* 45.

ges in Anno 13 Eliz. Now for the reſt of the parts of a Deed, you ſhall read thereof plentifully in our Books, & in my Reports; which by this ſhort inſtruction you ſhall eaſily underſtand.

*Unfait de feoffment.* It is properly called Charta feoffamenti, and yet if ſuch a Deed be denied, the plea is, Non eſt factum. So as of Deeds ſome concern the realty, as here a Deed of feoffment, ſome the perſonalty, as Deed of gift of goods, Obligations, Bills, &c. And ſome mixt, whereof more ſhall be ſaid in the Chapter of Releaſes.

If a man deliver a Writing ſealed, to the party to whom it is made, as an eſcrow to be his Deed upon certain conditions, &c. this is an abſolute delivery of the Deed, being made to the party himſelf; for delivery is ſufficient without ſpeaking any words (otherwiſe a man that is mute could not deliver a Deed) and tradition is only requiſite, and then when the words are contrary to the Fact, which is the delivery, the words are of none effect, non quod dictum, ſed quod factum eſt inſpicitur. And herein though there hath been (r) variety of opinions, yet is the Law now ſetled agreeable to judgments in former times, and ſo was it reſolved by the whole Court of Common Pleas. Nor it may be delivered to a ſtranger, as an eſcrow, &c. becauſe the bare act of delivery to him without words worketh nothing. And this is the ancient diverſity (t) in our Books, the record whereof I have ſeen agreeable with the reaſon of our old Books. And as a Deed may be delivered to the party without words, ſo may a Deed be delivered by words without any act of delivery, as if the writing ſealed lieth upon the table; and the Feoffor or Obligor ſaith to the Feoffee or Obligee, Go and take up the ſaid writing, it is ſufficient for you, or it will ſerve the turn, or take it as my Deed, or, the like words, it is a ſufficient delivery.

35. Aſſ. Pl. 11.
Tr. 29 H. 8. Dyer 95.

(r) Tr. 43 Eliz. inter Hawkesby and Lacher in the Kings Bench.
Hill. 12 Ja. R. in the Common Place.

(t) 13 H. 8. 19 H. 8. 8.
4 E. 3. 18. 13 H. 4. 8.

Of Deeds, and their diſtinctions you ſhall read excellent matter in antiquity. (r) Cartarum, alia regia, alia privatorum; & regiarum, alia privata, alia communis, & alia univerſitatis: Privatarum, alia de puro feoffamento & ſimplici, alia de feoffamento conditionali ſive conventionali, alia de recognitione pura, vel conditionali, alia de quicte clamantia, alia de confirmatione, &c. Verba intentioni, non è contra, debent inſervire.

(r) Bract. lib. 2. fol. 33.
Fleta lib. 3. cap. 14.

Carta non eſt (u) niſi veſtimentum donationis. Carta non eſt niſi veſtimentum orationis. Nemo tenetur amare adverſarium ſuum contra ſe. Scriptum eſt inſtrumentum ad inſtruendum quod mens vult. Carta eſt legatus mentis. (w) Benignæ ſunt faciendæ interpretationes cartarum propter ſimplicitatem laicorum ut res magis valeat quam pereat. Nil tam (x) conveniens eſt naturali æquitati quam voluntatem Domini, volentis rem ſuam in alium transferre, ratam habere.

(u) Fleta lib. 6. cap. 28.
Bracton.
Bract. lib. 2. fol. 34.
(w) Bracton lib. 2. fol. 94. 95.
(x) Idem lib. 2. fol. 18.

(y) Re, verbis, ſcripto, conſenſu, traditione,
Junctura veſtes ſumere pacta ſolent.

(y) Pl. Com. in Throgmorton's caſe fol. 161. b.

Verba cartarum fortius accipiuntur contra proferentem. Generale dictum generaliter eſt intelligendum. Verba debent intelligi ſecundum ſubjectam materiam. Carta de non ente non valet.

Note, the father may (a) make a Deed to the wife of his ſon, and ſo is the Law holden, for that the father's land by his aſſent is charged with a future Freehold, whereunto a Deed is requiſite, but to a Dower Ad oſtium Eccleſiæ, no Deed is requiſite. And here it is not well done (of him that made the addition to our Author) to vouch 44 E. 3. fol. 45. becauſe the Author himſelf vouched it not; for if he (b) meant to have vouched authorities, he would have vouched more than one in this caſe, and thoſe that (c) he vouched, he would have cited truly; but this caſe is miſtaken both in the year, and in the leaf: for where it is cited in 44 E. 3. it is in 40 E. 3. and where he ſaith it is fol. 45. it is fol. 43.

(a) 3 E. 2. Dower 116.
8 E. 2. Dower 154.
6 E. 3. 34. 40 E. 3. 43.

(b) 11 H. 3. Dower 186.
14 H. 3. Dower.
(c) 2 E. 2. Dower 125.
Vid. Stat. Walliæ anno. 12 E. 1 fol. 18. in veteri Magna Charta.
47 H. 3 Dower 174.

In aſſignment of Dower (d) either Ad oſtium Eccleſiæ, or Ex aſſenſu patris, may be made of more than a third part. But the ancient Law is that no greater aſſignment could be made in thoſe caſes, but of a third part; but leſſe he might, as appeareth in Glanvil.

(d) F. N. B. 150. P.
Glanvil lib. 6. cap. 1, 2, 3.

## *Sect.* 41.

ET ſi apres le mort le baron el enter agree a aſcun tiel dower de les dits dowers Ad oſtium Eccleſiæ, &c. donque

AND if after the death of her huſband, ſhe entreth and agree to any ſuch dower of the ſaid dowers at the Church door, &c. then

EL *eſt conclude a claimer aſcii auter dower per la common ley.* Wherein a diverſity is to be obſerved between a Dower Ad oſtium Eccleſiæ, or Ex aſſenſu patris, and a Joynture

Joynture or eſtate made to the wife in ſatisfaction of her Dower; for one of thoſe Dowers being aſſented unto, is a barr of the Dower at the Common Law, but a Joynture was no bar of her Dower at the common Law. For a right or title, that one hath to a Freehold, cannot be barred by acceptance of collaterall ſatisfaction. But a woman cannot have a double Dower, viz. Ad oſtium Eccleſiæ, &c. and at the Common Law; for the wife of one husband can have but one dower. But ſince Littleton wrote, by the Statute of 27 H. 8. if a joynture be made to (a) the wife according to the purview of that ſtatute, it is a bar of her Dower, ſo as the woman ſhall not have both joynture & dower, & to the making of a perfect joyntures, within that ſtatute, ſix things are to be obſerved. Firſt, her joynture by the firſt limitation is to take effect for her life in poſſeſſion or profit, preſently after the deceaſe of her husband. Secondly, that it be for the term of her own life, or greater eſtate. Thirdly, it muſt be made to her ſelf, & to no other for her. Fourthly, it muſt be made in ſatisfaction of her whole dower, and not of part of her dower. Fifthly, it muſt either be expreſſed or averred to be in ſatisfaction of her dower. And ſixthly, it may be made either before or after marriage.

el eſt conclude de claimer aſcun auter Dower per le Common Ley daſcuns terres ou tenements q̃r fueront a ſa dit baron. Mes ſi el voit, el poit refuſer tiel Dower Ad oſtium Eccleſiæ, &c. & donq̃ el poit eſtre endow ſolonque le cours del Common Ley.

ſhe is concluded to claim any other Dower by the Common Law of any the Lands or Tenements which were her Husbands; but if ſhe will, ſhe may refuſe ſuch Dower at the Church door, &c. and then ſhe may be endowed after the courſe of the Common Law.

Vernons caſe lib. 4. fol. 1. 1 Mariæ Dyer 91. 31 E. 3. Scire fac. 99. 20 E. 4. 3.

27 H. 8. cap. 10.
(a) 12 E. 2. Dower 158. 27 H. 8. cap. 10. verſus finem.

Concerning the firſt, if a man make a Feoffment in fee of lands or Tenements, either before or after marriage, to the uſe of the husband for life, and after to the uſe of A. for life, & then to the uſe of the wife for life in ſatisfaction of her dower; this is no Joynture within the ſtatute, becauſe by the firſt limitation it was not to take effect in poſſeſſion or profit, preſently after the death of her husband. And albeit in that caſe A. ſhould dy, living the husband, & after the death of the husband, the Wife entreth; yet this is no bar of her Dower, but ſhe ſhall have her Dower alſo, becauſe it is not within the ſaid Statute, and (as it hath been ſaid) by the Common Law it was no bar of her Dower. 2. It muſt be either in Fee tail, or for term of her own life, for an eſtate for life or lives of one or many other, or to her for an hundred or a thouſand years, &c. if ſhe live ſo long, or without ſuch limitation, is no bar of her Dower, albeit they be expreſly made in ſatisfaction of her Dower, Cauſa qua ſupra. 3. If an eſtate be made to others in Fee ſimple, or for her life upon truſt, ſo as the eſtate remain in them, albeit it be for her benefit, & by her aſſent, & by expreſſe words to be in full ſatisfaction of her Dower, yet is this no bar of her Dower. The fourth is ſo plain, as it needeth not any example. 5. A deviſe by will cannot be averred to be in ſatisfaction of her Dower, unleſs it be ſo expreſſed in the Will. 6. If the Joynture be made before marriage, the wife cannot waive it, and claim her Dower at the Common Law; but if it be made after marriage, ſhe may waive the ſame, & claim her Dower. I have touched theſe points the more ſummarily, becauſe they are reſolved at large with the reaſons thereof in Vernons caſe ubi ſupra. So as to comprehend all in few words, a Joynture (which in common underſtanding extendeth as well to a ſole eſtate, as to a joynt eſtate with her husband) is a competent livelihood of Freehold for the wife of Lands or Tenements, &c. to take effect preſently in poſſeſſion or profit, after deceaſe of the husband, for the life of the wife at leaſt, if ſhe her ſelf be not cauſe of the determination or forfeiture of it. Which ſee more at large in Vernons caſe ubi ſup. If a joynture be made to a wife of lands before the Coverture, & after the husband & the wife alien by fine thoſe lands ſo conveyed for her joynture, ſhe ſhall not be endowed of any of the other lands of her husband. But if a joynture had been made after marriage, notwithſtanding the alienation by the husband and wife thereof by fine; yet ſeeing her eſtate was originally wavable and the time of her election came not till after the deceaſe of her husband, ſhe may claim her dower in the reſidue of her lands. But in the other caſe, the joynture of the wife made before marriage, was not avoidable at all, now as the Dower Ad oſtium Eccleſiæ, & Ex aſſenſu patris, is better for the wife, becauſe in reſpect of the certainty, ſhe may enter; then the dower at the Common Law, where ſhe is driven, to her real action; and, therefore Britton calleth Dower Ad oſtium Eccleſiæ, and Ex aſſenſu patris, Eſtabliſhment of Dower by the husband, and aſſignment of dower after his deceaſe (for nothing that is uncertain is eſtabliſhed:) So a Joynture (that hath the force of a bar of dower by the ſaid act of 27 H. 8.) is, as hath been ſaid, more ſure and ſafe for the wife than either dower

Lecke and Randals caſe, lib. 4. fol. 4.

Vide Vernons caſe, ubi ſupra, fol. 2. b.

Dyer 19 Eliz. 358.

Brit. cap. 102. 103.

Ad

ad oſtium Eccleſiæ, or ex aſſenſu patris, for beſides it is as certain as thoſe others, and ſhe may enter into it, after the death of her husband and not be driven to her action. She ſhall not be barred of her Joynture albeit her husband commit treaſon or felony, as ſhe ſhall be both of her Dower, ad oſtium Eccleſiæ and ex aſſenſu patris by the Common Law. But now at this day by the Statutes of 1 E.6.cap.2. and 5 E.6. cap.11. a wife ſhall not loſe any title of Dower which to her was accrued, by the attainder of her husband by any manner of murder or other felony whatſoever. But (a) if the husband be attainted of high treaſon or petty treaſon, ſhe ſhall be (b) barred of her Dower at this day, ſo long as the attaindre ſtandeth in force.

Bract. 311. lib. 4. Britton cap. 15.

1 E.6.ca.6. 5 E.6.ca.11.

(a) Stanford 195. b.
(b) Vid. in the Chapter of Garrantie, ſect.

¶ *Conclude*, commeth of the (c) verbe Concludo, which is derived of con and claudo, to determine, to finiſh, to ſhut up, to eſtoppe, or barre a man, to plead or claim any other thing, Vid. Eſtoppell.

(c) Pl.Com.276.b. per Walſh. Vid. Sect. 693. 695. 667. 679.

## Sect. 42.

ET nota que nul feme ſerra endow ex aſſenſu patris en le forme avantdit, mes lou ſa baron eſt fits & heire apparant a ſon pier. Quære de ceux deux caies de doiement ad oſtium Eccleſiæ, &c. ſi la feme al temps del mort ſa baron, ne paſſe iage de ix. ans ſi el avera dower ou non.

AND note that no wife ſhall be endowed *ex aſſenſu patris* in form aforeſaid, but where her husband is Sonne and heir apparant to his father. *Quære* of theſe two caſes of dowment *ad oſtium Eccleſiæ, &c.* if the wife at the time of the death of her husband be not paſt the age of 9 years, whether ſhe ſhal have dower or no.

¶ *Nul feme ſerra endowed, &c.* Of this, ſufficient hath been ſaid before.

¶ *Quære de ceux deux caſes de dowment ad oſtium Eccleſiæ, &c.* And it ſeemeth that theſe dowers being made by aſſent, &c. that the ſame are good albeit the wife be within the age of nine years, for Conſenſus tollit errorem. But without queſtion a Joynture made to her under or above the age of nine years, is good.

## Sect. 43.

ET nota que en touts caſes lou le certaintie appiert queux fres ou tenements feme avet pur ſa dower, la le feme poit entrer aps la mort ſa baron, ſans aſſignment de nulluy. Mes lou le certaintie ne appiert, ſi come deſtre endow de la tierce part daver en ſeveraltie, ou del moytie ſolonque le cuſtome de tener

AND note that in all caſes, where the certainty appeareth what Lands or Tenements the wife ſhall have for her Dower, there the wife may enter after the death of her husband without aſſignment of any. But where the certainty appears not, as to be endowed of the 3. part, to have in ſeveraltie, or the moity according to the cuſtom

¶ *ET nota que en touts caſes, &c.* In all caſes where the demand of the Dower is certain as in caſe of Dower ad oſtium Eccleſiæ, or ex aſſenſu patris, there the wife after the death of the husband may enter. But where the demand is uncertain, as in Writs of Dower at the Common Law, there albeit the thing it ſelf be certain, yet ſhall ſhe not take it without aſſignment. As if a woman bring a Writ of Dower of three ſhillings rent; albeit ſhe ought to be endowed of one ſhilling, yet cannot ſhe after judgment diſtrein for twelve pence before aſſignment, becauſe the demand was uncertaine.

40 E.3.22.43. 45 E.3.4. 20 E.3.barre 132. 8 E.2.Entrie 75.

tain. And so it is if two Tenants in common be, and the Wife of one of them bring a Writ of Dower to be endowed of a third part of a moity, and have judgment to recover, yet cannot she enter without assignment, albeit the assignment cannot give her any certainty because her husbands state was incertain. Of more of this before, Sect. 39.

en severaltie, en tielz cases il covient que la Dower soit a luy assigne aps le mort del Baron, pur ē que non constant devant assignment quel part des terres ou tenaments el avera pur sa Dower.

to hold in severaltie; In such cases it behoveth that her Dower be assigned unto her after the death of her husband, because it doth not appeare before assignment what part of the lands or tenements she shall have for her Dower.

## *Sect.* 44.

Of this sufficient hath been said before, and that in this case the wife cannot enter without assignment.

¶ MEs si soient deux joyntenants de certaine terre en fee, & lun alien ceo que a luy affiert a un auter en Fee, que puis ment feme & puis devie; en ceo cas la feme pur sa dower avera la tierce part de la moytie que sa baron ad purchase, a tener en common (come sa part amounta) ovesque l'heire sa baron, & ovesque lauter joyntenant que ne aliena pas, pur ceo que en tiel cas sa dower ne poit estre assigne per metes & bounds.

But if there be two joyntenants of certaine land in fee, and the one alieneth that which belongeth to him, to another in fee, who taketh a wife, & after dieth; In this case the wife for her dower shall have the third part of the moity which her husband purchased, to hold in common (as her part amounteth) with the heire of her husband: and with the other joyntenant, which did not alien. For that in this case her dower cannot be assigned by metes and bounds.

## *Sect.* 45.

¶ The reason of this diversity is for that the joyntenant which surviveth, claimeth the land by the feoffment, and by survivorship, which is above the title of Dower, and may plead the feoffment, made to himself without naming of his companion that died, as shall be said hereafter in his proper place, but Tenants in common have several Freholds and Inheritances, and their moities shall descend to their several heirs, & therefore their wifes shall be endowed.

¶ ET est ascavoir, q̄ la feme ne serr̄ my endow de terres ou tenements q̄ sa baron tient joyntment ovesque un auter al temps de son mort: mes lou il tient en common auterment est, come en le case prochein avantdit.

And it is to be understood that the wife shall not be endowed of lands or Tenements which her husband holdeth joyntly with another at the time of his death: but where he holdeth in common, otherwise it is as in the case next abovesaid.

*Sect.*

## *Sect.* 46.

¶ ET eſt aſcavoir que ſi tenant en le tail endowa ſa feme ad oſtium Eccleſiæ, come eſt avantdit, ceo ſervera pur petit ou rien al feme, pur ceo que apres la mort ſa baron, iſſue en le taile puit entrer ſur le poſſeſſion la feme: Et iſſent puit celuy en le reverſ, ſi ne ſoit iſſue en le taile en vie, &c.

AND it is to be underſtood, that if tenant in taile endoweth his wife at the Church door, as is aforeſaid, this ſhall little or nothing at all availe the wife, for that, that after the deceaſe of her husband, the iſſue in tail may enter upon her poſſeſſion, & ſo may he in the reverſion, if there be no iſſue in taile then alive.

¶ The reaſon of this is, for that Tenant in tatle is reſtrained by the ſaid ſtatute of 13 E. 1. de donis conditionalibus.

And ſo did our Authour take the Law in his learned Reading. Here our Authours reaſon is à fine and therefore ſuch an Endowment is not to be made becauſe it is to no end. Vide ſect. 194.

## *Sect.* 47.

¶ AUTRY ſi home ſeiſie en Fee ſimple eſteant deins age endowa ſa feme al huiz del monaſterie ou deglíſe, & devie, & ſa feme enter, en ceo cas la heire la baron luy puit ouſter. Mes autrement eſt (come il ſemble) ſou la pier eſt ſeiſie en Fee, & le fits deins age endow ſa feme ex aſſenſu patris, le pier donque eſteant de plein age.

ALSO if a man ſeiſed in Fee ſimple being within age endoweth his wife at the Monaſterie or Church door, and dieth, and his wife enter, in this caſe the heire of the husband may out her. But otherwiſe it is, (as it ſeemeth) where the father is ſeiſed in Fee, and the ſon within age endoweth his Wife *ex aſſenſu patris*, the Father being then of full age.

¶ The reaſon of this diverſity is for that in the firſt caſe the husband within age is ſeiſed, and therfore he being within age cannot by a voluntary act bind himſelf: otherwiſe it is where he doth an act whereunto he is compellable by law, but in the latter caſe the Father which giveth the aſſent, is ſeiſed of the Freehold and Inheritance, & the ſon therein hath nothing, & therefore his heir ſhall not avoid it in reſpect of his Infancy. Vid. 9 H. 3. tit. Dower 197.

## *Sect.* 48.

¶ AUTRY ſly ad un auter endowment, que eſt appel dowment de la pluis beale. Et ceo eſt come en tiel caſe, que home ſeiſie de xl. acres de terre, & il tient vint

ALSO there is another dower which is called dowment *de la pluis beale*. And this is in caſe where a man is ſeiſed of forty acres of land, and he holdeth twenty acres of

¶ ET *le Seignior de que le terre eſt tenus en Chivalry enter en les vint acres tenus de luy.* For he is not poſſeſſed as a Gardein againſt whom a Writ of Dower lieth, untill he doth enter: of the Wardſhip of the body he is poſſeſſed before ſeiſure, becauſe

cause it is transitory, but he is not possessed of the land until he enter, because it is permanent. And therefore if he doth not enter, the heir within age may assign Dower, as hath been said, and as it appeareth afterwards.

Vide le statut. de bigamis, cap.3.

¶ *Si en tiel case el port breve de dower envers le Gardein en Chivalrie.* Albeit (a) the Gardein in Chivalrie or the Grantee of the King of a Wardship hath but a Chattell during the minority of the heir, and the woman shall recover a Freehold in her Writ of Dower, yet after the Gardein, as is aforesaid, hath entred into the land, that Writ lyeth against him, and not against the heir who is Tenant of the Freehold, because the Law hath trusted the Gardein to plead for the heir within age, and that is in his custody, and also for his own particular interest, and by this diversity all the Books be reconciled. So likewise if the Gardein dy, the Wife shall have a Writ of Dower against his Executors, and if there be two Executors, and one of them alone take the profits, the Writ of Dower shall be maintained against him only. If a man be possessed of the Wardship of certain land, either joyntly with his wife, or in the right of his wife, yet the writ of Dower lieth against the husband onely. Gardein in Socage shal not endow her self de la pluis beale without judgment, as shall be said hereafter.

(a) 44 E.3.13.4 H.6. 11. Stanf. pier. 13. 6 E.3.15. 16 E.3.Breve 657. Temps E.1.Breve 863. 11 E.3. Breve 473. 45 E.3.5. 17 E.3.70. 1 H 7.17.4 H.7.1. 4 H.7. aid le Roy 33. 38 E.3. 13. 9 H.6.6.b. 39 E.3.8. 8 E.2.Dower 169. 8 E.2. Breve 809. 22 E.4.Dower 10.

8 E.3.5.

¶ *Le Gardein en Chivalrie poit pleader.* The authority of Littleton is direct, the Gardein may plead this plea. But hereof arise two questions. First, Whether if the Heire be vouched by the Tenant in the Writ of Dower in the gard of the Gardein, whether he coming in as Voucher may plead that plea. The second is, Whether if the Gardein in

2 E.3.15.& 31. 18 E.3.37. 47 E.3.9.b.

acres de les dits xl. acres de terre dun per Service de Chivalrie, & les autres vint acres de terre dun auter en Socage, & prent feme, & ust issue fits, & morust, son fits esteant deins lage de xiiii. ans, & le Seigniour de que la terre est tenus en Chivalrie, entre en les xx. acres tenus de luy, & eux ad come Gardein en Chivalrie durant le nonage lenfant, & la mere de lenfant enter en le remnant, & ceo occupie come Gardein en Socage: si en tiel case la feme port Briefe de Dower enuers le Gardein en Chivalrie, desire endow de les Tenements tenus per service de Chivaler en le Court le Roy, ou en auter Court, le Gardein en Chivalrie puit plede en tiel case tout cest matter & monstre coment la feme est Gardein en Socage, coment devant est dit, & prie que serra adjudge per la Court que la feme luy meisme endowera de le pluis beale de les Tenements que el ad come Gardein en Socage solonque le value de le tierce part the said forty acres, of one by Knights Service, and the other twenty acres of another in Socage, and taketh wife, and hath issue a sonne, and dieth, his sonne being within the age of fourteen years, and the Lord of whom the Land is holden by Knights Service entreth into the twenty acres holden of him, and holdeth them as Gardein in Chivalrie, during the nonage of the infant, and the mother of the infant entreth into the residue, and occupieth it as Gardein in Socage. If in this case the Wife bringeth a Writ of dower against the Gardein in Chivalry to be endowed of the Tenements holden by Knights Service, in the Kings Court, or other Court, the Gardein in Chivalrie may plead in such case all this matter; and shew how the wife is Gardein in Socage, as aforesaid, and pray that it may be adjudged by the Court, that the wife may endow her selfe *de le pluis beale*, i. of the most fair, of the Tenements which she hath as Gardein in Soque

que el claime dower de les Tenements ten⁹ en Chivalrie p la hiefe de Dower. Et ſi la feme ceo ne puit dedire, donq̃ le judgement ſerra fait, que le Gardein en Chivalrie tiendra les terres tenus de luy durant le nonage lenfant, quit de la feme, &c.

cage, after the value of the third part which ſhe claims by her Writ of Dower, to have the Tenements holden by Knights Service. And if the Wife cannot gainſay this, then the judgment ſhall be given, that the Gardein in Chivalry ſhall hold the lands holden of him during the nonage of the infant, quite from the woman, &c.

Socage have not ſufficient, as if the land holden by ſervice of Chivalry be thirty acres, and the lands holden in Socage but five acres, whether ſhe ſhall be endowed by parcels, viz. to recover five acres againſt the Gardein in Chivalry, and to retain five acres. And as to the firſt the Gardein ſhall as well plead it, when he comes in as Voucher, as when he is Tenant. And as to the ſecond ſome ſay that the Demandant in the Writ of Dower muſt have aſſets in her hands to the value of her Dower, ſo as ſhe ſhall not be partly endowed againſt

5 E.3.67. 2 E.3.37. Lib.Intrat.Dower fo.225.a. 18 E.3.4.b.

the Gardein, and partly retain in her own hands. And they ſay, that the judgment ſhould be in part, that is, as to the land in Socage in ſeveralty, and as to the land in Chivalry to recover the third part, and compare it to the caſe in 8 E.4.3. that damages ſhall not be recovered, partly againſt the Defendant in an appeal, and partly againſt the Abettors, but entirely either againſt the one or the other. And Littleton here putteth his caſe, that the Gardein in Socage hath aſſets in value, and ſeeing it is a Dower againſt common right, they hold that ſhe muſt be entirely endowed either by her ſelf againſt common right, or againſt the Gardein according to common right. But (a) yet by the Book in 25 E.3.52. b. and others, it appeareth that ſhe may in this very caſe retain for part, and recover againſt the Gardein for part.

14 H.7.26.Keble.

(a) 25 E.3.52. b. 4 E.2. tit. diſſeiſin 10. Regiſt. judic.26. Lib.Intrat.22. 19 E.3. Breve 657. 20 E.3. judgment 175.

Gardein in Chivalry (b) ſhall plead in bar of her Dower, detainment, or eloigning of the body of the Ward, becauſe his marriage doth appertain unto him: And if the heir come in (c) as Voucher, he ſhall plead the ſame plea. But he ſhall not plead detainment of the Charters, (d) becauſe the Charters concerning the inheritance of the heir, belong not to the Gardein. The Gardein in Chivalry (e) may aſſign Dower of the lands and tenements he hath in ward or if he aſſign a rent out of thoſe lands in allowance of her Dower, it is good. If the Gardein in Chivalry aſſign too much for her Dower, the heir ſhall have a writ of Admeſurement by the Common Law. And ſo (f) if the heir within age aſſign before the Gardein enter, to the wife too much in the Dower, the Gardein ſhall have a writ of Admeſurement, by the Statute of Weſt.2. cap.7. And if the heir within age, before the Gardein enter into the land aſſign too much in Dower, he himſelf ſhall have a Writ of Admeſurement at full age: and ſome have ſaid, that in that caſe he may have it within age. (g) But if the heir (before the Gardein enter) endow the wife of more than ſhe ought, and the Gardein aſſign over his eſtate, his Aſſignee ſhall have no Writ of Admeſurement becauſe it was a thing in action. Alſo the heir ſhall have an (h) Admeſurement for the aſſignment in the life of his anceſtor, by the Common law, (i) and a Writ of Admeſurement lieth upon an aſſignment in Chancery.

(b) 7 E.3.37.8 E.3.71. (c) 17 E.3.58. (d) 10 E.3.50.6 El.Dyer 230 (e) 3 E.3.Dower 75. 8 Ed.2. Dower 255. W.2.cap.7.

(f) Bract. lib.4.314. Reg. origin.171. Flet.lib.5. cap.22.7 E.2.tit. Admeſ. 13 F.N.B. 149.

(g) 7 R.2. Admeſ.2. F.N.B.148.i. (h) 7 R.2. ubi ſup. F.N.B.149.a. (i) 7 R.2.ubi ſup. 12 H.6. Admeſ.9. F.N.B.149. 25 E.3.51.

¶ *Donques le judgement ſerra fait que le Gardein en Chivalrie tiendra les terres tenus de luy durant le nonage lenfant, quite de la feme, &c.*

¶ *Judgment.* Judicium, quaſi Juris dictum, the very voice of the law and right, and therefore Judicium ſemper pro veritate accipitur. The ancient words of Judgment are very ſignificant, Conſideratum eſt, &c. becauſe that Judgment is ever given by the Court upon due conſideration had of the Record before them: and in every Judgment there ought to be three perſons, Actor, Reus, and Judex. Of Judgments ſome be finall, and ſome not finall, whereof you ſhall read more hereafter. And now to return to our Author, it is material the ſe words (& cætera) be explained at large, viz. Et quod prædicta A. (the Demandant) capiat de terris hæred. præd &. in cuſtodia ſua exiſtenſ ad valentiam præd. 3. partis cum pertinenſ tenend. nomine dotis ſuæ pro præd. 3. parte ſuperius per eam petit. Now ſome are of opinion, that upon this Judgment the Demandant may not in any ſort endow her ſelf of the land, becauſe ſhe cannot do an act to her ſelf, but ſhe ſhall recoup the third part of the profits upon her account, and be endowed againſt the heir at his full age. But obſerve what Littleton ſaith in the next Section: but before you come to that, obſerve what privilege the Common Law giveth to

22 E.4.Dow.16. 16 E.3. Waſte 100 45 E.3.6.

the land holden by Knights ſervice, viz. that it ſhall not be diſmembred, but the whole dower taken of the lands holden in Socage, and the reaſon is, for that Knights ſervice is for the defence of the Realm, which is pro bono publico, and therefore to be favoured.

## *Sect.* 49.

ET nota, que apres tiel judgement done, la feme puit prender ſes Vicines, & en lour preſenē endower luy meſme p metes & Bonds, de la pluis beale part de les teneñts que el ad cōe gardein en Socage, Dañ & tener a luy pur terme de ſa vie, & tiel dower eſt appel Dower de la pluis beale.

AND note, That after ſuch a judgement given, the wife may take her Neighbours, and in their preſence endow her ſelf by Metes and Bonds, of the faireſt part of the Tenements which ſhe hath as Gardein in Socage, to have and to hold to her for term of her life: and this Dower is called *Dower de la pluis beale*.

And the judgment, viz. Tenend' nomine Dotis, proveth, that ſhe may have it for term of her life, for every Dower is for term of life.

## *Sect.* 50.

15 E. 3. Dower 69. 10 E. 3. tit. Waſte, 100.

¶ *Ou le judgement eſt fait, &c.* For without ſuch a judgment as appeareth before, Gardein in Socage cannot endow her ſelf, as likewiſe hath ban ſaid before.

Bract. lib. 5. 329. F. N. B. 798.

¶ *Ou en auter court.* That is by Writ of Right of Dower in the Court of the heir, if he have any, or of the Lord of whom the land is holden.

¶ *Et ceo eſt pur ſalvation del eſtate del Gardein en Chivalrie, durant le nonage de lenfant.* For the heir (before the entry of the Gardein) cannot plead the ſaid plea, that the Demandant ſhould endow her ſelf de la pluis beale. And the reaſon of this Dower de la pluis beale to be all of the Socage land, was for advancement of Chivalry for the defence of the Realm.

ET nota, q̄ tiel Dowment, ne puit eſte, mes lou le judgement eſt fait en le court le Roy, ou en auter court, &c. & ceo eſt pur ſalvation del eſtate del Gardein in Chivalrie durant le nonage le Enfant.

AND note, that ſuch dowment cannot be, but where a judgement is given in the Kings Court, or in ſome other Court, &c. and this is for the preſervation of the eſtate of the Gardein in Chivalry, during the nonage of the Infant.

## Sect. 51.

This is manifeſt of it ſelf, and therefore needeth no explanation.

ET iſſint poyes veier cinque manners de Dower, ſ̄, Dower per le Common Ley, Dower per le cuſtome, Dower ad oſtium Eccleſiæ, Dower ex aſſenſu patris, & Dower de la pluis beale.

AND ſo you may ſee five kindes of Dower, *viz.* dower by the Common Law, dower by the cuſtome, dower *ad oſtium Eccleſiæ*, dower *ex aſſenſu patris*, and dower *de la pluis beale*.

*Sect.*

## Sect. 52.

¶ FT memorandum que en chescun case lou home prent feme seise de tiel estate de tenemts, &c. issint que issue que il ad person feme poit per possibility enherit mesmes les tenements de tiel estate que la feme ad come heire al feme, en tiel case apres le mort la feme il avera mesmes les Tenements per le Curtesie de Angleterre, autrement nemy.

AND *memorandum*, that in every case where a man taketh a wife seised of such an estate of Tenements, &c. as the issue which he hath by his Wife, may by possibility inherit the same Tenements of such an estate as the Wife hath, as Heir to the Wife; In this case, after the decease of the Wife, he shall have the same tenements by the curtesie of England, but otherwise not.

*Memorandum*, This word doth every token some excellent point of learning, which our Author hath used in other places; as appeareth in the Margent. Sect. 234. 301. 335.

The matter hereof hath been partly explained in the Chapter of Tenant by the curtesie.

If a man (a) taketh a wife seised of lands or tenements in fee, and hath issue; and after the wife is attainted of felony, so as the issue cannot inherit to her; yet he shall be tenant by the Curtesie, in respect of the issue which he had before the felony, and which by possibility might then have inherited. But if the wife had been attainted of felony before the issue, albeit he hath issue afterward, he shall not be tenant by the curtesie. (a) 21 E. 3. 9. 11 H. 7. 3 H. 7. 27 Satam fol. 195. 27 E. 377. 46 E. 3. Pet. 20. 26. Ass. p. 2. 13 H. 4. 8.

¶ *Come heire al feme.*

This doth imply (b) a secret of Law, for except the wife be actually seised, the heir shall not (as hath been said) make himself heir to the wife, and this is the reason that a man shall not be Tenant by the curtesie of a seisin in Law. (b) Lib. 8. fol. 34. in Paines case.

## Sect. 53.

¶ ET auxy en chescun case lou le feme prent baron seisie de tiel estate des Tenements, &c. Issint q̄ si per possibility il puissoit happer q̄ si le feme avoit aūcū issue q̄ sa baron, & que m̄ issue purissoit per possibility enheriter mesmes les Tenements de tiel estate que le baron ad, come heire a le baron, de tiels tenements el aver sa Dower, & autrement nemy. Car

AND also in every case where a woman taketh a husband seised of such an estate in tenements, &c. so as by possibility it may happen, that the wife may have issue by her husband, and that the same issue may by possibility inherit the same Tenements of such an estate as the husband hath, as heire to the husband. Of such Tenements she shall have her Dower and otherwise not. For

¶ *Issint que si per possibility il puit happer que le feme avoit ascun issue per son baron.*

Albeit the wife be a hundred years old, or that the husband at his death was but four or seven years old, so as she hath no possibility to have issue by him; yet seeing the Law saith, That if the wife be above the age of nine years at the death of her husband, she shall be endowed; and that women in ancient times have had children at that age, whereunto no Woman doth now attain, the Law cannot judge that impossible, which by nature was possible. And in my time, a Woman above threescore years old hath had a child, and ideo non definitur in 12 H. 4. 2. 7 H. 6. 11. 22.

in jure. And for the husbands being of such tender years, he hath habitum, though he hath not potentiam at y time; and therefore his Wife shall be endowed.

¶ *Et que meſme liſſue puiſſoit per poſſibility inheriter meſmes les tenements, &c.* A man seised of land in generall tail, taketh wife, and after is attainted of felony, before the said Statute of 1 E. 6. the Issue should have inherited, and yet the wife should not have been endowed: For the Statute of W. 2. cap. 1. relieveth the issue in tail, but not the wife in that case. But at this day, if the husband be attainted of felony, the wife shall be endowed; and yet the issue shall not inherit the Lands which the father had in Fee simple. If the wife elope from her husband, &c. she shall be barred of her Dower, as hath been said, and yet the Issue shall inherit:

ſi teneñts ſont doñs a un hõe & a les hẽs que il ingendra de cozps ſa feme en tiel caſe la feme nad riẽs en les tenements, & le baron ad eſtate forſque come Donee en eſpecial tail; uncoze ſi le baron deuy ſans iſſue, meſme la feme ſerra endow de meſmꝭ les teneñts, pur ceo que iſſue que el p poſſibility puiſſoit aver per meſme l' baron, puiſſoit enheriter meſmes les tenements. Mes ſi la feme deviaſt, vivant ſa baron, & puis l' baron pꝛiſt auter feme, & moruſt, ſa ſecond feme ne ſerra my endow en ceſt caſe, cauſa qua ſupra.

if tenements be given to a man, and to the heires which he shall beget of the body of his wife; in this case the wife hath nothing in the tenements, and the husband hath an estate but as Donee in special tail; yet if the husband dy without issue, the same wife shall be endowed of the same tenements, because the issue which she by possibility might have had by the same husband, might have inherited the same tenements. But if the wife dieth, living her husband, and after the husband takes another wife and dieth, his second wife shall not be endowed in this case, for the reason aforesaid.

## Sect. 54.

¶ You may easily perceive by the context, that this shaft came never out of Littletons quiver of choice arrows; and therefore I will leave it. Only for Students sake, I will refer them to 5 E. 3. Voucher 249. 8 E. 3. Aſſ. 393. 4 H. 6. 24 F. N. B. 149.

5 E. 3. Voucher 349.
8 E. 3. Aſſ. 193.
4 H. 6. 24. F. N. B. 149.

¶ Nota, ſi un home ſoit ſeiſie de certain terres, & pꝛiſt un feme, & puis aliena meſme la terre oue garranty, & puis le feoffor, & le feoffee deviont, & le feme de le feoffor port un action de dower enuers le iſſue le feoffee, & il vouch l' heire le feoffor, & pendant le voucher & nient termine, la feme le feoffee port ſon action de dower enuers le heire le feoffee, & demaunda le tierce part de ceo

NOte, if a man be seised of certain Lands, and taketh wife, and after alieneth the same Land with warranty, and after the feoffor and feoffee die, and the wife of the feoffor bring an action of Dower against the issue of the feoffee, and he vouch the heir of the feoffor; and hanging the voucher and undetermined, the wife of the feoffee brings her action of Dower against the heire of the

de

de que sa Baron fuit seisie, & ne voile demander le tierce part del eur deux parts de que sa Baron fuit seisie, fuit adjudge, que el navera judgement tanque lauter plee puit determine.

Feoffee, and demand the third part of that whereof her husband was seised, and will not demand the third part of those two parts of which her husband was seised; It was adjudged, That she should have no judgement, untill such time as the other plea were determined.

## *Sect.* 55.

ET nota, que Vavisour dit, Que si un home soit seisie de terre & fait felonie, & puis alien, & puis est attaint, la feme avera bone action de Dower envers le Feoffee: Mes si soit eschete al Roy, ou al Seignior, el navera bee de dower Et sic vide diversitatem, & quære inde Legem.

And note, *Vavisour* saith, that if a man be seised of land & committeth felony, and after allieneth, and after is attaint, the wife shall have a good action of Dower against the Feoffee: but if it be escheated to the King, or to the Lord, she shal not have a writ of Dower. And so see the difference, and inquire what the law is herein.

THis is also of the new addition, & explosa est hæc opinio: for it is clear in Law, that the wife at the Common Law should not have ben endowed against the Feoffee. For to deterre and retain men from committing of treason or felony, the law hath inflicted five punishments upon him that is attainted of treason or felony. 1. He shall lose his life, and that by an infamous death of hanging between heaven and earth, as unworthy in respect of his offence of either. 2. His wife that is a part of himself, (Et erunt animæ duæ in carne una) shall lose her Dower. 3. His blood is corrupted, and his children cannot be heirs to him; and if he be noble or gentle before, he and all his posterity are by this attainder made ignoble. 4. He shall forfeit all his lands and tenements; And 5. all his goods and chattels: & all this is included by the Law in the Judgment, Quod suspendatur per collum. But this is not intended of all felonies, but of felony by stealing of goods above the value of xii pence, and not of petit larceny under the value. So as the woman shall lose her Dower as well against the Feoffee as against the Lord by escheat. And so it was resolved in a Writ of Dower brought by Mary Gates, late wife of John Gates, who after the coverture had infeoffed Wiseman in fee, and after commited high treason, and was thereof attainted, that the wife should not be indowed against the Feoffee; and in that case it was resolved, that so it was at the common Law in case of felony. And it is to be understood, that the wife shall not only lose her reasonable Dower at the Common Law for the felony of her husband, but also her Dower Ad ostium Ecclesiæ, and Ex assensu patris, for felony done after the Dower assigned & dower by custom also. And the reason of all this, is yielded by Littleton himself in the Chapter of Warranties, Sect. 746. to the end, that men should be afraid to commit felony. But at this day the wife of a man attainted of felony (as often hath ben said) shall be endowed by force of the Statutes in that case provided.

And it appeareth by Britton, Que feme de homicidene teigne nul dower de tenancs que lour fuit assigne per lour barons, so as the wife of a Felon attainted by the Common Law, was disabled to recover Dower Ad ostium Ecclesiæ, and Ex assensu patris, as well as her reasonable Dower which the Common Law gave her. See in Bracton many barres of Dower, as the Law was then held.

Vide Sect. 746. Vide Britton cap. 109. lib. 1. Bracton title evidens, lib. 4. fol. 197. 30. 311. Stanf. pl. cor. 194. 195.

Britton fol. 15. p. 5.

Vide sect. 746.

M. 3. & 4 Ph. & Mar. Ro. 760. in com. Banco. 8 E. 3. 20 12 H. 4. 30.

Bracton lib. 4. fol. 311.

Vide Sect. 746. Britton cap. de homicide, fol. 15. Bracton lib. 4. fol. 308. & Fleta ubi supra, & Britton ubi supra.

CHAP.

# CHAP. 6. Sect. 56.

*Tenant a terme de vie.*

¶ *Ou pur terme de vie dum auter home*, Now it is to be understood, that if the Lessee in that case dieth, living Cestuy que vie (that is, he for whose life the lease was made) he that first entreth, shall hold the land during that other mans life, & he that so entreth is within Littletons words, viz. Tenant pur auter vie, and shall be (a) punished for waste as Tenant pur auter vie, and subject to the payment of the rent reserved, and is in Law called an occupant (occupans) because his title is by his first occupation. And so if tenant for his own life grant over his estate to another, if the Grantee dieth, there shall be an occupant. In like manner it is of an estate created by Law; for if Tenant by the Curtesie, or Tenant in dower grant over his or her estate, and the Grantee dieth, there shall be an occupans. But against the King there shall be no occupant, because nullum tempus occurrit Regi. And therefore no man shall gain the Kings land by priority of entry. There can be no occupant of any thing that lieth in grant, and that cannot passe without Deed, because every occupant must claim by a Que estate, and averre the life of Ce' que vie. It were (c) good to prevent the incertainty of the estate of the occupant to add these words, (to have and to hold to him and his heirs during the life of Ce' que vie) and this shall prevent the occupant, and yet the Lessee may assign it to whom he will; or if he hath already an estate for another mans life without these words, then it were good for him to assign his estate to divers men and their heirs during the life of Ce' que vie.

Bract. lib. 2. cap. 5. & cap. 9. fol. 26. Fleta lib. 3. cap. 12. Britton fol. 83. Bracton lib. 4. fol. 170. Vide Sect. 381.

(a) Vide le Doane de Worcest. case, lib. 6. fol. 37. 20 Ass. 31. 39 E. 3. 1. 27 H. 6. Recognizance. Statham Pl. ultimo. 38 H. 6. 27. Bracton lib. 2. fol. 9. Britton fol. 84, 85.

(b) 27. Ass. p. 31. & Pl. Com. fol. 28. b. in Colthrolt case. tit. Barre 303.

(c) Littleton 167. 11 H. 4. 42. 17 E. 3. 48. 39 E. 3. 25. 7 H. 4. 46. 8 H. 4. 15. Dier 8 Eliz. 253.

¶ Tenant p terme de vie est, lou home lessa terres ou tenements a un auter pur terme de vie le Lessee, ou pur terme de vie dun auter home en tiel, case le Lessee est Tenant a terme de vie. Mes per common parlance celuy que tient pur terme de sa vie demesme, est appel Tenant pur terme de sa vie, & cestuy que tient pstr thrme dauter vie, est appel Tenant pur terme dauter vie.

Tenant for term of life is, where a man letteth lands or tenements to another for terme of the life of the Lessee, or for term of the life of another man. In this case the Lessee is Tenant for term of life. But by common speech he which holdeth for term of his own life, is called Tenant for term of his his, and he which holdeth for term of anothers life, is called Tenant for term of another mans life.

(d) Bract. lib. 4. fol. 222. 231, 232. & Vid. fol. 136, 137. Fleta lib. 4. cap. 19. 25, 26. 27. 8 E. 3. 54, 55. 31 E. 3. 41. 48 E. 3. 34. 7 E. 4. 28. 21 H. 6. 46. 10 E. 4. 3. F. N. B. 180. lib. 4. 86, 87. in Luttrels case.

Vide Sect. 381.

Note, that (d) to every Tenant for life, the Law as incident to his estate without prohibition of the party giveth him three kind of Estovers, (that is) Housbote which is twofold, viz. Estoverium ædificandi & ardendi. Ploughbote, that is, Estoverium arandi. And lastly, Haybote, and that is, Estoverium claudendi. And these Estovers must be reasonable, Estoveria rationabilia. And these the Lessee may take upon the land demised without any assignment, unlesse he be restrained by special covenant, for modus & conventio vincunt legem. Bote in the Saxon Tongue, and Estovers in the French in this case are all of one signification, that is, to have compensation or satisfaction for these purposes. Estovers commeth of the French word Estover. And the same Estoverg that Tenant for life may have, Tenant for years shall have.

You have perceived, That our Author divides Tenant for life into two branches, viz. into Tenant for term of his own life, and into Tenant for term of another mans life: to this may be added a third, viz. into an estate both for term of his own life, and for term of another mans life.

Rosses case, lib. 5. fol. 13.

As if a lease be made to A. to have to him for term of his own life, and the lives of B. and C. for the Lessee in this case hath but one Freehold, which hath this limitation; During his own life, and during the lives of two others. And herein is a diversity to be observed between several estates in several degrees, and one estate with several limitations. For in the first, an estate for a mans own life is higher than for another mans life; but in the second it is not. As if A. be tenant for life, the remainder or reversion to B. for life, A. may surrender to B. for

for the eſtate of B. for term of his own life, is higher than an eſtate for another mans life: And therefore if Tenant for life infeoffe him in ℔ remainder for life, this is a ſurrender, & no forfeiture. And albeit an eſtate for term of a mans own life be but one freehold, yet may ſeveral freeholds in certain caſes be derived out of the ſame, whereof our books are very plentiful, & wherewith you may diſpoſe your ſelves for a time. As if Tenant for life maketh a leaſe by deed, or without deed, to him in the remainder, or reverſion, in tail or in fee for the term of the life of him in the term or reverſion, & after he in the remainder taketh wife & dieth, his wife ſhall not be endowed, for Tenant for life ſhal enjoy the land again, for forfeiture it cannot be; for he in the rem was party, & ſurrender cannot be, for that his whole eſtate was not given. 24 E. 3. 32. & 68. 30. Aſſ. p. 47. 19 E. 3. Sur. 8. 13 R. 2. Dower 95. 7 H. 6. 3. per Cur. 18 E. 3. 38.

The heir maketh a leaſe for life, reſerving a rent, againſt whom the wife recovereth her Dower and dieth, the Leſſee ſhall have the land again for his life, and the rent is tolled. 7 H. 5. 4.

So it is, if Tenant for life take husband, and by deed indented, they make a leaſe to him in the reverſion for the life of the husband, reſerving a rent; this is neither forfeiture, nor abſolute ſurrender, for the cauſe aforeſaid, and the reſervation is good. 29. Aſſ. p. 64.

B. ſeiſed of lands in fee, taketh to wife If. and infeoffe C. in fee, who takes Alice to wife: C. dieth, Alice is endowed; B. dieth, If. recovereth Dower againſt Alice and dieth, Alice ſhall enjoy the land again during her life. 8 E. 2. Aſſ. 393. 45 E. 3. 13.

A. and (a) B. Joynt-tenants, A. for life, and B. in fee, joyn in a leaſe for life, A. hath a Reverſion, and ſhall joyn in an Action of Waſte. (a) 2 H. 5. 7. 13 H. 7. 15. 18 E. 2. Br. 835. F. N. B. 59. ſ.

Tenant for (b) life, and he in the Reverſion joyn in a leaſe for life; it is ſaid, that they ſhall joyn in an Action of Waſte, and that the Leſſee for life ſhall recover the place waſted, and he in Reverſion, Dammages. (b) 27 H. 8. 13. 13 H. 7. 15. 22 H. 6. 24. 17 E. 3. 9. b.

If a man grant (c) an eſtate to woman dum ſola fuit or durante viduitate or quam diu ſe bene geſſerit, or to a man & a woman during the coverture, or as long as the Grantee dwell in ſuch a houſe, or ſo long as he pay x. l. &c. or until the Grantee be promoted to a Beneflee, or for any like incertain time, which time, as Bracton ſaith, is tempus indeterminatum: In all theſe caſes, if it be of lands or tenements, the leſſee hath in judgment of law an eſtate for life determinable if livery be made; & if it be of Rents advowſons, or any other thing that lie in grant, he hath a like eſtate for life by the delivery of the Deed, and in count and pleading he ſhall alleage the leaſe, and conclude that by force thereof he was ſeiſed generally for term of his life. (c) 37 H. 6. 27. 25 E. 3. 69. 14 E. 2. Grant. 92. 3 E. 3. 15. 14 H. 8. 13. Breſton lib. 4. fol. 207. Fleta lib. 3. cap. 12.

If a man make a leaſe of a Mannor, that at the time of the leaſe made is worth xx l. per an. to another until C. l be paid; in this caſe, becauſe the annual profits of the Mannor are incertain, he hath an eſtate for life, if livery be made determinable upon the levying of ℔ C. l. But if a man grant a Rent of xx l. per an. until C. l. be paid, there he hath an eſtate for five years; for there it is certain & depends upon incertainty. And yet in ſome caſes a man ſhall have an incertain intereſt in lands or tenements, and yet neither an eſtate for life, for years, or at will. As if a man by his will in writing, deviſe his lands to his Executors for payment of debts, and until his debts be paid; in this caſe the Executors have but a Chattel, and an incertain intereſt in the land until his debts be paid; for if they ſhould have it for their lives, then by their death their eſtate ſhould ceaſe, and the debts unpaid: but being a Chattel, it ſhall go to the Executors of Executors for the payment of his debts; and ſo note a diverſity between a deviſe and a conveyance at the Common Law in his life time. And tenant by Statute merchant, by Statute ſtaple, & by Elegit, have incertain intereſts in lands or tenements; and yet they have but Chattels, and no freehold, whoſe eſtates are created by divers Acts of Parliament, whereof more ſhall be ſaid hereafter. And ſo have Gardians in Chivalry, which hold over for ſingle or double value incertain intereſts, and yet but Chattels. 33. Aſſ. p. 2. Lib. 8. fol. 9. Mannings caſe. 3 H. 7. 13. 27 H. 8. 5. 24 H. 8. 13. 12. Aſſ. p. 8.

If one grant lands or tenements, reverſions, remainder, rents, advowſons, commons, or the like, & expreſſe or limit no eſtate, the Leſſee or Grantee (due ceremonies requiſite by Law being performed) hath an eſtate for life: The ſame Law is of a declaration of a uſe. A man may have an eſtate for term of life determinable at will; As if the King doth grant an office to one at will, and grant a rent to him for the exerciſe of his office for term of his life, this is determinable upon the determination of the office. Vide ſect. 381. 7. Aſſ. Pl. 1. 13 El. Dyer 300. 7 E. 4. 23.

A. Tenant in fee ſimple make a leaſe of lands to B. to have and to hold to B. for term of life, without mentioning for whoſe life it ſhall be, it ſhall be deemed for term of the life of ℔ Leſſee; for it ſhall be taken moſt ſtrongly againſt the Leſſor, & as hath been ſaid, an eſtate for a mans own life is higher than for the life of another. But if tenant in tail make ſuch a leaſe without expreſſing for whoſe life, this ſhall be taken but for the life of the Leſſor, for two reaſons. Vide ſect. 381.

Firſt, when the conſtruction of any Act is left to the Law, the Law which abhorreth injurye wrong will never ſo conſtrue it, as it ſhall work a wrong: and in this caſe, if by conſtruction it ſhould be for the life of the Leſſee, then ſhould the eſtate tail be diſcontinued, & a new reverſion gained by wrong: but if it be conſtrued for the life of the Tenant in tail, then no wrong is wrought. And it is a general rule, that whenſoever the words of a Deed, or of the parties without Deed may have a double intendment, and the one ſtandeth with Law and right,

right, and the other is wrongful, and against Law, the intendment that standeth with Law shall be taken.

4 E. 2. Writ. 11. 17 E. 3. 7.

Secondly, The Law more respecteth a lesser estate by right, than a larger estate by wrong, as if Tenant for life in remainder disseise Tenant for life, now he hath a Fee simple; but if Tenant for life die, now is his wrongful estate in fee by judgment in Law changed to a rightful estate for life.

19 H. 6. 7 H. 4. 32. 6 E. 3. 17. 7 E. 3. 66. 18 E. 3. 60. 23 E. 3. cap. 19 &c. 1 H. 4. 44. 38 E. 3. 23 324.

If a man retain a servant generally, without expressing any time, the Law shall construe it to be for one year, for that retainer is according to Law. Vide 23 E. 3. cap. 1, &c. To shut up this point, it hath been adjudged, that where Tenant in tail made a lease to another for term of life generally, and after released to the Lessee and his heirs, albeit between the Tenant in tail, and him a Fee simple passed; yet after the death of the Lessee, the entry of the issue in tail was lawful; which could not be, if it had been a lease for life of the Lessee, for then by the release it had been a discontinuance executed. But let us now return to Littleton.

## Sect. 57.

THis and the rest that follow in this chapter, concerning the description of the Feoffor and Feoffee, Donor and Donee, and Lessor and Lessee, are evident.

*Et est ascavoir que li y ad le Feoffor, & le Feoffee, &c.* Vide Sect. 2. Where a light touch is given who may purchase. Now somewhat is to be said, who have ability to enfeoffe, &c. and may be a Feoffor, Donor, Lessor, &c. Whosoever is disabled by the Common Law to take, is disabled to infeoffe, &c. But many that have capacity to take, have no ability to infeoffe, &c. As men attainted of Treason, Felony, or of a Præmunire, Aliens born, the Kings Villains, Traitors, Felons, &c. he that hath offended against the Statutes of Præmunire, after the offences committed, if attainders ensue. Ideots, madmen, a man deaf, dumb, and blind from his Nativity, a Fem Covert, an Infant, a man by dures: for the feoffments, &c. of these may be avoided. But an Heretick, though he be convicted of heresie, a Leper removed by the Kings writ from the society of men, Bastards, a man deaf, dumb, or blind; so that he hath understanding and sound memory, albeit he expresse his intention by signs, Villain of a common

Bracton lib. 5. fol. 415. Britton fol. 88. Fleta lib. 3. cap. 3. & lib. 6. cap. 39, 40.

2 H. 5. cap. 7. which is repleaded. Dect. and Stud. lib. 2. cap. 29.

ET en ascavoir que il y ad le Feoffor & le Feoffee, Donor & le Donee, le Lessor & le Lessee. Le Feoffor est proprement lou home enfeoffa un auter en ascuns terres ou tenements en fee simple, celuy que fist le feoffment est appel feoffour, & celuy a que le feoffment est fait, est appel, feoffee. Et le Donour est proprement lou un home done certaine terres ou tenements a un auter en le taile, celuy que fist le done est appel le Donor, & celuy a que le done est fait, est appel le Donee. Et le Lessor est proprement lou un home lessa a un auter certain terres ou tenements pur terme de vie, ou per terme des ans, ou a tener a volunt: celuy que fist le leas est appel les-

AND it is to be understood, that there is Feoffor and Feoffee, Donor, & Donee, Lessor and Lessee. Feoffor is properly where a man enfeoffes another in any Lands or tenements in Fee simple; he which maketh the feoffment, is called the Feoffor, and he to whom the Feoffment is made, is called the Feoffee. And the Donor is properly where a man giveth certain lands and tenements to another in tail; he which maketh the gift, is called the Donor, & he to whom the gift is made, is called the Donee. And the Lessor is properly where a man letteth to another lands or tenements for term of life, or for term of years, or to hold at will; He which maketh the lease, is called Lessor,

for

for ẽ celuy a que le leas est fait, est appel Lessee. Et chescun que ad estate en ascun terres ou tenements pur terme de sa vie ou pur terme dauter vie, est appel Tenant de Franktenement, ẽ nul auter de meindre estate pot aver Franktenement, mes ceux de greinder estate ont franktenement car celuy en fee simple ad franktenement ẽ celuy en le taile ad franktenement, &c.

and he to whom the lease is made, is called Lessee. And every one which hath an estate in any Land or Tenements for terme of his owne or another mans life, is called Tenant of Freehold, and none other of a lesser estate can have a Freehold, but they of a greater Estate have a Freehold; For hee in Fee simple hath a Freehold, and Tenant in taile hath a Freehold, &c.

ri domino feodi servicium ei debitum quod pertinet ad feodum illud. Upon which Act I have heard great question (d) made, whether the feoffment made against that statute were voidable or no, and some have said that the statute intended not to avoid the feoffment, but implicite to direct the tenure, viz. that the Tenant should not infeoff another of parcel to hold of the chief Lord (for is of the next Lord) but to hold of himself, and then the Lord may distrein in every part for his whole service without any prejudice unto him. But this opinion is against (e) the authority of our Books, and against the said statute of Magna Charta. For, first it is agreed in 10 H. 7. fo. as well before the statute as after, a Tenant which held two acres might have alienen one of the Acres to hold of him, and notwithstanding the Lord might have distrained in which of the Acres he would for his whole services: and reason teacheth that before that statute a Tenant could not have alienen parcel to hold of the chief Lord; for the Seignory of the Lord was entire, for the which the Lord might distrein in the whole or in any part, and which the Tenant by his own Act cannot divide to the prejudice of the Lord to barre him to distrein in any part for his Services, as he should doe, if he should infeoff another of parcell to hold of the chief Lord. But the Tenant might have made a Feoffment of the whole to hold of the chief Lord, for there no prejudice insued to the Lord. Others have said, and they said truly, that the intention of the statute was that the Tenant could not alien parcel (which might turn to the prejudice of the Lord) without his assent, and this appeareth clearly by the Mirror. And by this statute the King took benefit to have a Fine for his Licence, before which statute no Fine for alienation was due to the King. For it is (f) adjudged that for an alienation in time of Henry the second, no Fine was due, and it appeareth in our Books, that if an alienation had been made before 20 H. 3. no fine was due to the King for alienation: Now it is to be observed that oftentimes for the better understanding of our Books, the advised Reader must take light from Historys and Chronicles especially for distinction of times. And therefore Matthew Paris (who in his Chronicle reciteth Magna Charta) testifieth, King Henry the third by evill counsell (and especially, as the truth was, of Hubert de Burgo then chief Justice) sought to avoid the great Charter first granted by his father King John, and afterward granted and confirmed by himself in the ninth of Henry the third, for that as he said King John did grant it by Duress, and that he himself was within age when he granted and confirmed it. But forasmuch as afterwards the said King Henry the third in the twentieth year of his Reign, at what time he was nine and twenty years old, did grant and confirm the said great Charter for that cause to put out all scruples in the twentieth year of Henry the third named, albeit in law the Kings Charter granted in the ninth year of Henry the third, was of force and validity notwithstanding his nonage, for that in judgement of Law the King, as King, cannot be said to be a Minor

person before entry or the like may intreat &c.

(a) All Feoffments, Gifts, Grants, and Leases by Bishops, albeit they be confirmed by the Dean and Chapter, by any of the Colledges or Halls in either of the Universities or elsewhere, Deans & Chapters, Master or Gardian of any Hospital, Parson, Vicar, or any other having Spirituall or Ecclesiasticall living, are also to be avoided, (b) and all the said bodies politique or corporate are by the the Statutes of the Realm disabled to make any conveyances to the King, or to any other, as it hath been adjudged: which Statutes have been made since Littleton wrote.

It is provided (c) by the Statute of Magna Charta, quod nullus liber homo det de cætero amplius alicui de terra sua, quam ut de residuo terræ suæ posset sufficiens fieri

(a) 32 H. 8. cap. 28. 1 El. not printed. 13 El. ca. 10. 14 El. ca. 11. 21 El. ca. 20. Ja. ca.

(b) Lib. 4. fo. 76. 12 co. lib. 5. fol. 6. 14. lib. 6. fo. 37. lib. 11. fol. 67. Magdalen Colledge case. Vide Lect. de W. 2. cap. 41.

(c) Magna Charta ca. 32. Mirror cap. 5. sect. 2. Glanvil lib. 7. cap. 1. Bract. lib. 1. Brit. 88. &c. Fleta lib. 3. cap. 3.

(d) Vide an excellent declaration hereof inter adjucat. coram Rege. Trin. E. 1. fol. 2. in Thesaur. Nott. & Derb.

(e) Bract. lib. 1. 10 H. 7. fol. 10. b. 33 E. 3. avowrie 255. Staml. prer. fol. 29. 8 E. 4. 12.

Mirror cap. 5. sect. 2. Fleta lib. 5. cap. 3.

(f) 26 Ass. p. 17. 20 Ass. p. 17. 20 E. 3. avowr. 126. 34 E. 3. c. 15. Vide Staml. 29. 30. Matt. Paris. Walsingham 37. 39.

Vide 5 H. 3. Mordanc. 53. Magna Charta there vouched, which was the Charter of King John. for it was cited before 9 H. 3.

nor, for when the Royall body Politick of the King doth mat with the natural capacity in one person, the whole body shall have the quality of the Royal Politick, which is the greater and more worthy, wherein is no minority. For, Omne majus trahit ad se quod est minus. And it is to be observed, that no Record can be found, that either a licence of alienation was sued, or pardon for alienation was obtained, for an alienation without licence at any time before the twentieth year of Henry the third, and it is holden in the twentieth of Edward the third, that a licence for alienation grew from this Statute.

20 Ass. Pl. 17. by Skipwith.

b Now in case of a common person it was the common opinion, that if the Tenant had alienated any parcel contrary to the said Act, that he himself was bound by his own Act, but his heir might have avoided it, and in the Kings case many held the same opinion. For Britton saith, Ne Counts, ne Barons, ne Chivaler, ne Serjeants, que reignont en chiefe de nous ne purrount my dismember nous fees saunce licence: que nous ne puissent per droit engettre les purchasors, &c. And herewith agreeth Fleta and our Books. But now by the Statute 1 E. 3. cap. 12. & 34 E. 3. cap. 15. although the Kings Tenant in chief or by Grand Serjeanty do alien all or any part without licence, yet is there not any forfeiture of the same, but a reasonable fine therefore to be paid. And note, it appeareth by the preamble in 1 E. 3. that complaint was made that Land holden of the King in Capite, being alienes without licence, was seised as forfeited. And in the case of a common person, the Statute of 18 E. 1. De quia emptores terrarum hath made it clear, for this hath in effect as to the common persons taken away the said Statute of Magna Charta, cap. 32. for thereby it is provided, Quod liceat unicuique libero homini terras suas seu tenementa sua, seu partem inde ad voluntatem suam vendere, ita quod feoffatus teneat, &c. de Capitali Domino. And herein are divers notable points to be observed. First, that this word licet proveth that the Tenant could not, or at least wayes was in danger to alien parcell of his Tenancy, &c. upon the said Act of Magna Carta. Secondly, that upon the feoffment of the whole, the Tenant shall hold of the chief Lord. Thirdly, that the Tenant might infeoff one of part to hold pro particula of the chief Lord. But this Act (the King being not named) doth not take away the Kings fine due unto him by the Statute of Magna Charta.

Regist. int. les breves de onerand. pro rata portione.

¶ *Franktenement.* Here it appeareth that Tenant in Fee, Tenant in Taile, and Tenant for life, are said to have a Franktenement, a Frahold so called, because it doth distinguish it from terms of years, chattels upon incertain interests, lands in Villenage or Customary, or Copyhold lands. Liberum autem tenementum dicitur ad differentiam Villenagii & villanorum qui tenent Villenagium quia non habent actionem nec assisam, &c. item quod sit suum & non alienum, hoc est si teneat nomine alieno ut firmarius & ad terminum vel sicut creditor ad vadium. And note that Tenant by Statute Merchant, Statute Staple, or Elegit are said to hold land ut liberum Tenementum, until their debt be paid, and yet in troth they (as hath been said) have no Freehold but a Chattle, which shall go to the Executors, and the Executors also if they be ousted shall have an assise. But (ut) is similitudinary, because they shall by the Statutes have an assise as Tenant of the Freehold shall have, and to that respect hath a similitude of a Freehold, but Nullum simile est idem.

Brast. lib. 4. fol. 224. Britton cap. 32. & 47. Bracton lib. 4. fol. 22. Regist. Judic. 68. 73.

28 Ass. p. 7. W. 2. cap. 18. Stat de Mercatoribus an. 13 E. 1. 27 E. 3. cap. 9. 23 H. 8. cap. 6. F. N. B. 178. 7.

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# CHAP. 7. Sect. 58.

## *Tenant for terme of years.*

¶ *Lou home lessa terres, &c. Lessa,* and Lease is (a) derived of the Saxon word Leapan, or Leasum, for that the Lessee commeth in by lawfull means (b) and dimittere is in French layser to depart with or forgoe.

(a) Mirror cap. 2. Sect. 17. Bracton lib. 2. cap. 16. & lib. 4. fol. 220. Fleta lib. 3. cap. 12. & lib. 5. cap. 34.
(b) For the word (dimitto) see Sect. 531.

When Littleton wrote, many persons might make Leases for years, or for life, or

¶ Tenant pur terme dans ē lou home lessa terres ou Tenements a un auter pur terme de certaine ans solonque le number des ans que est accord perenter de Les-

¶ Tenant for terme of yeares is, where a man letteth Lands or Tenements to another for terme of certaine yeares, after the number of yeares that is accorded betweene the

for

for le Lessee. Et quant le Lessee enter pur force del leas, donque il est Tenant pur terme des ans. Et si le Lessor en tiel case reserve a luy un annuall rent sur tiel leas il poit eslier a distrainer pur le rent en les tenements lesses, ou il poit aver un action de debt pur les arrerages enuerz le Lessee. Mes en tiel case il covient que le Lessour soit seisie de mesmes les tenemẽts al temps del leas, car il est bone plee pur le Lessee adire, q̃ le Lessor navoit riens en les tenements al tẽps de le leas si non que le leas soit fait per fait endent, en quel case tiel plee donque ne gist en le bouch le Lessee a pleader.

Lessor and the Lessee, and when the Lessee entreth by force of the Lease, then is he Tenant for terme of yeares, and if the Lessor in such case reserve to him a yearely Rent upon such Lease, hee may chuse for to distrain for the Rent in the Tenements letten, or else he may have an Action of Debt for the Arrearages against the Lessee. But in such case it behoveth that the Lessor be seised in the same tenements at the time of this Lease, for it is a good plee for the Lessee to say, that the Lessor had nothing in the tenements at the time of the lease, except the lease be made by Deed indented, in which case such Plea lieth not for the Lessee to plead.

lives at their will and pleasure, which now cannot make them firm in Law. And some persons may now make leases for yeares, or for like or lives (observing due incidents) firm & good in Law, who of themselves could not so do when Littleton wrote, and this by force of divers Acts of Parliament (c) as namely 32 H.8. 1 Eliz. 13 Eliz. 18 Eliz. and 1 Jac. Regis, of which statutes one is enabling, and the rest are disabling. When Littleton wrote, Bishops with the confirmation of the Dean and Chapter, Master & Fellowes of any Colledge, Deans and Chapters, Master or Gardian of any Hospitall, and his Brethren, Parson or Vicar with the consent of the Patron and Ordinary, Archdeacon, Prebend, or any other body Politique, Spirituall and Ecclesiasticall (Concurrentibus his quæ in jure requiruntur) might have made Leases for lives or years without limitation or stint. And so might they have made gifts in tayle or states in Fee at their will and pleasure, whereupon not only great decay of Divine Service, but Dilapidations and other inconveniencies ensued, and therefore they were disabled and restrained by the said Acts of 1 Eliz. 13 Eliz. and 3 Jac. Regis to make any State or Conveyance to the King at all, or to the subject, but there is excepted out of the restraint or disability, Leases for three lives, or one & twenty years, with such reservation of Rent, and with such other provisions & limitations as hereafter shall appear. Also they may make grants of ancient offices of necessity in ancient Fees, Concurrentibus his quæ in jure requiruntur, for these grants are not within the statute of 32 H.8. but by construction, they are not restrained by the statutes of 1 Eliz. or 13 Eliz. because these ancient offices be of necessity, & with the ancient fees, & so no diminution of revenue.

(c) 32 H.8. ca. 28. 1 Eliz. not printed but in the Abridgment. 13 Eliz. ca. 10. 18 Eliz. cap. 6. 1 Jac. cap. 3.

Lib. 5. fol. 14. case de Ecclesiastical persons. Lib. 11. fol. 66. Magdalen Colledge case. Leveſque de Sarums case lib. 10. fol. 60, 61.

There be three kinds of persons that at this day may make leases for three lives, &c. in such sort as hereafter is expressed, which could not so do when Littleton wrote, viz. First, any person seised of an estate tail in his own right. Secondly, any person seised of any estate in Fee simple in the right of his Church. Thirdly, any husband & wife seised of any estate of inheritance in Fee simple or Fee Tail in the right of his wife, or joyntly with his wife before the Coverture or after, viz. the Tenant in tail by Deed to bind his issues in Tail, but not the reversion or remainder, the Bishop &c. by Deed without the Dean & Chapter to bind his Successours, the husband and wife by Deed to bind the wife and her and their heirs & these are made good by the Statute of 32 H. 8. which enableth them thereunto. But to the making good of such leases by the said Statute, there are nine things necessarily to be observed belonging to them all, and some other to some of them in particular.

First, the lease must be made by Deed indented, and not by Deed Poll or by Parol.

Secondly, it must be made to begin from the day of the making thereof, or from the making thereof.

Lib. 5. fol. 6. Seig. Mountjoyes case.

Lib.5.fol.2.Elmers caſe.

Thirdly, If there be an old leaſe in being, it muſt be ſurrendred or expired, or ended within a year of the making of the leaſe, and the ſurrender muſt be abſolute and not conditional.

Fourthly, There muſt not be a double leaſe in being at one time, as if a leaſe for years be made according to the Statute, he in the reverſion cannot expulſe the Leſſee, & make a Leaſe for life or lives according to the ſtatute, nor è converſo, for the words of the ſtatute be, to make a Leaſe for three lives, or one and twenty years, ſo as one or the other may be made, and not both.

Fifthly, It muſt not exceed three lives, or one and twenty years from the making of it, but it may be for a leſſer term or fewer lives.

(d) Lib.5.fol.2. Jewels caſe. 17 E.3.75.9 Aſſ.24. 14 E.3.Scire facias 22. 10 H.6.2.3 H.6.21.

Sixthly, It muſt be of Lands, Tenements, or Hereditaments, manurable or corporeall, which are neceſſary to be letten, and whereout a rent by Law may be reſerved, and not (d) of things that lie in grant, as Advowſons, Fairs, Markets, Franchiſes, and the like whereout a rent cannot be reſerved.

(e) Lib.6.fol.37. Deane and Chapter of Worceſters caſe.

Seventhly, It muſt be of Lands or Tenements, which have moſt commonly bin letten to farm, or occupied by the farmers thereof by the ſpace of 20. years next before the leaſe made, ſo as if it be letten for 11. years at one or ſeveral times within thoſe 20. years it is ſufficient. A grant (e) by copy of Court roll in fee for life or years is a ſufficient letting to farm within this ſtatute, for he is but a Tenant at will according to the cuſtom, & ſo it is of a leaſe at will by the Common Law, but thoſe lettings to farm muſt be made by ſome ſeiſed of an eſtate of inheritance & not by a Gardian in chivalry, tenant by the curteſy, tenant in dower, or the like.

Lib.6.fol.6. Seignior Mountjoyes caſe.

Eighthly, That upon every ſuch leaſe there be reſerved yearly during the ſame leaſe due & payable to the Leſſors, their heirs and ſucceſſors, &c. ſo much yearly farm Rent, or more, as hath been moſt accuſtomably yielded or paid for the lands, &c. within twenty years next before ſuch leaſe made. Hereby firſt it appeareth (as hath been ſaid) that nothing can be demiſed by authority of this Act, but that whereout a Rent may be lawfully reſerved. Secondly, That where not only a yearly rent was formerly reſerved, but things not annual, as heriots, or any fine or other profit at or upon the death of the Farmor, yet if the yearly rent be reſerved upon a leaſe made by force of this ſtatute, it ſufficeth by the expreſs words of the Act. Thirdly, If he reſerve more than the accuſtomable Rent, it is good alſo by the expreſs letter of the Act; but if twenty acres of land have been accuſtomably letten, & a leaſe is made of thoſe twenty, and of one acre which was not accuſtomably letten, reſerving the accuſtomable yearly Rent, and ſo much more as exceeds the value of the other acre, this leaſe is not warranted by the Act, for the accuſtomable Rent is not reſerved, ſeeing part was not accuſtomably letten, & the Rent iſſueth out of the whole. Fourthly, if Tenant in Tail let part of the land accuſtomably letten, and reſerve a Rent pro rata, or more, this is good, for that is in ſubſtance the accuſtomable Rent.

Lib.5.fol.37.38. Deane and Chapter of Worceſters caſe.

Lib.5.fol.5. Seignior Mountjoyes caſe, lib.6.fol.37.

Fifthly, If two Coparceners be Tenants in Tail of twenty acres every one of equal value, and accuſtomably letten, and they make partition, ſo each have ten acres, they may make leaſes of their ſeveral parts, each of them reſerving the half of the accuſtomable Rent. Sixthly, if the accuſtomable Rent had been payable at four dayes or feaſts of the year, yet if it be reſerved yearly payable at one Feaſt, it is ſufficient, for the words of the ſtatute be reſerved yearly.

Lord Mountjoyes caſe, ubi ſupra.

Ninthly, nor to any leaſe to be made without impeachment of waſte, therefore if a leaſe be made for life, the remainder for life, &c. this is not warranted by the ſtatute, becauſe it is diſpunishable of waſte. But if a leaſe be made to one during three lives, this is good, for the occupant, if any happen, ſhall be puniſhed for waſte. The words of the ſtatute be (ſeiſed in the right of his Church) yet a Biſhop that is ſeiſed jure Epiſcoparus, a Dean of his ſole poſſeſſions in jure Decanatus, an Archdeacon in jure Archidiaconatus, a Prebendary and the like are within the ſtatute, for every of them generally is ſeiſed in jure Eccleſiæ.

Deane and Chapter of Worc. caſe, ubi ſupra.

Deane and Chapter of Worc. caſe, ubi ſupra.

But a Parſon and Vicar are excepted out of the ſtatute of 32 H.8. & therefore if either of them make a leaſe for three lives, &c. of lands accuſtomably letten, reſerving the accuſtomed Rent. it muſt be alſo confirmed by the Patron and Ordinary, becauſe it is excepted out of 32 H.8. & not reſtrained by the ſtatutes of primo or 13 Eliz. And what hath been ſaid concerning a leaſe for three lives, doth hold for a leaſe for one and twenty years.

3 E.6.1. Mar. tit. Leaſes, Bre.62.

Thus much ſhall ſuffice to have ſpoken of the inabling ſtatute of 32 H.8. the better to inable the Reader to underſtand both this and that which followes. Now to ſpeak ſomewhat of the diſabling ſtatutes of 1 Eliz. and 13 Eliz. the words of the exception out of the reſtraint and diſability of 1 Eliz. are, Other then for the term of twenty one years, or three lives, from ſuch time as any ſuch grant or aſſurance ſhall be given, whereupon the old and accuſtomed yearly rent, or more, ſhall be reſerved: And to that effect is the exception in the ſtatute of 13 Eliz. Firſt, it is to be underſtood, that neither of theſe diſabling Acts, nor any other, do in any ſort alter or change the inabling ſtatute of 32 H.8 but leaveth it for a pattern in many things for leaſes to be made by others. Secondly, It is to be known, that no leaſe made according to the exception of 1 Eliz. or 13 Eliz. and not warranted by the ſtatute of 32 H.8. if it be made by

by a Biſhop or any ſole Corporation, but it muſt be confirmed by the Deans & Chapters, or others y have intereſt, as hath been ſaid in the caſe of the Parſon and Vicar, but examples do illuſtrate. If a Biſhop make a leaſe for one and twenty years, and all thoſe years being ſpent ſaving three or more, yet may the Biſhop make a new leaſe to another for twenty one years, to begin from the making. according to the exception of the ſtatute, but not a leaſe for life or lives, as hath been ſaid, and this concurrent leaſe hath been reſolved to be good, as well upon the exception of 1 Eliz. in the caſe of Biſhops, as upon 13 Eliz. which extend to ſpiritual and eccleſiaſtical Corporations, aggregate of many, as Deans and Chapters, &c. which 32 H. 8. did not: but in the caſe of the concurrent leaſe, in the caſe of the Biſhop it muſt be confirmed. Alſo the exception of 1 and 13 Eliz. doth differ from the ſtatute of 32 H. 8. for the Leaſes for years to be made according to the exceptions of the ſtatutes of 1 & 13 Eliz. muſt begin from the making, & not from the day of the making, but by force of 32 H. 8. from the day of the making. And although the ſtatutes of the firſt or thirteenth of Eliz. do not appoint a Leaſe to be made by words, yet muſt it therein and in the other eight properties or qualities before mentioned & required by 32 H. 8. follow the pattern thereof (the concurrent Leaſe only except.) Although the exception in 1 & 13 Eliz. concerning the accuſtomed Rent is more general than y of 32 H. 8. and there is not any proviſion for leaſes made diſpunishable of waſte, &c. yet muſt y pattern of 32 H. 8. be followed: for leaſes without impeachment of waſt made by ſuch Spiritual & Eccleſiaſtical perſons are unreaſonable & cauſes of dilapidations. Thus much have I thought good to lead the ſtudious Reader by the hand, and to conduct him in the right way. And to put all theſe things together upon conſideration had of all the ſtatutes, which otherwiſe might have prima facie ſeemed to him a diffuſe & dark Labyrinth. And albeit it be provided by the ſaid Acts of 1 & 13 Eliz. y all grants &c. leaſes, &c. made, &c. (other than leaſes for three lives, or one and twenty years according to thoſe Acts) ſhould be utterly void and of none effect, to all intents, conſtructions, and purpoſes, yet grants, or leaſes, &c. not warranted by thoſe Acts are not void, but good againſt the Leſſor if it be a ſole Corporation, or ſo long as the Dean or other head of the Corporation remain, if it be a Corporation aggregate of many, for the ſtatute was made in benefit of the Succeſſor. But let us now return to our Author.

Lib. 3. fo. 59, 60. Lincolne Colledg caſe. P. 39. Eliz. inter Hunt and Singleton, ibidem.

¶ *Homeleſſa.* Here Littleton putteth this caſe where one letteth, &c. It is therefore neceſſary to be ſeen what the Law is where divers joyn in a Leaſe. If the Tenant of the Land, and a ſtranger which hath nothing in the Land, joyn in a Leaſe for years by Deed indented of one and the ſelf ſame Land, this is the Leaſe of the Tenant only, & the confirmation of the ſtranger, and yet the Leaſe as to the ſtranger works by concluſion.

Vide ſect. 346, 11 H. 4. 1. 5 E. 4. 4, 2. 27 H. 8. 16.

If two ſeverall Tenants of ſeverall Lands joyn in a Leaſe for years by Deed indented, theſe be ſeveral Leaſes & ſeveral Confirmations of each of them, from whom no intereſt paſſeth, & works not by way of concluſion in any ſort, becauſe ſeveral intereſts paſs from them. B. Tenant for life of C. and he in the remainder or reverſion in Fee, having ſeveral eſtates in one and the ſame Land, joyn in a leaſe for years by Deed indented, this Demiſe ſhall work in this ſort, during the life of C. it is the Leaſe of B. and confirmation of him in y reverſion or remainder, & after the deceaſe of C. it is the Leaſe of him in the Reverſion or Remainder, and the Confirmation of B. for ſeeing the Leſſors have ſeveral eſtates, the Law ſhall conſtrue the Leaſe to move out of both their eſtates reſpectively, and every one to let y which he lawfully may let, and not to be y Leaſe only of Tenant for life, and the Confirmation of him in y Remainder or Reverſion; neither is there any concluſion in this caſe, as ſhall be ſaid hereafter. Tenant for life, & he in the Remainder in Fee, made a Leaſe for years by Deed indented, the Leſſee was ejected, and brought an ejectione firmæ, and declared upon a Demiſe made by Tenant for life & him in the Remainder, & upon not guilty pleaded, this ſpecial matter was found, and that Tenant for life was living, and it was adjudged (a) againſt the pl. for during the life of the Tenant (as hath been ſaid) it is the Leaſe of the Tenant for life, and therefore during his life he ought to have declared of a Leaſe made by him, & after his deceaſe he ought to declare of a leaſe made by him in remainder. (b) And the Deed indented could be no Eſtoppel in this caſe, becauſe there paſſed an intereſt from them both. And whenſoever any intereſt paſſeth from the party, there can be no Eſtoppel againſt him, & (c) ſo it was adjudged Hereby you ſhall underſtand your books the better which treat of thoſe matters, & accordingly it was adjudged y where Tenant in Tail, & he in the Remainder in Fee joyned in a grant of a Rent charge by Deed in Fee, & after Tenant in Tail died without iſſue, the Grantee diſtrained and avowed by force of a grant from him in the Remainder, & upon non conceſſit, y Jury found the ſpecial matter, and it was adjudged for the Avowant; for every one granted according to his eſtate and intereſt.

X 47. a

(a) 27 H. 8. f. 13, 2, 13 H. 7. 14 2 H. 5. 7. Lib. 1. fol. 76. Bredons caſe.

(b) Mich. 36. & 37 Eliz. in the Kings Bench. Vide Mich. 6 & 7 Eliz. Dier 234, 235.

(c) Hil. 44. Eliz. Rot. 1459. in communi Banco inter Ellice & Cown.

Leaſes for lives or years are of three natures: ſome be good in law, ſome be voidable by

entry, and ſome void without entry. Of ſuch as be good in Law, ſome be good at the Common Law as made by Tenant in Fee, whereof Littleton here putteth his caſe, ſome by Act of Parliament, as Tenant in Tail, a Biſhop ſeiſed in Fee in the right of his Church alone without his Chapter, a man ſeiſed in Fee ſimple or Fee tail in the right of his wife together with his wife (as hath been ſaid) may by deed indented make leaſes for 21. years or 3. lives in ſuch manner and forme as hath been ſaid and by the ſtatute (d) is limited, all which were voidable by the Common Law when Littleton wrote, and now are made good by Parliament.

(d) 32 H.8. cap.28.

An Infant ſeiſed of land holden in Socage, may by Cuſtom make a Leaſe at his age of 15. years, & ſhall bind him, which leaſe was voidable by the Common Law; Voidable, ſome by the Common Law, after the death of the Leſſor as of Tenant in Tail a Biſhop, &c. Or after the death of the husband (intended of leaſes not warranted by ỹ ſaid ſtatute of 32 H 8.) Some voidable by Act of Parliament, as by a Biſhop though it be confirmed by Dean and Chapter if it be not warranted by the ſtatute of 32 H. 8. and ſo of a Dean and Chapter after the death of the Dean; Some voidable at times by the Leſſor himſelf or his heirs, as by an Infant and the like. Some void in futuro, and ſome void in præſenti. In futuro, as if a Tenant in Tail make a leaſe for years and dy without iſſue, it is void as to them in reverſion or remainder, though it be made (e) according to the ſaid ſtatute. If a Prebend, Parſon, or Vicar make a Leaſe for years, it is void by death; if it be not according to the ſtatutes. Otherwiſe it is of a leaſe for life, for that is voidable, & ſic de ſimilibus.

(e) 33 H.8. Dier lib. 2. fol. 59, 60. in Lincolne Colledge caſe. Hunts caſe vouched.

Some void in præſenti, as if one make a Leaſe for ſo many years as he ſhall live, this is void in præſenti for the incertainty. Et ſic in ſimilibus, whereof Littleton himſelf will teach you next and immediately, and I know you would now gladly hear him.

¶ *Pur terme.* Pro termino. Terminus in the underſtanding of the Law doth not onely ſignify the limits and limitation of time, but alſo the eſtate and intereſt ỹ paſſeth for that time. As if a man make a Leaſe for 21 years, and after make a Leaſe to begin à fine & exſpiratione prædicti termini 21 annorum dimiſſ. and after the firſt leaſe is ſurrendred, the ſecond leaſe ſhall begin preſently, but if it had been to begin Poſt finem & exſpirationem prædict. 21 annorum, in ỹ caſe although the firſt Term had been ſurrendred, yet the ſecond Leaſe ſhould not begin, till after the 21 years be ended by effluction of time, and ſo note the diverſity between the Term for 21 years, and 21 years; and (f) herewith agreeth the Lord Pagets Caſe.

Pl.Com. Wroteſl. 198. 35 H.8. tit. Expoſition des parols 44. Lib. 1. fo. 145. in Davenports caſe.

(f) Lib. 1. fol. 154. in the Rector of Chedingtons caſe.

(g) Words to make a leaſe be, demiſe, grant, to farm let, betake, and whatſoever word amounteth to a grant may ſerve to make a leaſe. In the Kings caſe (h) this word Committo doth amount ſometime to a grant as when he ſaith, Commiſimus W. de B. officium Seneſchalciæ, &c. quamdiu nobis placuerit, and by that word alſo he may make a leaſe: and (i) therefore à fortiori a common perſon by that word may do the ſame.

(g) Vide Sect. 531.
(h) Regiſt. F.N.B. 270. c.

(i) 8 H. 6. 34.

¶ *De certaine ans.* For regularly in every leaſe for years the Term muſt have a certain beginning, and a certain end, and herewith (k) agreeth Bracton, terminus annorum certus debet eſſe & determinatus. And Littleton is here to be underſtood firſt that the years muſt be certain when the leaſe is to take effect in intereſt or poſſeſſion. For before it takes effect in poſſeſſion or intereſt, it may depend upon an incertainty, viz. upon a poſſible contingent before it begin in poſſeſſion or intereſt or upon a limitation or condition ſubſequent. Secondly, albeit there appear no certainty of years in the leaſe, yet if by reference to a certainty it may be made certain it ſufficeth, Quia id certum eſt quod certum reddi poteſt. For example of ỹ firſt: If A ſeiſed of lands in Fee grant to B. that when B. pays to A. xx. ſhillings, that from thenceforth he ſhall have and occupy the land for 21 years. and after B. payes the xx. ſhillings, this is a good leaſe for 21 years from thenceforth. For the ſecond, if A. leaſeth his land to B. for ſo many years as B. hath in the Mannor of Dale and B. hath then a Term in the Mannor of Dale for 10 years, this is a good leaſe by A. to B. of the land of A. for 10 years. If the Parſon of D. make a leaſe of his glebe for ſo many years as he ſhall be Parſon there, this cannot be made certain by any means, for nothing is more uncertain than the time of death, Terminus vitæ eſt incertus, & licet nihil certius ſit morte, nihil tamen incertius eſt hora mortis. But if he make a leaſe for three years, and ſo from three years to three years, ſo long as he ſhall be Parſon, this is a good leaſe for ſix years, if he continue Parſon ſo long, firſt for three years, and after that for three years; and for the reſidue uncertain.

(k) 14 H.8.14. 3 Mar. Leaſes. Br. 67. 2 Mar. ibid. 67. Say and Fullers caſe, Pl. Com. 272. & Weldens caſe, ibid. 4 H.6, 12. 21 H. 7. 38. Vid. le caſe de leveſque de Bathe, lib. 6. fol. 34, 35. Bract. lib. 2. ca. 9. Vid. lib. 1, fol. 155, 156. Rector de Chedingtons caſe.

Bract. lib. 2, cap. 9. So reſolved Hill. 26. Eliz. Rot. 935. in Com. Banco.

If a man maketh a leaſe to I.S. for ſo many years as I.N. ſhall name, this at the beginning is incertain, but when I N. hath named the years, then it is a good leaſe for ſo many years.

A man maketh a leaſe for 21 years, if I.S. live ſo long; this is a good leaſe for years. and yet is certain in incertainty, for the life of I.S. is incertain. See many excellent caſes concerning this matter put in the ſaid caſe of the Biſhop of Bath and Wells. By the ancient Law of England for many reſpects a man could not have made a leaſe above 40 years at the moſt, for

Pl.Com. Say & Fullers caſe. Mirror. ca. 2. ſect. 17. & cap. 5. ſect. 1.

then was it ſaid that by long leaſes many were prejudiced, and many times men diſherited: but the ancient Law is antiquated.

In the eye of the law any eſtate for life, being, as Littleton hath ſaid, an eſtate of Freehold, againſt whom a præcipe quod reddat doth lie, is an higher and greater eſtate than a leaſe for years, though it be for a thouſand or more, which never are without ſuſpition of fraud, and they were the leſs valuable, for the at the Common law they were ſubject unto, and under the power of the Tenant of the Freehold, the learning whereof ſtandeth thus, and is worthy to be known. When Littleton wrote, if a man had made a Leaſe for years by writing, and he that had the Freehold had ſuffered himſelf to be impleaded in a real action by colluſion to bar the Leſſee of his term and made default, &c. the ſtatute of Glouc' gave the Leſſee for years ſome remedy by way of receipt, and a triall whether the Demandant did move the plea by good right or colluſion; and if it were found by colluſion, then the Termor ſhould enjoy his term, & the execution of the judgment ſhould ſtay until after the Term ended. But this ſtatute extended not to five caſes. 1. If the Leaſe were without writing; for the words of the Act are, (ſo the Termor may have recovery by writ of covenant.) 2. It extended not but to a recovery by default. 3. The Termor could not be relieved by this ſtatute, unleſs he knew of the recovery, & were received, &c. 4. By the better opinion of Books, it extended not to Tenants by ſtatute Merchant, ſtatute Staple, or Elegit. 5. Not to Gardian. (l) But now the ſtatute of 21 H. 8. doth give remedy in all the ſaid caſes, ſaving the caſe of the Gardian and giveth them power to falſifie all manner of recoveries had againſt the Tenants of the Freehold upon fained & untrue Titles, &c. Now the (m) ſtatute ſaith, the it was a doubt before the ſtatute whether a Termor for years might falſifie or no: but yet it ſeemeth by the better opinion of books in ſo great variety, the having but a chattel, was not able by the Common law to falſifie a covenous recovery of the Freehold, becauſe he could not have the thing the was recovered. (a) And Thirning & Hankford do hold the a Gardian is not within the ſtatute of Glouc'.

Lib. 11. fol. 33.

(l) 21 H. 8. ca. 15.

(m) That a termor might falſifie at the Common Law. Vid. 19 E. 3. Aſſ. 82. 21 E. 3. 1. 7 H. 7. 11. b. 1 H. 7. 9. b. Pl. Com. 83. 10 E. 3. 46. 19 E. 3. reſceit 112. That he could not. 30 H. 6. Fauxer recovery 9. 43 Aſſ. 41. 26 H. 8. 2. 9 E. 4. 38. F. N. B. 168. E. 14 H. 8. 4. lib. 9. fo. 135. Aſcoughes caſe.

(a) 7 H. 4. 12. 33 H. 8. Dier 52.

If two Coparceners be, and one of them let her part to another for years, and after upon a Writ of partition brought againſt the Leſſor too little is allotted to the leſſor, it is holden by ſome the Leſſee cannot avoid it, for that it is made by the oath of men, and judgement is thereupon given that the partition ſhal remain firm and ſtable. But if there be two Coparceners of three acres of land, every one of equal value, & the one Coparcener letteth her part, and after make partition, and one acre is allotted only to the Leſſor, the Leſſee is not bound thereby, but he may enter and take the profits of another half acre, for that of right belongs unto him. Thus much I have thought good to ſet down, for it ſufficeth not to know what the law is in theſe caſes, unleſs he underſtand the reaſon and cauſe thereof.

And albeit (as hath been ſaid) a Leaſe for years muſt have a certain beginning, & a certain end, yet the continuance thereof may be incertain, for the ſame may ceaſe & revive again in divers caſes. As if Tenant in tail make a leaſe for years reſerving xx. ſhillings, & after take a wife and dy without iſſue, now as to him in the Reverſion the leaſe is meerly void, but if he endow the wife of Tenant in tail of the land, (as ſhe may be, though the eſtate Tail be determined) now is the leaſe as to the Tenant in Dower (who is of the in ſtate of her husband) (a) revived again as againſt her, for as to her the eſtate Tail continueth, for ſhe ſhall be attendant for the third part of the rent ſervices, and yet they were extinct by act in law. So it is if Tenant in Tail make a Leaſe for years ut ſupra, & dieth without iſſue, his wife enſeint with a ſon, he in the Reverſion enter, againſt him the Leaſe is void; but after the ſon be born the Leaſe is good, if it be made according to the (b) ſtatute, and otherwiſe is voidable.

(a) 10 E. 3. 26. 34 Aſſ. 15. 23 E. 3. Dower 130.

(b) 32 H. 8. ca. 28.

The King made a gift in Tail of the Mannor of Eaſtfarleigh in Kent to W. to hold by Knights ſervice; W. made a leaſe to A. for thirty ſix years, reſerving thirteen pound Rent; W. died, his ſon and heir of full age, all this was found by office: as to the King this leaſe is not of force, for he ſhall have his Primer ſeiſin, as of lands in poſſeſſion, but after livery, the Leſſee may enter; and if the iſſue in Tail accept the Rent, the leaſe ſhall bind him, for the Kings Primer ſeiſin ſhal not take away the election of the iſſue in Tail, for it may be the the Rent was better than the land, (c) and ſo it was adjudged in Awſtens caſe, as I had it of the report of Maſter Edmond Plowden, a grave and learned Apprentice of Law.

(c) Paſch. 2 & 3 Ph. & Mar. in an information of Intruſion in the Exchequer againſt Auſten. Vid. Dier Paſch. 2 & 3 Ph. & Mar. 115.

If Tenant in Fee take wife, and make a leaſe for years, & dieth, the wife is endowed, ſhe ſhall avoid the leaſe, but after her deceaſe the leaſe ſhall be in force again. But if the Patron grant the next avoidance, and after Parſon, Patron, and Ordinary, before the ſtatute, (d) had made a leaſe of the glebe for years, and after the Parſon dieth, & the Grantee of the next avoidance had preſented a Clerk to the Church, who is admitted, inſtituted, and inducted, & dieth within the Term, the Patron preſents a new Clerk, and he is admitted, inſtituted and inducted, albeit he commeth in under the Patron that was party to the leaſe, yet becauſe the laſt Incumbent, who had the whole ſtate in him, avoided the leaſe, it ſhall not revive again, no more than if a feme covert levy a fine alone, if the husband enter & avoid the fine, and dy, the whole eſtate is ſo avoided as it ſhall not bind the wife after his death.

13 Eliz. ca. 10.

(d) 5 E. 6. Dier 72. 17 E. 3. 52. 17 Aſſ. p. 17. 2 R. 3. 20. 9 H. 6. 33.

If

2 E.3.8.per Scroop. If a woman be endowed of an Advowſon which is appropriated, and the preſent, and her Incumbent is admitted, inſtituted, & inducted, albeit the Incumbent dy yet is the appropriation wholly diſſolved, becauſe the Incumbent which came in by preſentation, had the whole ſtate in him, and ſo was it adjudged, as the caſe is to be intended.

Pl.Com.437.a. Tenant in tail make a leaſe for forty years, reſerving a Rent, to commence ten years after; Tenant in Tail dy, the iſſue enter & infeoff A. ten years expire, the Leſſee enter, if A. accept the Rent, the leaſe is good, for he ſhall have the ſame election that the iſſue in tail had, either to make it good, or to avoid it, ſo as it could not be preciſely affirmed, whether by the entry of the iſſue this executory leaſe was avoided, but it dependeth incertainly upon ꝯ will of the feoffee.

But now I know you are deſirous to hear Littleton who is ſpeaking to you.

V.Sect.454.455. ¶ *Et quant le Leſſee enter per force del Leaſe, donques il eſt Tenant pur terme des ans.* And true it is, ꝯ to many purpoſes he is not Tenant for years until he enter, as a releaſe made to him is not good to him to increaſe his eſtate before entry; but he may releaſe the Rent reſerved before entry, in reſpect of privity. Neither can the Leſſor grant away the reverſion by the name of the reverſion, before entry, vide Sect.567. But the leſſee before entry hath an intereſt, intereſſe termini grantable to another, vide Sect.319. And albeit the Leſſor dy before the Leſſee enters, yet the Leſſee may enter into the lands as our Author himſelf holdeth in this Chapter. And ſo if the leſſee dieth before he entred, yet his Executors or Adminiſtrators may enter, becauſe he preſently by the leaſe hath an intereſt in him: And if it be made to two, and one dy before entry, his intereſt ſhall ſurvive. Vid.Sect.281.

V.Sect.665. more fully of this matter. He that hath a leaſe for years hath it either in his own right, whereof Littleton hath here ſpoken, or in an others right, & that in divers manners, as a man may have a term for years in the right of his wife, whereof the husband hath power to diſpoſe at any time during his life, and if he ſurvive his wife, the law doth give the leaſe to him. But if he make no diſpoſition thereof, and his wife ſurvive him, it remaineth with the wife: but of this in another place more fully.

If a man be poſſeſſed of a term of forty years in the right of his wife, and maketh a leaſe for twenty years, reſerving a Rent, and dy, the wife ſhall have the reſidue of the term, but ꝯ Executors of the husband ſhall have the Rent, for it was not incident to the Reverſion, for ꝯ the wife was not party to the leaſe. So note a diſpoſition of part of the term is no diſpoſition of the whole. But if the husband grant the whole term, upon condition that the Grants ſhall pay a ſum of money to his Executors, &c. the husband dy, the condition is broken, the Executors enter; this is a diſpoſition of the term: and the wife is barred thereof, for the whole intereſt was paſſed away.

Hil.17 El. in the Kings Bench. If a leaſe be made to a baron & feme for term of their lives, the Remainder to ꝯ Executors of the ſurvivor of them, the husband grant away this term & dieth, this ſhall not bar ꝯ wife, for that the wife had but a poſſibility and no intereſt.

37 Aſſ. p.11. Pl.Com.418.b. If the husband and wife be ejected of a term in the right of his wife, & the husband bring an Ejectione firmæ in his own name, and have judgment to recover, this is an alteration of ꝯ term, and veſteth it in the husband.

If a leaſe for years be made to a Biſhop and his Succeſſors, yet his Executors or Adminiſtrators ſhall have it in auter droit, for regularly no Chattel can go in ſucceſſion in a caſe of a ſole Corporation, no more than if a leaſe be made to a man and his heirs, it can go to his heirs. But let us return to Littleton.

Li.5.fo.1. Claytons caſe, 12 Eliz.Dyer 286. Touching the time of the beginning of a leaſe for years, it is to be obſerved, ꝯ if a leaſe be made by Indenture, bearing date 26 Maii, &c. to have and to hold for twenty one years, from the date, or from the day of the date, it ſhall begin on the twenty ſeventh day of May. If the leaſe bear date the twenty ſixth day of May, &c. to have & to hold from the making hereof, or from henceforth, it ſhal begin on the day in which it is delivered, for the words of the Indenture are not of any effect til the delivery, & thereby from the making, or from henceforth take their firſt effect. But if it be à die confectionis, then it ſhall begin the next day after the delivery. If the Habendum be for the term of twenty one years, without mentioning when it ſhall begin, it ſhall begin from the delivery, for there the words take effect, as is aforeſaid.

14 El. Dyer 307.5. El. Dyer 218.

Li.2.fo.5. Goddards caſe. If an Indenture of leaſe bear date, which is void or impoſſible, as the thirtieth day of February, or the fortieth of March, if in this caſe the term be limited to begin from the date, it ſhall begin from the delivery, as if there had been no date at all.

(a) Pl.Com.148. 3 E.6. tit.Leaſes, Br.62. 3 El. Dyer 195.1 Mar.Dyer 116. (a) And ſo it is, if a man by his Indenture of leaſe either recite a leaſe which is not, or is void, or miſ-recite a leaſe in point material which is in eſſe, To have & to hold from the ending of the former leaſe, this leaſe ſhall begin in courſe of time from the delivery thereof.

¶ *Et ſi le Leſſor en tiel caſe reſerve a luy un annual rent ſur tiel leaſe, il poet eſlier a diſtreyner pur le rent, ou il poet aver action de debt pur les arrerages.*

¶ *Reſerve*

¶ *Reserve a luy un annual rent, &c.* First, it appeareth (b) here by Littleton that a rent must be reserved out of Lands or Tenements, whereunto the Lessor may have resort, or recourse to distrein, as Littleton here also saith, and therefore a rent cannot be reserved by a common person out of any incorporeall inheritance, as Advowsons, Commons, Offices, Corody, Mulcture of a Mill, Tythes, Fairs, Mazkets, Liberties, Privileges, Franchises, and the like. (c) But if the Lease be made of them by Deed for years, it may be good by way of Contract to have an Action of debt, but distrein the Lessor cannot. Neither shall it pass with the grant of the reversion, for that it is no rent incident to the reversion. But if any rent be reserved in such case upon a lease for life, it is utterly void, for ꝑ in that case no Action of debt doth lie. But if a man demiseth the desture or herbage of his land he may reserve a rent, for that the thing is matnorable, and the Lessor may distrein the cattel upon the land: And so a reversion, or a remainder of lands or tenements may be granted reserving a rent, for the apparent possibility that it may come in possession, and they are Tenements within ꝑ words of Littleton.

(b) Li.7.fo.23. Burs case. Ib.10. fo.59,60. (c) 30 Ass.p.5. 12 Ass.20. 20 E 4.10. 1 H.4.12.3. 11 H.4.82. 19 E.2.Fines 136. 44 E.3.45. 9 Ass.24.26 Ass.60. 14 E.3. Scir. fac.121. 5 E.3.68. 17 E.3. 75. 11 H.4.40. 3 H.6.21.45. 10 H.6.12, 21 H.6.11. 5 H.7.32. 21 H.7.19. 17 E.2. Ex.112. 23 El. Dyer 377.

(a) It appeareth by Littleton ꝑ reservando is an apt word of reserving a Rent, & so is reddendo, solvendo, faciendo, inveniendo, dummodo, and the like.

(a) 40 E.3.47. 8 E.3.67. 21 E.4.62. 3 H.6.45. 31 Ass.p.30. 3 Ass.9. 26 Ass.66. 32 E.3.Br.291. 8 E.4.8. 10 El. Dy.276. Pl.Com. en Browning & Beestones case, fol.131, 132,&c.

(b) And note a diversity between an exception (which is ever of part of the thing granted and of a thing in esse) for which, exceptis, salvo, præter and the like, be apt words; and a reservation which is alwayes of a thing not in esse, but newly created or reserved out of the land or Tenement demised. (c) Poterit enim quis rem dare & partem rei retinere, vel partem de pertinentiis, & illa pars quam retinet semper cum eo est & semper fuit. (d) But out of a general a part may be excepted, as out of a Mannor, an Acre, Ex verbo generali aliquid excipitur, and not a pars of a certainty, as out of twenty Acres, one.

(b) 50 E.3.12. 13 Ass.9. 38 E.3.10. 21 E.3.4. 34 Ass.11.29 E.3.14. 3 H.6.45. 10 H.6.8.41. 33 H.6.1. 35 H.6.34. 17 Ass. 14 H.8.1. 44 E.3.43. Pl.Com.361. (c) Bract.lib.2.fol.32.b. & fol.249. (d) 9 El.Dy.264. 38 H.6.38. 14 H.8.1.22 E 3.8. 2 E.3.36. 5 E.3.66. 34 Ass.11.

It is further to be observed that the Lessor cannot reserve to any other but to himself, for Littleton saith, reserve a luy, reserve to himself. (e) If two Joyntenants be, & they make a lease for years by parol, or deed poll reserving a rent to one of them, this shall enure to them both, but if it be so reserved by Deed indented, it shall enure to him alone by way of conclusion.

(e) 5 E.4.4.14 E.3. Bre.282.lib.8.fo.70,71.

(f) Littleton here is putting of a case, & not making of a lease; for then he would not reserve the rent to him, but to him and his heirs, for otherwise the rent shall determine by his death, if he dy within the term. (g) But if he reserve a rent generally without shewing to whom it shall go, it shall go to his heirs. If he reserve a Rent to him and his Assigns, yet the Rent shall determine by his death because the reservation is good but during his life. So it is if he reserve a Rent to him & his Executors, it shall end by his death because the heir hath the reversion, and the rent was incident to the reversion. So if a man warrant land to B. and his Assignes, the Assignee must vouch during the life of B. for the warranty continues but only during the life of B. for the warranty is but for life, for want of words of inheritance, But if the warranty be to B. his heirs and Assigns, so as he hath an inheritance therein, then his Assignee shall vouch after his decease. So if the Rent be reserved to the Lessor his heirs and Assigns, so as it be incident to the inheritance, then shall all the Assigns of the Reversion enjoy the same.

(f) Vid. sect.214,215, 216,&c. 10 E.4.18. 11 E.3.Ass 86. 27 H.8.19. 21 H.7.25. 30 H.8. Dyer 45. (g) Mich.5.Ja.in repl.inter Wooton & Edwin en bank le Roy.Hil. 33.El.Rot.14.31. in Bank le Roy, enter Richmond and Butcher.

¶ *Annual rent.* So it is if the Rent be reserved every two or three or more years. Of Rents Littleton doth excellently treat hereafter in his Chapter of Rents, and therefore in this place thus much shall suffice.

¶ *A distreiner pur le rent.* Here it is necessary to be seen of what things a distress may be taken for a Rent, and how the distress ought to be demeaned. (h) First it must be of a thing, whereof a valuable property is in some body, and therefore Dogs, Bucks, Does, Conies, and the like, ꝑ are feræ naturæ cannot be distrained. Secondly, although it be of valuable property, as a horse, &c. yet when a man or woman is riding on him, or an ax in a mans hand cutting of wood, and the like, they are for ꝑ time privileged & cannot be distrained.

Vid. for this word Distrein, sect. 136. (h) 14 H.8.25.2 E.2.tit. Distress.6 R.2.Reseous 11. 7 E.3.Avowr.199. 15 E.2.Avowr.2.

(i) Thirdly, valuable things shall not be distrained for Rent, for benefit & maintenance of trades, which by consequent are for the Common-wealth, and are there by authority of Law as a horse in a Smiths shop shall not be distrained for the Rent issuing out of the shop, nor ꝑ horse, &c. in the hostrie, nor the materials in the Weavers shop for making of cloth, nor cloth or garments in a Tailors shop, nor sacks of corn or meal in a Mill, nor in a Market, nor any thing distrained for damage feasant, for it is in custody of Law and the like.

(i) 22 E.4.49.b.7 H.7.1.b. 22 E.4.36. 4 E.6.tit. Dist. Br.74.

(k) Fourthly, nothing shall be distrained for Rent, that cannot be rendred again in as good plight as it was at the time of the distress taken, as sheaves or shocks of corn or the like cannot be distrained for Rent, but for damage feasant they may be distrained. But charrets or carts with corn may be distrained for Rent, for they may be safely restored.

(k) 18 E.3.4.a. 11 H.7.14.a. 21 H.7.39.b. 22 E. 4.50.b. 2 H.4.15.

(l) Fifthly, beasts belonging to the plow, averia carucæ shall not be distrained, which is the ancient common law of Eng for no man shall be distrained by the utensils or instruments of his trade or profession, (as the axe of the Carpenter, or the books of a Scholler) while goods or

(l) Okeham 38,39. Bra.li.4.fo.217.F.N.B.pa.2. Reg.97.Plet.li.2.c.41. Mirr.cap.2.sect.15,16. 4 E.2.1. 29 E.3.17.

or other beasts, which Bracton calls animalia (or catalla) otiosa, may be distrained. (m) 6. Furnaces, Cauldrons, or the like, fixed to the Freehold, or the doors or windows of a house, or the like cannot be distrained. (n) Lastly, beasts that escape may be distrained for rent, though they have not been levant and couchant. (o) Note, that he that distrains any thing that hath life, must impound them in a lawful Pound within three miles in the same County, & that is either Overt or Open, in a Pinfold made for such purposes, or in his own Close, or in the Close of another by his consent. And it is therefore called Open, because the owner may give his Cattle meat & drink, without trespasse to another, and then the Cattle must be sustained at the peril of the owner. (p) Or it is a Pound Covert or Close, as to impound the Cattle in some part of his house, and then the Cattle are to be sustained with meat and drink at the perill of him that distraineth, and he shall not have any satisfaction therefore. But if the distresse be of Utensils of houshold, or such like dead goods which may take harm by wet or weather, or be stolne away, there he must impound them in a house or other Pound covert within three miles within the same County, for if he impound them in a pound overt he must answer for them.

(m) 21 H. 7. 26. 3 E. 3. Ass. 46. 9.
(n) 7 H. 7. 1. b. 10 H. 7. 21. 21. 1 H. 7. 4. a. 15 H. 7. 17. 18 E. 2. avowry 219. 6 E. 4. 22 E. 4. 49. 4 E. 3. distreis. 18. 27 E. 3. 80. 2 H. 4. 16.
(o) Marlebr. cap. 4. W. 1. cap. 16. 2 & 3 Ph. & Mar. cap. 13. Fleta lib. 2. cap. 2. 6 H. 3. avowry 242. 30. Ass. 38. 1 H. 6. 9. 22 E. 4. 11. F. N. B. 89. Doctor and Student, lib. 2. cap. 27. 5 H. 7. fol. 9.
(p) 33 H. 8. tit. distres. Br. 65.

(q) If the distresse be taken of goods without cause, the owner may take Rescous; but if they be distrained without cause, and impounded, the owner cannot break the Pound and take them out, because they are then in the custody of the Law.

(q) 4 E. 6. tit. distres. 74. F. N. B. 100. E.

(r) But if a man distrain Cattle for Damage feasant, and put them in the Pound; and the owner that had common there make fresh suit, and find the door unlocked, he may justifie the taking away of the Cattle in a Parco fracto. (s) If the owner breake the Pound, and take away his goods, the party distraining may have his Action De parco fracto, and he may also take his goods that were distrained wheresoever he find them, and impound them again.

(r) 3 E. 3. tit. trans. 11.

(s) 34 H. 6. 18.

It is called a Writ De parco fracto, of these words in the Writ (t) Parcum illum vi & armis fregit. And the form thereof appears in the Register and F. N. B.

t) Regist. F. N. B. 100. 101.

But it is to be observed, that for the rent due the last day of the Term, the Lessor cannot distrain, because the term is ended, and therefore some use to reserve the last half years rent, at the Feast of the Nativity of Saint John Baptist before the end of the Term; so as if the rent be not then paid, he may distrain between that and Michaelmas following.

¶ *Action de debt.* Note a diversity between a rent reserved upon a lease for years, reserving a yearly rent: the Lessor may have several Actions of debt for every years rent. But upon a bond or contract for payment of several sums, no Action of debt lyeth till the last day be past. But otherwise it is of a Recognizance, which see at large, and the reason thereof cap. Releases, Sect. 512, 513. (u) Note, that the Lord shall not have an Action of debt for reliefe, or for escuage due unto him, because he hath other remedy; but his Executors or Administrators shall have an Action therefore, because it is now become as a flower faine from the stock and they have no other remedy. Neither shall the Lord have an Action of debt for aid, pur file marier, or faire fitz Chivaler, for the cause aforesaid.

(u) 7 H. 6. 13. lib. 4. fol. 49. Lib. 3. fol. 16. 34 E. 1. tit. avowry 233. 32 H. 8. Br. release 11. F. N. B. 82, 83. Glanvil lib. 9. cap. 35. Fleta lib. 2. cap. 40. & lib. 3. cap. 14. Bract. lib. 2. fol. 36. W. 1. cap. 35. 25 E. 3. cap. 11. Britton fol. 57. & 70.

¶ *Mes en tiel case il covient que le Lessor soit seisie de mesmes les tenements al temps del lease, car est bone plea pur le Lessee a dire que le Lessor navoit riens, en les tenements al temps del lease.* And the reason of this, is, for that in every contract there must be quid pro quo, for contractus est quasi actus contra actum; and therefore if the Lessor hath nothing in the Land, the Lessee hath not quid pro quo, nor any thing for which he should pay any rent. And in that case he may also plead, that the Lessor non demisit, and give in evidence the other matter.

¶ *Si* (x) *non que le lease soit per fait indent, &c.* If the Lease be made by Deed indented, then are both parties concluded; (y) but if it be by Deed pol, the Lessee is not estopped to say that the lessor had nothing at that time of the lease made. A. lessee for the life of B, makes a lease for years by Deed indented, and after purchase, the reversion in fee. B. dieth, A. shall avoid his own lease; for he may confesse and avoid the lease which took effect in point of interest, and determined by the death of B. But if A. had nothing in the Land, and made a lease for years by Deed indented, and after purchase the land, the lessor is as well concluded, as the lessee to say that the lessor had nothing in the land, and here it worketh only upon the conclusion, and the lessor cannot confesse and avoid as he might in the other case. (z) If a man take a lease of his own land by Deed indented, reserving a Rent, the lessee is concluded. (a) But if a man take a lease of the herbage of his own land by Deed indented, this is no conclusion, to say that the lessor had nothing in the land, because it was not made of the land it self (b) but if a man take a lease for years of his own land by Deed indented, the Estoppell doth not continue after the term ended. For by the making of the lease, the Estoppel doth grow; and consequently by the end of the lease, the Estoppell determine, (c) and that part

(x) 45 E. 3. 7. 20 E. 4. 10. 34 H. 6. 48. 35 H. 6. 14. 9 H. 6. 35. 11 H. 4. 22.
(y) 2 E. 2. Estop. 253. 39 E. 3. 13. P. Com. 434. 18 E. 3. 26. 15 E. 3. Estop. 236. 14 H. 4. 32.

(z) 14 H. 6. 23. 8 H. 47.

(a) Resolve Pasch. 2 Eliz. in Communi Banco.
(b) Mich. 31. & 32 Eliz. in Communi Banco adjudge in Londons case.
(c) 38 H. 6. 24. 30 E. 3. 11.

part of the Indenture which belonged to the Lessee, doth after the term ended, belong to the Lessor, which should not be, if the Estoppel continued.

## *Sect.* 59.

¶ ET est ascavoir Que en lease pur terme de ans per fait ou sans fait, il ne besoygne ascun liverie de Seisin destre fait al Lessee, mes il poit entrer quant il voit p force de mesme le Lease. Mes des Feoffments faits en pais, ou donees en le Tole, ou lease pur terme de vie, en tiels cases ou Franktenement passera, si ceo soit per fait ou sauns fait, il vient aver un liverie de seisin.

AND it is to be understood, That in a lease for years by deed or without deed, there needs no Livery of Seisin to be made to the Lessee, but he may enter when he will by force of the same lease. But of Feoffments made in the Country, or gifts in Taile, or Lease for term of life, in such cases where a Freehold shall passe, if it be by Deed, or without Deed, it behoveth to have livery of Seisin.

¶ *Livery de Seisin*, Traditio or deliberatio seisinæ, is a solemnity that the Law requireth for the passing of a Freehold of Lands or Tenements by delivery of Seisin thereof. (b) Intervenire debet solemnitas in mutatione liberi tenementi, ne contingat donationem deficere pro defectu probationis. 18 E. 3. fol. 16. 41 E. 3. 17. 40. Ass. 10. 2. Ass. r. 2 E. 3. 3. 4. 43 E. 3. Feoff. 51. Pl. Com. 25. a. & 303. b. Vide sect. 66. (b) Bract. lib. 2. cap. 15.

And there be two kinds of livery of seisin, viz. a livery in (c) Deed, and a livery in Law. A livery in Deed is when the Feoffor taketh the ring of the door, or turf, or twig of the Land, and delivereth the same upon the Land to the Feoffee in name of Seisin of the Land, &c. per hostium & per haspam & annulum vel, per fustem vel baculum, &c. (c) Bract. lib. 2. cap. 15. & 18. Brit. cap. 33. in fine, fol. 87. Fleta lib. 3. cap. 15.

A. seised of a house in fee, and being in the house, (d) saith to B. I demise to you this house for term of my life; is this a good beginning to limit the state, but here wanteth livery. A livery in deed may be done two manner of wayes by a solemn act and words, as by delivery of the ring, or haspe of the door, or by a branch or twig of a tree, or by a turf of the land; and with (e) these and the like words the Feoffor and Feoffee both holding the deed of feoffment, and the ring of the dor, haspe, branch, twig, or turf: and the feoffor saying, Here I deliver you seisin and possession of this house, in the name of all the Lands & Tenements contained in this Deed, according to the form and effect of this Deed. Or by words without any Ceremony or Act as the Feoffor being at the house door, or within the house, Here I deliver you seisin and possession of this house, in the name of seisin and possession of all the lands and tenements contained in this Deed, Et sic de similibus, or, Enter you in this house or land, and have and enjoy it according to the Deed; or, Enter into the house or lands, and God give you joy; or, I am content you shall enjoy this land according to the deed, or the like. For if words may amount to livery within the view, much more it shall upon the land: But if a man deliver the deed of feoffment upon the land, this amounts to no livery of the land, for it hath another operation to take effect as a Deed; but if he deliver the Deed upon the Land in name of seisin of all the lands contained in the Deed, this is a good livery: and so are other books intended that treat thereof that the deed was delivered in name of seisin of that land. Hereby it appeareth, that the delivery of any thing upon the land in the name of seisin of that land, though it be nothing concerning the land, as a ring of gold, is good; and so hath it been resolved by all the Judges, and so of the like. (d) Lib. 6. fol. 20. Sharps case. (e) See of this more, sect. 60. 41 E. 2. 17. b. 41. Ass. p. 10. 38. Ass. p. 2. 28. E. 3. 21. 39. Ass. p. 12. 26. Ass. 39. 27. Ass. p. 61. 18 E. 2. 16. Lib. 6. fol. 26. Sharps case. 43 E. 3. tit. Feoff. 51. 35 H. 8. Feoffm. &c. 58 E. 3. Rot. Parl. nu. 30.

If divers parcels of land be contained in a Deed, and the Feoffor delivers Seisin of one parcel according to the Deed, all the parcels do passe, albeit he saith not (in name of all &c.) because the Deed containeth all. And so if there be divers Feoffees, & he make livery to one according to the Deed, the land passeth to all the Feoffees, and yet the plainer way is to say (in the name of the whole, or, of all the Feoffees.) 1 E. 3. Estop. 177.

If a man make a Charter in fee and deliver seisin for life secundum formam cartæ, the whole Fee simple shall passe, for it shall be taken most strongly against the Feoffor. Note, that these words (Secundum formam cartæ) are understood according to the quantity and quality of the effectual estate contained in the Deed. If a man make a lease for years by deed, and deliver Ibidem. 7 E. 4. 25. 29. Ass. 40. 10. Ass. 19. 43. Ass. 30.

liuer seisin according to the form and effect of the Deed; yet he hath but an estate for years, and the liuery is void, as Littleton saith. So if A. by Deed give land to B. to have and to hold after the death of A. to B. and his heirs, this is a void Deed, because he cannot reserve to himself a particular estate, and construction must be made upon the whole Deed, and if liuery be made according to the form and effect of the Deed, the liuery also is void, because the liuery referreth to a Deed that hath no effect in Law; and therefore it cannot work secundum formam & effectum cartæ. And so it was adjudged, & sic de similibus. † And it is to be obserued, that neither the Feoffor being absent can make liuery; nor the Feoffee being absent, can take liuery, but by warrant of Attorney, by Deed and not by Parol, because it concerneth matter of Freehold.

Mich. 13. & 14 Eliz. in the Kings Bench inter Hogge and Crosse for lands in London. Vide Pl. Com. 395.
† See more of this sect. 56. 11 H. 4. 71. 19. Ass. 9. b. 19 H. 8. 9.

Vide Sect. 1. in Bridgewaters Case, where a man hath a moueable estate of inheritance, for example there put, in 13 acres: the question is, Where liuery shall be made. First, if they be parcell of a Mannor, they may passe by the name of the Mannor; but if they be in grosse, then the Charter of feoffment must be of 13 acres, lying and being in the Meadow of 80 acres, generally without bounding or describing of the same in certainty, and liuery of the seisin of any 13 acres allotted to the Feoffee for a year secundum formam cartæ, is a good liuery to passe the content of 13 acres wheresoeuer the same lye in that Meadow. In the second case where one entire Mannor is separate and diuided, as is aforesaid, there is no question but the liuery must be made of that Mannor; but in the other case, where two Mannors are separate and diuided alternis vicibus, there the Charter of feoffment must be made of both, and liuery in that Mannor which is seised of in any one year secundum formam cartæ, and the next year in the other secundam formam cartæ: for there are two distinct Mannors, and seuerall estates in them.

Bridgewaters case.

Vide sect. 1.

38 E. 3. 11. 38. Ass. p. 2. 43. Ass. p. 20. Temps H. 8. tit. Feoffments Br. 70. 28 E. 3. 16. b. 28 H. 8 F. 18. 9 E. 4. 39. per Moyle. Bract. lib. 2. cap. 18. & lib. 4. fol. 225. a.

A liuery in Law is when the Feoffor saith to the Feoffee being in the view of the house or land, (I give you yonder land to you and you heirs, and go enter into the same, and take possession thereof accordingly) and the Feoffee doth accordingly in the life of the Feoffor enter, this is a good feoffment, for Signatio pro traditione habetur. And herewith agreeth Bracton, Item dici poterit, & assignari quando res vendita vel donata sit in conspectu, quam venditor & donator dicit se tradere: And in another place he saith, In seisina per effectum & per aspectum. But if either Feoffor or the Feoffee die before entry, the liuery is void. And liuery within the view is good, where there is no Deed of feoffment; (a) And such a liuery is good, albeit the land lye in another Country. (b) A man may have an inheritance in an upper Chamber, though the lower buildings and soil be in another; and seeing it is inheritance corporeal it shall passe by liuery: (c) If man maketh a Charter of feoffment, and deliuers seisin within the view, the Feoffee dares not enter for fear of death, but claims the same; this shall vest the freehold and inheritance in him, albeit by the liuery no estate passed to him, neither in deed, nor in law, so as such a claim shall serue, as well to vest a new estate and right in the Feoffee, as in the common case to reuest an antient estate and right in the Disseisee, &c. as shall be said hereafter more at large in the chapter of continual Claim. And so note a liuery in Law shall be perfected and executed by an entry in Law. (d) If a man be disseised, and make a Deed of feoffment, and a letter of Attorney to enter and take possession, and after to make liuery secundum formam cartæ; this is a good feoffment, albeit he was out of possession at the time of the Charter made, for the authority given by the letter of Attorney is executory, and nothing passed by the delibery of the Deed, till liuery of seisin was made: And in ancient letters of Attorney, power is given to others to take possession for the Feoffor. But if a man be disseised, and make a writing of a lease for years, and deliuer the Deed; and after deliuer it upon the ground, the second deliuery is void, for the first deliuery made it a Deed; and for that the lease for years must take effect by the deliuery of the Deed, therefore the Deed deliuered when he was out of possession, was void; But so it is not of a Charter of feoffment for that takes effect by the liuery and seisin. But if the Lessor had deliuered it as an Escrow to be deliuered as his Deed upon the ground, this had been good.

38 E. 3. 11. 38. Ass. p. 2. 43. Ass. p. 20. Temps H. 8. tit. Feoffments Br. 70. 28 E. 3. 16. b. 28 H. 8 F. 18. 9 E. 4. 39. per Moyle. Bract. lib. 2. cap. 18. & lib. 4. fol. 225. a.
(a) 9 E. 4. 39. 38 E. 3. 12.
(b) 9 E. 4. 28. 42. 5 H. 7. 9. 3 H. 6. tit. Pleint. 1. 11 H. 4. 32. 11 E. 3. Ass. 86.
(c) 38. Ass. p. 23.

A man makes a lease for years, and after makes a Deed of feoffment, and deliuers seisin, the Lessee being in possession, and not assenting to the feoffment, this liuery is void; for albeit the Feoffor hath the freehold and inheritance in him, yet that is not sufficient, for a liuery must be given of the possession also: but if the Lessee be absent, and hath neither wife nor seruants (though he hath cattel) upon ground the liuery of seisin shall be good.

(d) Hil. 37 Eliz. Rot. 626. in Com. Banco, inter Brown & Terrey adjudged. Dyer 16 Eliz. 234. 3 Eliz. Dyer 131.

Lib. 3. fol. 35. inter Jennings & Bragge.

If a man be seised of an house, & of diuers seuerall closes in one County in fee, and makes a lease thereof for years, & afterward maketh a feoffment in fee of the same, and makes liuery of seisin in the closes, (the Lessee, or his wife or seruants then being in the house) the liuery is void for the whole: for the Lessee cannot be upon every parcell of the land to him demised, for the preseruation and continuance of his possession thereon. And therefore his being in the house, or upon any part of the land to him demised, is sufficient to preserue and continue his possession in the whole, from being ousted or dispossessed.

Lib. 3. fol. 31, 32. Battlesworths case.

Note,

Note a great diversity, when a man hath two wayes to pass lands, and both of the ways be by the Common law, & he intendeth to pass them by one of the wayes, yet ut res magis valeat it shall pass by the other. But where a man may pass lands either by the Common Law, or by raising of an use, & selling it by the statute, there in many cases it is otherwise. For example, If a man be seised of two acres in Fee, & letteth one of them for years, and intending to pass them both by Feoffment, maketh a Charter of Feoffment, & maketh livery in § acre in possession in name of both, onely the acre in possession passeth by the livery. Yet if the Lessee attorn, the Reversion of that acre shall pass by the deed and attornment, for he is in by the Common law, and in the per in both, & so in the like. But otherwise it is, if the father make a Charter of Feoffment to his son, and a Letter of Attorney to make livery, and no livery is made, yet no use shall rise to the son, because he should be in the statute in another degree, viz. in the post, and the intention of the parties worth much both in the raising & direction of uses. So if Cesty que use and his feoffees had joyned in a feoffment after the statute of 1 R 3. &c. it had been the feoffment of the feoffees, and the confirmation of Cesty que use, for the state at the Common law shall be preferred. So to conclude this point; Of Freehold and Inheritances, some be corporeall, as houses, &c. lands, &c. these are to pass by livery of Seisin, by Deed or without Deed; some be incorporeal, as Advowsons, Rents, Commons, Estovers &c. these cannot pass without Deed, but without any livery. And § law hath provided § deed in place or stead of a livery. And so it is if a man make a lease, and by deed grant the reversion in fee, here the Freehold with attornment of the Lessee by the Deed doth pass, which is in lieu of § Livery. See Bract. lib. 2. cap. 18. Et est traditio de re corporali de persona in personam de manu, &c. gratuita translatio, & nihil aliud est traditio in uno sensu, nisi in possessionem inductio de re corporali; & ideo dicitur, Quòd res incorporales non patiuntur traditionem sicut ipsum jus quod rei sive corpori inhæret, & quia non possunt res incorporales possideri sed quasi, ideo traditionem non patiuntur, &c.

7 E. 4. 20. a per touts les just. 11 H. 4. 71. Pl. Com. 152. 10. L. 4. 3.

Lib. 2. fol. 35, 36. Sir R. Heywards case.

1 R. 3. ca. 1. 21 H. 7.

This ancient manner of conveyance by feoffment & livery of seisin, doth for many respects exceed all other conveyances. For (as hath been said) if the Feoffor be out of possession, neither fine, recovery, indenture of bargain & sale inrolled, nor other conveyance, doth avoid an estate by wrong, & reduce clearly the estate of the Feoffee, and make a perfect Tenant of the Freehold, but onely livery of seisin upon the land: the other conveyances being made off from the ground, do sometimes more hurt than good, when the Feoffor is out of possession. And yet in some cases a Freehold shall pass by the Common law without livery of seisin: As if a house or land belong to an office, by the grant of the office by Deed, the house or land passeth as belonging thereunto. So if a house or chamber belong to a Colledge by the grant of a Colledge, the house or chamber passeth. A freehold may by custom be surrendred without livery, as hereafter shall be said: and so of assignment of Dower ad ostium Ecclesiæ, or otherwise, and by exchange a Freehold may pass without livery, as hereafter shall be said in this Chapter.

Lib. 2. fo. 55. Bucklers case.

1 H. 7. 28. 8 H. 7. 4.

31 H. 6. 16. 8 H. 7. 4. M. 31 E. 1. coram Rege. Ranulph Huntingfels case. 4 E. 3. Coron. 310. 11 H. 4. 83. V. sect. 74.

## *Sect.* 60.

¶ MEs si home lessa terres ou Tenements per fait, ou sans fait, a terme des ans, le remainder ouster a un auter pur terme de vie, ou en teile, ou en Fee donque en tiel case il covient que le Lessor fait un liverie de seisin a le Lessee p terme de ans, ou autrement riens passa a eux en le remaind̄ com̄ q̄ le Lessee ent̄ en

BUt if a man letteth lands or tenements by deed or without deed for terme of years, the remainder over to another for life, or in taile, or in fee; in this case it behooveth, that the Lessor maketh livery of seisin to the Lessee for years, otherwise nothing passeth to them in the remainder, although that the Lessee enter into the

¶ *Per fait, ou sauns fait.* For seeing § the remainders take effect by livery, there needs no Deed.

22 H. 6. 1, 10 E. 4. 1. 18 E. 4. 13.

¶ *Le remainder* is a reslque of an estate in land depending upon a particular estate, and created together with the same, and in Law-Latine it is called Remanere.

¶ *Fait un liverie de seisin al Lessee.* This livery is not necessary in this case for the Lessee himself, because he hath but a Terme for years; but it is for the benefit of them in the rem', so as the livery to the Lessee shall endure for the benefit of them in the rem': for the livery

very of ꝯ poſſeſſion could not be made to ꝯ next in remainder, becauſe the poſſeſſion belonged to ꝯ Leſſee for years, and for that the particular term, and all the remainders make in Law but one eſtate, and take effect at one time, therefore the livery is to be made to the Leſſee, but if a leaſe for years without Deed be made to A. and B. the remainder to C. in Fee, & livery is made to A. in ꝯ abſence of B. in the name of both, it ſeemeth the livery is good to veſt the remainder, and there is a diverſity betwéen two joynt Attornies to receive livery for another, and livery and ſeiſin is made to one of them, in the name of both, this is clearly void, becauſe

les tenements. Et ſi le termor en tiel cas entra devant aſcun liverie de ſeiſin fait a luy, donque eſt le franktenemẽt & auxy le reverſion en le Leſſor: Mes ſi il fait liverie de ſeiſin a le Leſſee, donque eſt le franktenement ove le fee a eux en le remainder, ſolonqz le forme del grant & le volunt del Leſſor.

tenements. And if the Termour in this caſe entreth before any livery of ſeiſin made to him, then is the Freehold and alſo the Reverſion in the Leſſor. But if he maketh livery of ſeiſin to the Leſſee, then is the Freehold together with the fee to them in the remainder according to the forme of the grant, and the will of the Leſſor.

they had but a mér and bare authority, & they both do in Law make but one Attorney, unleſs the warrant be joyntly & ſeverally, but the Leſſee for years hath an intereſt in the land. Again, if A. is to make a feoffment to B. and C. and their heirs without Déed, and A. makes livery to B. in the abſence of C. in the name of both, and to their heirs, this livery is void to C. becauſe a man being abſent cannot take a Freehold by a livery, but by his Attorney being lawfully authorized to receive livery by Déed, unleſs the Feoffment be made by Déed, & then the livery to one in the name of both is good.

10 E.4.1.12 E.4.16.
15 E.4.18. 22 E.4.35.
40 E.3.10.41.
Temps H.8. Feoffments 72.
6 H.4.2.b. Litt.153.
3 H.7.13.

Note, there is a diverſity betwéen livery of ſeiſin of land, & the delivery of a déed, for if a man deliver a déed without ſaying of any thing, it is a good delivery; but to a livery of ſeiſin of land words are neceſſary, as taking in his hand the Deed, & the ring of the door (if it be an houſe), or a turf or twig (if it be of land), and the Feoffor & laying his hand on it, ꝯ Feoffor ſay to the Feoffée: Here I deliver to you ſeiſin of this houſe, or of this land, in the name of all the land contained in this Déed, according to the form and effect of the Déed, (as hath béen ſaid), & if it be without Déed, then the words may be, Here I deliver you ſeiſin of this houſe or land, &c. to have and to hold to you for life, or to you and the heirs of your body, or to you and your heirs for ever, as the caſe ſhall require.

When the Kinſman of Elimelech gave unto Boaz the parcel of land that was Elimelech's, he took off his ſhoe, and gave it unto Boaz in the name of ſeiſin of the land (after the manner in Iſrael) in the preſence, & with the teſtimony of many witneſſes. And when Ephron enfeoffed Abraham of the field of Machpela, he ſaid to him, Agrum trado tibi, &c. I deliver this field to thée.

Ruth cap.4.verſ.7,8.
Deut.25.9,10.

Gen.23. verſ.11.

A man makes a leaſe for years to A. ꝯ remainder to B. in fée, & makes livery to A. within the view: this livery is void, for no man can take by force of a livery within the view, but he ꝯ taketh the Freehold himſelf.

¶ *Et ſi le termor en tiel caſe enter devant aſcun liverie fait, &c.* By the entry of the Leſſee, he is in actual poſſeſſion, and then the livery cannot be made to him ꝯ is in poſſeſſion, for Quod ſemel meum eſt, amplius meum eſſe non poteſt. But if the Leſſor & Leſſee come upon the ground, of purpoſe for the Leſſor to make, and for ꝯ Leſſee to take livery, there his entry veſts no actual poſſeſſion in him until livery be made, for (a) Affectio tua nomen imponit operi tuo. And therefore if it be agreed betwéen ꝯ Diſſeiſor and Diſſeiſee, ꝯ the Diſſeiſee ſhall releaſe all his right to the Diſſeiſor upon ꝯ land, and accordingly ꝯ Diſſeiſee, entreth into ꝯ land, and delibereth ꝯ releaſe to the Diſſeiſor upon ꝯ land, this is a good releaſe, and the entry of the Diſſeiſee, being for this purpoſe, did not avoid the Diſſeiſin, for his intent in this caſe did guide his entry to a ſpecial purpoſe. And ſo was it reſolved (b) by Sir James Dyer, and the whole Court of Common Pleas, Paſch. 18 Eliz. upon evidence which I my ſelf heard and obſerved. But if the Diſſeiſor infeoff the Diſſeiſee & others there, albeit the Diſſeiſee came to take livery, yet when livery is made the Diſſeiſee is remitted to the whole in judgment of law, as ſhalbe ſaid more at large in the chapter of Remitter in his proper place.

(a) Bracton lib. 1.

(b) P.19. in Communi Banco.
Pl.Com. in Aſſ.de freſh. force 91. 29 Aſſ.26.
43 Aſſ.p.3. 3 H.6.19. in Formedon.

*Sect.*

## *Sect.* 61.

¶ ET si home voile faire feoff, p fait ou sans fait, de fres ou tenements que il ad en plusors villes en un Countie, le liverie de seisin fait en un parcel de les tenements en un ville en le noisme de touts suffist pur touts les autres terres & tenements comprehendes deins ñ l' Feoffment, en toutz les autres villes deins ñ le Countie. Mes si home fait un fait de Feoffment des terres ou Tenements en divers Counties, la il covient en chescun Countie aver un liverie de seisin.

AND if a man will make a Feoffment by Deed or without Deed of Lands or Tenements which he hath in divers Townes in one County the Livery of Seisin made in one parcell of the Tenements in one Towne in the name of all the rest is sufficient for all other the Lands and Tenements comprehended within the same Feoffment in all other the Towns in the same County, but if a man maketh a Deed of Feoffment of Lands or Tenements in divers Counties, there it behoveth in every County to have a livery of Seisin.

¶ EN *un Countie.* A Countie is fetched from ꝑ French, and Shire from the Saxon. For Scyran in the Saxon tongue signifieth partiri, because every County or Shire is divided and parted by certain metes & bounds from another, and in Latine is called Comitatus à comitando, for accompanying together. And for as much as the men of one County doe not accompany together with men of another County at County Courts, Turnes, Leets, and other Courts therefore in judgement of Law they shall take no notice of a livery in another County to pass any Lands in their own County. But of this more shall be said hereafter 45 E.3.21.

## *Sect.* 62.

¶ ET en ascun cas home avera per le grant dun auter Fee simple, Fee Taile, ou Frankten. sans liverie de seisin. Si come deux homes sont, & chescun deux est seisie dun quantitie de terre deins un countie, & lun granta sa terre a lauter en eschange pur la terre que lauter ad, & en meisme le Manner lauter granta sa ter-

AND in some case a man shall have by the grant of another a Fee simple, Fee Tail, or Freehold without Livery of Seisin. As if there be two men and each of them is seised of one quantity of Land in one County, and the one granteth his Land to the other in exchange for the Land which the other hath, and in like manner the other gran-

¶ HEre Littleton putteth a case where Freehold, &c. shall passe without livery of Seisin, and thereupon putteth the case of an exchange of lands in one County that is good by Deed or without deed, without any livery, but if it be in severall Counties there must be a Deed. Also of things that lye in grant, as Advowsons, Rents, Commons, &c. an exchange of them albeit they be in one County, is not good; unlesse it be by Deed: and therefore Littleton putteth his Case warily of land. And in case of a fine which is a Feoffment of Record, of a devise by a last will of a surrender, of a release or confirmation to a Lesse 45 E.3.21.3 E.4.10. 9 E.4.21.7 H.4.1. 8 H.7.4. 28 H.6.2.

Vide sect. 1.

Lesse for years, or at will. In all these and some other cases a Freehold, &c. (as hath been said) may pass without livery. But this word (Exchange) which our Author here useth, is so appropriated by Law, to this case, as it cannot be expressed by any Periphrasis or circumlocution.

re a le primer Grantor en eschange pur la terre que le primer Grantor ad, en ceo cas chescun poit enter en lauter terre issint mise en eschange sans ascun liverie de seisin, & tiel eschange fait per parolx de tenemts deins mesme le Countie sans escript, est Assets bone.

teth his Land to the first Grantor in exchange for the Land which the first Grantor hath. In this case each may enter into the others land, so put in exchange without any Livery of Seisin. And such exchange made by paroll of tenements within the same County without writing, is good enough.

¶ *En ceo case chescun poit enter, &c.* For by the exchange the parties, albeit the lands be all in one County, have no Freehold in Deed or Law in them before they execute the same, by entrie; and therefore if one of them dieth, before the exchange be executed by entry, the exchange is void; for the heir cannot enter and take it as a Purchasor, because he was named onely to take by way of limitation of estate in course of discent.

9 E.4.38,39.45 E.3.20,21. 45 E.3. Exchange 10.

## *Sect.* 63.

¶ This is evident enough. But of what things an exchange may be made (which was a conveyance frequent in former times) is to be seen, and herein many things are to be observed.

¶ Et si les terres ou tenements, soient en divers counties, cest ascavoire ceo que lun ad est un County & ceo que lauter ad est en auter Countie la il covient de aver un fait indent destre fait enter ceux de tiel eschange.

And if the lands of Tenements be in divers Counties, *viz.* that which the one hath in one Countie and that which the other hath in another Countie, there it behoveth to have a deed indented, made between them of this exchange.

(a) 30 E.1. Esch. 15. 3 E.4.10. 9 E.4.21. 14 H.8.20.

First, That the things exchanged (a) need not to be in esse at the time of the exchange made. (As if I grant a Rent newly created out of my lands in exchange for the mannor of Dale, this is a good exchange)

(b) 6 E.56.30 E.1. Ass. 16. 26 E.3. Esch. 2. 7 H.4.34. 3 E.4.11.

(b) Secondly, There needeth no transmutation of possession, and therefore a release of Rent, or Estovers, or right to land in exchange for land is good.

(c) 9 E.4 21.9 E.3.56. 21 E.3.6.

The things (c) exchanged need not be of one nature, so they concern lands or tenements, whereof Littleton here speaketh. As land for rent, or common, or any other inheritance which concern lands or tenements, or spiritual things, as tithes, &c. for temporal, and tenure by a divine service for a temporal Seigniory &c. But Annuities, or such like, which charge the person onely, and do not concern lands or tenements, cannot be exchanged for lands or tenements.

## *Sect.*64, 65.

Estates. Vide sect. 650.

¶ *En eschange, il covient qui les estates soient egales, &c.* Equality in lands is threefold, viz. 1. equality in value;

¶ Et nota que en eschange il covient q̄ les estates soient egales, que

And note that in exchanges it behoveth that the estates which both par-

am-

ambideux tiels parties avcront en les tres iſſint eſchanges, car ſi lun voit & grant que lauter averoit la terre en Fee taile, pur le terre que il averoit del grant de le auter en Fee ſimple, coment que lauk voit agree a cel, ceſt eſchange eſt voyde, pur ceo q̄ les eſtates ne ſont my egales.

ties have in the Lands ſo exchanged, be equall, for if the one willeth and grant that the other ſhal have his land in fee taile for the land which he hath of the grant of the other in Fee ſimple, although that the other agree to this, yet this exchange is void, becauſe the eſtates be not equal.

Secondly, equality in quantity of eſtate given & taken. Thirdly, equality in quality or manner of the eſtate given and taken. But, as Littleton after ſaith, Equality in value of lands in an exchange is not requiſite; neither equality in the quality or manner of the eſtate. And therefore if two joyntenants give lands joyntly to two men, and their heirs and the other in exchange of other lands to them and their heirs in common, this is a good exchange, and yet the manner of their eſtates is not equall, for the eſtate of one party is joynt, and the other in common. And ſo it is if two men give lands in exchange to A. and his heires for lands from A. to them two and their heires, though the one party have a joynt eſtate, and the other a ſole eſtate, yet the exchange is good. The like is if the one land be of a defeaſible Title, and the other of an undefeaſible Title, yet the exchange is good till it be avoided.

(a) An exchange with the King is good, and yet the King is ſeiſed in his politick capacity, and the ſubject in his natural capacity. But equality of the quantity of the eſtate is requiſite, as it appeareth clearly in the caſes put by Littleton. (b) But therein it is to be obſerved that it is not neceſſary that the parties to the exchange be ſeiſed of an equall eſtate at the time of the exchange made; for if Tenant in Tail or a husband ſeiſed in the right of his wife, exchange Lands, and both by the exchange give a Fee ſimple, this is good untill it be avoided by the iſſue in Tail or by the wife after the death of the husband, (d) ſo as Littleton ſaith, that in exchanges it behoveth the eſtates which both parties have in the land ſo exchanged be equall is as much to ſay, as the eſtate reciprocally given in exchange ought to be equal. (e) But in a partition the eſtates allotted to either party

(a) Bracton lib. 5. fo. 389. 17 E. 3. 12. b. 4 H. 4. 2.

(b) 14 H. 6. 6 E. 2. Ex. h. 12. 8 E. 2. Cui in vita 28. 10 E. 2. Exch. 13. 16 E. 3. Exch. 2. 3 E. 3. 19. 10 H. 4. 12. 21 H. 6. 25. 13 E. 4. 3.

(d) 44 E. 3. 20. 38 E. 3. 15. 39 E. 3. 1. 9 E. 4. 21. 7 H. 4. 17. 39 E. 1. tit. Bre. 884. 30 E. 1. tit. exchange, 15.

(e) F. N. B. 61. m.



Mes en le manner eſt, lou il eſt grant & agree enter eux, que lun avera en lun terre Fee taile, & lauter en lauter terre forſq̄ a terme de vie, ou ſi lun avera en lun terre Fee taile generall, & lauk en lauk terre Fee taile eſpecial, &c. Iſſint touts foits il covient que en eſchange les eſtates dambideux parties ſoient egales ceſt aſcavoire, ſi lun ad Fee ſimple en lun terre, que lauter avera tiel eſtate en lauter terre, & ſi lun ad Fee taile en lun terre ell covient que lauter aũa ſemblable eſtate en lauter terre, &c. & ſic de aliis ſtatibus, mes neſt my riens a charger del egal value des terres, car

IN the ſame manner it is, where it is granted & agreed between them, that the one ſhall have in the one land Fee taile, and the other in the other Land but for terme of life, or if the one ſhall have in the one Land Fee taile generall, and the other in the other land Fee taile eſpecial, &c. ſo alwayes it behoveth that in exchange the eſtates of both parties be equall, *viz.* if the one hath a Fee ſimple in the one land that the other ſhall have like eſtate in the other Land; and if the one hath Fee Taile in the one Land, the other ought to have the like eſtate in the other land &c. and ſo of other eſtates, but it is nothing to charge of the equall

ned not to bee qual as shall be observed in his proper place.

To shut up this point, There be five things necessary to the perfection of an exchange. 1. That the estates given be equal. 2. That this word (excambium exchange) be used (f) which is so individually requisite, as it cannot be supplyed by any other word, or described by any circumlocution: and herewith agreeth Littleton afterwards in this Chapter Sect. In the Book of Domesday I find, Hanc terram cambiavit Hugo Briccuino quod modo tenet comes Meriton, & ipsum scambium valet duplum.

Hugo de Belcamp pro escambio de warres.

coment que la terre lun vault mult pluis que la terre de lauter ceo nest riens a purpose: issint que les estates per leschange fait, soient egales. Et issint en leschange sont deux grants car chescun partie grant son tre a lauter en eschange, &c. & en chescun de lour grants mention serra fait de leschange.

value of the Lands, for albeit that the Land of the one be of a farre greater value than the Land of the other, this is nothing to the purpose, so as the estates made by the exchange be equall. And so in an exchange there be two grants, for each partie granteth his Land to the other in exchange, &c. & in each of their grants mention shall be made of the exchange.

(f) 9 E.4.21.25 H.6.56. 19 H.6.27. 44 E.3.24. 50 Ass. Dorset. Wadon. Bedf. Sandeia. 9 E.4.39. 15 E.4.3. 45 E.3.30.

3. That there be an execution by entry or claim in the life of the parties, as hath ben said. (g) 4. That if it be of things y lye in grant, it must be by Deed. (h) 5. If y lands be in sevetal Counties there ought to be a Deed indented, or if y thing lye in grant albeit they be in one County.

45 E.3. eschange 1. (g) 28 H.6.2. (h) 45 E. 3. 20. 7 H.4.11.

(i) If an Infant exchange lands, and after his full age occupy y lands taken in exchange y exchange is become perfect, for y exchange at y first was not void (because it amounted to a livery, and alls in respect of y recompence) but voydable.

(i) 4 E.2. ttt. exch. 10. 12 H.4.12.

¶ *Coment que lauter agree a cel cest eschange est voide.* The agreement of y parties cannot make y good which y Law maketh void.

## Sect.66.

¶ *Si home lessa terre a un auter pur terme dans, coment, que le lessor morust devant, &c.* The reason is because the interest of the Terme, (as hath ben said) doth pass and vest in the Lesse before entry, and therefore the death of the Lessor cannot devest that which was vested before.

¶ *Atturney.* Is an antient English word, and signifieth one that is set in the turn, stead, or place of another; and of these some be private (whereof our Author here speaketh) & some be publike, as Attorneys at Law, whose warrant from his master is ponit loco suo talem Attornatum suum, which setteth in his turn or place such a man to be his Attorney.

¶ Item si home lessa terra a un auter pur term dans, coment que le Lessor morust devant que le Lessee enter en les tenements, uncore il poit enter en mesmes les tenements apres le mort le Lessor, pur ceo que le Lessee per force de le Lease ad droit maintenant dauer les tenements solonqz le forme de le lease. Mes si home fait un fait de feoffment a un auter, & un letter dattorney a un

ALso if a man letteth land to another for term of years, albeit the Lessor dieth before the Lessee entreth into the Tenements, yet he may enter into the same Tenements after the death of the Lessor, because the Lessee by force of the Lease hath right presently to have the Tenements according to the forme of the lease: but if a man maketh a Deed of Feoffment to another, and a Letter of Attorny to home

home a deliverer a luy ſeiſin per force de meſme le fait, uncore ſi liverie de ſeiſin ne ſoit fait en la vie celuy que feſoit le fait, ceo ne vault riens, pur ceo que lauter nad pas aſcun droit daver les tenſts ſolongz le purport de le dit fait, devant le liverie de ſeiſin. Et ſi mul liverie de ſeiſin ſoit fait, donqz apres le mort celuy que fiſt le fait, le droit de tiels tenements eſt maintenant en ſon heire ou en aſcun auter.

one to deliver to him ſeiſin by force of the ſame deed, yet if liverie of ſeiſin be not executed in the life of him which made the deed, this availeth nothing, for that the other had nought to have the Tenements according to the purport of the ſaid Deed before liverie of ſeiſin made, & if there be no liverie of ſeiſin, then after the deceaſe of him who made the Deed, the right of theſe Tenements is forthwith in his heire, or in ſome other.

¶ *Et un letter dattorney a un home a deliver a luy ſeiſin per force de meſme le fait.* Here firſt it appeareth that the authority to deliver ſeiſin (as hath been ſaid) muſt be by Deed: For Letter dattorney is as much as a warrant of Attorney by Deed, for Literæ doe ſignify ſometimes a Deed, as Literæ acquietanciæ do ſignify a Deed of Acquittance, and herewith (a) agreeth Britton. Vid. Sect. 196.

(a) 14 E. 3. 27. 11 Brit. 101. b.

2. Littleton here ſpeaks generally a un home, and few perſons are (b) diſabled to be private attorneys to deliver ſeiſin: for Monkes, Infants, Feme coverts, Perſons attainted, outlawed, excommunicated, Villeins, Aliens, &c. may be Attorneys. A Feme may be an Attorney to deliver ſeiſin to her husband, and the husband to the wife, and he in the remainder to the Leſſee for life.

(b) 21 E. 4. 18. Br. Feoffments. 50. 21 H. 6. 30. 13 E. 3. Attorney 72.

3. It appeareth here that the attorney muſt (c) purſue his warrant, otherwiſe he doth not deliver ſeiſin by force of the deed, as Littleton ſpeaketh. Now his authority is twofold, expreſſed in his warrant, and implyed in law, both which he muſt purſue, & firſt of his expreſs authority. A man ſeiſed of black acre and white acre makes a Deed of feoffment of both, and a Letter of Attorney to enter into both acres, & to deliver ſeiſin of both of them according to the form and effect of the deed, and he enters into black acre and delivers ſeiſin ſecundum formam cartæ, this livery & ſeiſin is good, albeit he did enter into both, nor into one in the name of both; for when he delivereth ſeiſin of one ſecundum formam cartæ, this is tantamount, & implyeth a livery of both. So when the feoffment is made to two or more, and the attorney is to make livery of ſeiſin to both, and the attorney make livery of ſeiſin to one of the Feoffees, ſecundum formam & effectum cartæ, this is good to both, & yet in that caſe, he that is abſent may wave the livery. If the Leſſee for life make a deed of feoffment, & a Letter of attorney to the Leſſor to make livery, & the Leſſor maketh livery accordingly, notwithſtanding he ſhall enter for the forfeiture, but if Leſſee for years make a feoffment in fee and a letter of attorney to the Leſſor to make livery, and he make livery accordingly, this livery ſhall bind the leſſor, and ſhall not be avoided by him: for the leſſor cannot make livery as attorney to the leſſee, becauſe he had no Freehold whereof to make livery, but the Freehold was in the leſſor. If the leſſor make a deed of feoffment, and a letter of attorney to the leſſee for years to make livery, and he doth it accordingly, this ſhall not drown or extinguiſh his term, becauſe he did it as a miniſter to another, and in anothers right, and is accounted in judgment of law the act of the other, and the Feoffee claimeth nothing by him.

(c) 12 Aſſ. pl. 24. 26 Aſſ. 39. 11 H. 4. 3. 10 H. 7. 11 H. 7. 13. 40 Aſſ. 38.

27 Aſſ. 61. 41 Aſſ. 10. 41 E. 3. 27.

Tr. 7. Eliz. in Com. Banco.

If one as Procurator or Attorney to another preſent to his own Benifice, he puts himſelf out of poſſeſſion, becauſe he commeth in by the induction & inſtitution of the Ordinary. If the Tenant deviſe that the Lord ſhall ſell the land, & dieth, & the Lord ſelleth it; the Seigniory remains. But if the Lord or a Grantee of a rent charge had been alſo Ceſtque uſe of the land, and after the ſtatute of R. 3. & before the ſtatute of 27 H. 8. Ceſtque uſe had made a feoffment in fee of the land albeit the land paſſeth from the feoffees & his feoffment is warranted by the power given to him by the ſtatute, yet the Seigniory or rent charge is extinct by his feoffment, for that he hath not a bare authority as the Attorney hath. 17 E. 3. 61.

If a man be diſſeiſed of black acre, and white acre, & a warrant of attorney is made to enter into both & to make livery, there if the Attorney enter into black acre only, and makes livery ſecundum formam cartæ, there the livery of ſeiſin is void, becauſe he doth leſs than his warrant, for the eſtate of the Diſſeiſor in white acre cannot be deveſted without an entry. But there

there is a diverſity b. tween an authority couple d with an intereſt, and a bare authority. For example, A cuſtom within a Mannor time out of mind of man uſed, was to grant certain lands parcel of the ſaid Mannor in Fee ſimple, and never any grant was made to any, but the heirs of his body, for life or for years & the Lord of the ſaid Mannor did grant to one by copy for life, the remainder over to another, and the heirs of his body: And it was (k) adjudged, that the grant and remainder over was good, for the Lord having authority by cuſtom, and an intereſt withal, might grant any leſſer eſtate: for in this caſe, the cuſtom that enableth him to a greater, enableth him to the leſſer, Omne majus in ſe continet minus. But he that hath but a bare authority, as he that hath a Warrant of Attorney, muſt purſue his authority (as hath been ſaid) and if he do leſs it is void.

(k) Hil. 36 El. Rot. 492. Inter Stanton & Barnes in Ejectione firmæ in the Kings Bench.

2 & 3 Ph. & M. Dyer 131, 17 El. Dyer 340.

A man make a leaſe for life, & after make a Charter of Feoffment, with a Letter of Attorney to deliver ſeiſin, the Attorney enters upon the leſſee, this is ſufficient to convey away the reverſion, for (that it may be ſaid once for all) livery of ſeiſins being to perfect the common aſſurance of lands, is always expounded favourably, ut res magis valeat quam pereat. And all this was adjudged and (l) reſolved by the Court of Common Pleas, and after affirmed by all the Judges of the Kings Bench in a Writ of Error.

(l) Paſch. 31 El. Rot. 514. in Com. Banco inter Carter pl. & Claypole & alter def. in Ejectione firmæ, & in Brevi de Error. Hil. 32 El. Rot. 791.

And it is to be known, that a Deed of Feoffment beginning Omnibus Chriſti fidelibus, &c. or Sciant preſentes & futuri, &c. or the like, a Letter of Attorney may be contained in ſuch a deed, for one continent may contain divers deeds to ſeveral perſons: but if it be by Indenture between the Feoffor on the one part, & the Feoffee on the other part, † there a Letter of Attorney in ſuch a Deed is not good, unleſs the Attorney be made a party in the deed indented.

† Communis error facit jus (ut dicitur) in contrarium.

Now the authority of an Attorney implied in the Law is, though the Warrant be general, to deliver ſeiſin: yet the Attorney cannot deliver ſeiſin within the view, for his Warrant is intendable in law of an actual and expreſs livery, and not of a livery in law, and ſo hath it been reſolved. See more hereof here next following.

Paſch. 3 El. in Com. Banc. in Yarhams caſe.

¶ *Uncore ſi liverie & ſeiſin ne ſoit fait en la vie celuy que feſoit le facit.* Here albeit the warrant of Attorney be indefinit, without limitation of any time yet the law preſcribeth a time, as Littleton here ſaith in the life of him that made the deed, but the death not onely of the Feoffor, of whom Littleton ſpeaketh, but of the Feoffee alſo is a countermand in Law of the letter of Attorney & the deed it ſelf is become of none effect, becauſe in this caſe nothing doth paſs before livery of ſeiſin. For if the Feoffor dieth, the land deſcends to his heir, and if the Feoffee dieth, livery cannot be made to his heir, becauſe then he ſhould take by purchaſe, where heirs were named by way of limitation. And herewith agreeth Bracton, Item oportet quod donationem ſequatur rei traditio, etiam in vita donatoris & donatorii. Therefore a Letter of Attorney to deliver livery of Seiſin after the deceaſe of the Feoffor is void.

Bract. li. 2. fo. 16. 40 Aſſ. P. 38. 29 H. 6. 7. a. 14 E. 4. 2. 18 E. 3. 16. b. 21 H. 7. 13. &c.

Fourthly, In all caſes the Attorney muſt purſue the Warrant in ſubſtance and effect that he hath to deliver Seiſin.

Fifthly, All this is to be underſtood of ſole perſons, or of a Corporation or Body conſiſting of one ſole perſon, or a Biſhop perſon, &c. But it holdeth not in a Corporation aggregate of many perſons capable. And therefore if a Maior or Commonalty make a Charter of feoffment, & a Letter of Attorney to deliver Seiſin, the Livery of Seiſin is good after the deceaſe of the Maior, becauſe the Corporation never dieth. The like of a Dean and Chapter, Et ſic de ſimilibus.

18 H. 8. 3. 21 H. 7. 19.

Laſtly, If the Leſſor by his Deed license the Leſſee for life or years, (which is reſtrained by condition not to alien without licence) to alien, and the Leſſor dieth before the Leſſee doth alien, yet is his death no countermand of the licence, but that he may alien, for that licence exempteth the Leſſee out of the penalty of the Condition, & it was executed on the part of the Leſſor as much as might be. And ſo was it reſolved, Michael. 3. Jacob. in Communi Banco. By if the King doth license to alien in Mortmain, and dieth, the licence may be executed after.

Mich. 3. Ja. in Com. Banc. F. N. B. 223. 2 E. 3. offi. de Court. 29. Stanf. Prer. 30.

## *Sect.* 67.

¶ *Si le Leſſee fait waſte.* Waſte. Vaſtum dicitur à vaſtando, of waſting and depopulating: and for that Waſte is often allea-

¶ Item ſi Tenements ſoient leſſes a un home p̄ term de demy an, ou pur le

ALſo if tenements be let to a man for terme of half a yeare, or for a quarter of a

ged

quarter de un an, &c. En tiel caſe, ſi le leſſee fait waſt, l'leſſor avera envers luy Briefe de Waſt, & le Briefe dirra, Quod tenet ad terminum annorum: Mes il avera un ſpeciall Declaration ſur le veritie de ſon matter, & le Count nabatera le Briefe, pur ceo que il puit aver nul auter Briefe ſur le matter.

years, &c. In this caſe if the Leſſee commit waſte, the Leſſor ſhall have a Writ of waſte againſt him; and the Writ ſhall ſay, *Quod tenet ad terminum annorum:* but he ſhall have an eſpecial declaration upon the truth of his matter, and the Count ſhall not abate the Writ, becauſe he cannot have any other Writ upon the matter.

ged to be timber, which we call in Latine Maremium, or Marelnium, or Mareſmium, it is good to fetch both of them from the original. Firſt, Timber is a Saxon word. Secondly, Maremium is derived of the French word Marreim, or Marrein, which properly ſignifieth Timber.

In action of waſte doth lye againſt Tenant by the curteſie, tenant in dower, tenant for life, for years, or half a year, or gardian in chivalry, by him that hath the immediate eſtate of inheritance, for waſte or deſtruction in houſes, gardens, woods, trees, or in lands, meadows, &c. or in exile of men, to the diſheriſon of him in the reverſion or re- V. Merlb. cap. 23. 2. part of the Inſtit.

mainder. There be two kinds of waſtes, viz. voluntary or actuall, and permiſſive. (a) Waſte may be done in houſes, by pulling or proſtrating them down, or by ſuffering the ſame to be uncovered, whereby the ſpars or rafters, plaunchers, or other timber of the houſe are rotten. (a) 34 E. 3. Waſt. 143.

(b) But if the houſe be uncovered when the Tenant cometh in, it is no waſte in the Tenant, to ſuffer the ſame to fall down. But though the houſe be ruinous at the Tenants coming in, yet if he pull it down it is waſte, unleſs he re-edifie it again. (c) Alſo if glaſſe windows (though glaſed by the tenant himſelf) be broken down or carried away, it is waſte, for the glaſſe is part of his houſe. And ſo it is of wainſcot, benches, doors, windows, furnaces, and the like, annexed or fixed to the houſe, either by him in the reverſion, or the Tenant. (b) 40. Aſſ. p. 22. 2 Mar. Dyer 117. 23 H. 6. 24. 10 H. 7. 2. 44 E. 3. 44. 29 E. 3. 33. lib. 4. fol. 63. Herlakendens caſe. (c) 22 H. 6. 18. 12 H. 8. 1. 13 H. 7. 21, 22 E. 4. 18. 21 E. 4. 39. 10 H. 7. 2. Reg. Judic. 26.

(d) Though there be no timber growing upon the ground, yet the Tenant at his peril muſt keep the houſes from waſting. If the Tenant do or ſuffer waſte to be done in houſes, yet if he repair them before any action brought, there lieth no action of waſte againſt him, but he cannot plead, Quod non fecit vaſtum, but the ſpecial matter. (d) 44 E. 3. 21, 38. Aſſ. 1. 4 E. 3. Waſt. 22. 10 El. Dyer 276. lib. 5. fol. 119. in Whelpdales caſe, 3

A wall uncovered when the Tenant commeth in is no waſte if it be ſuffered to decay. (e) If the Tenant cut down or deſtroy any fruit trees growing in the garden or orchard, it is waſte, but if ſuch trees grow upon any of the ground which the Tenant holdeth out of the Garden or Orchard, it is no waſte. 19 E. 3. Waſt. 30. 44 E. 3. 44. (e) 7 H. 6. 38. 44 E. 3. 44.

(f) If the Tenant build a new houſe, it is waſte, and if he ſuffer it to be waſted, it is a new waſte. (g) If the houſe fall down by tempeſt, or be burnt by lightning, or proſtrated by enemies, or the like, without a default of the Tenant, or was ruinous at his coming in, and fall down, the Tenant may build the ſame again with ſuch materials as remains, and with other timber which he may take growing on the ground for his habitation, but he muſt not make the houſe larger than it was. If the houſe be diſcovered by tempeſt, the Tenant muſt in convenient time repair it. (f) 42 E. 3. 21. 49 E. 3. 2. 9 H. 6. 52. 17 E. 2. Waſt. 118. (g) Lib. 4. fol. 63. Herlakendens caſe, 43 E. 3. 6. 26 E. 3. 76. 11 H. 4. 34. 12 H. 4. 5. 22 H. 6. 18. 19 E. 3. Waſt. 30.

(h) If the Tenant of a Dove-houſe, Warren, Parke, Vivary, Eſtangues, or the like, do take ſo many, as ſuch ſufficient ſtore be not left as he found when he came in, this is waſte; and to ſuffer the pale to decay, whereby the Deer are diſperſed, is waſte. (h) Temps E. 1. Waſt. 128. Brit. fol. 34. 5 R. 2. Waſt. 97. 12 H. 8. 1 Pl. Com. 222. 7 H. 3. Waſt. 141.

And it is to be obſerved, that there is waſte, deſtruction, and exile. Waſte properly is in houſes, gardens, (as is aforeſaid) in timber trees, (viz. Oke, Aſh, & Elm, and theſe be timber trees in all places) either by cutting of them down, or topping of them, or doing any act whereby the timber may decay. Alſo in Countries where timber is ſcant, and Beeches, or the like, are converted to building for the habitation of man, or the like, they are alſo counted timber. (i) If the Tenant cut down timber trees, or ſuch as are accounted timber, as is aforeſaid, this is waſte; and if he ſuffer the young germins to be deſtroyed, this is deſtruction. (k) So it is, if the tenant cut down underwood, (as he may by law) yet if he ſuffer the young germins to be deſtroyed, or if he ſtub up the ſame, this is deſtruction. (i) 22 H. 6. 12. 2. 9 H. 6. 1. 66. 11 H. 6. 1. F. N. B. 59. m. (k) 20 E. 3. Waſt. 32. 10 H. 7. 2. 42 E. 3. 6. b. 5 E. 4. 100. 41 E. 3. Waſt. 82. 20 E. 3. Waſt. 32. 12 E. 4. 1.

(l) Cutting down of willows, beech, birch, aſpe, maple, or the like, ſtanding in the defence and ſafegard of the houſe, is deſtruction. (m) If there be a quickſet fence of white thorne, if the tenant ſtub it up, or ſuffer it to be deſtroyed this is deſtruction; and for all theſe and the like deſtructions an action of waſte lieth. (n) The cutting of dead wood, that is, ubi arbores ſunt aridæ, mortuæ, cavæ, non exiſtentes maremium, nec portantes fructus, nec folia in æſtate, is (l) 40 E. 3. 15. b. & 35. 12 E. 4. 1. 12 H. 8. 1. b. 10 H. 7. 1. 8 E. 2. Waſt. 111. 4 E. 6. Waſt. Br. 136. (m) 36 E. 3. 17. 9 H. 6. 10. 12 H. 8. 1. (n) 16 El. Dyer 322. 20 E. 3. Waſt. 32. F. N. B. 59. m.

no waſte; but turning of trees to coals for fuel, when there is ſufficient dead wood, is waſte; (o) if the Tenant ſuffer the houſes to be waſted, and then fell down timber to repair the ſame, this is a double waſte. (p) Digging for gravel, lime, clay, brick, earth, ſtone, or the like; or for mines of metal, coal, or the like hidden in the earth, and were not open when the Tenant came in, is waſte; but the Tenant may dig for gravel or clay for the reparation of the houſe, as well as he may take convenient timber trees.

(q) It is waſte to ſuffer a wall of the ſea to be in decay, ſo as by the flowing & reflowing of the ſea, the meadow or marſh is ſurrounded, whereby the ſame becomes unprofitable: but if it be ſurrounded ſuddenly by the rage & violence of the ſea, occaſioned by wind, tempeſt, or the like, without any default in the Tenant. (r) this is no waſte puniſhable. So it is, if the Tenant repair not the banks or wals againſt rivers or other waters, whereby the meadows or marſhes be ſurrounded, and become ruſhy and unprofitable.

(ſ) If the Tenant convert arable land into wood, or è converſo, or meadow into arable, it is waſte, for it changeth not only the courſe of his husbandry, but the proof of his evidence.

(t) The Tenant may take ſufficient wood to repair the walls, pales, fences, hedges and ditches, as he found them, but he can make no new: and he may take alſo ſufficient plowbote, firebote, and other housebote.

The Tenant cutteth down trees for reparations and ſelleth them, and after buyeth them again, & imploys them about neceſſary reparations, yet it is waſte by the condition: he cannot ſell trees, and with the mony cover the houſe: Burning of the houſe by negligence or miſchance is waſte.

(u) If a man make a leaſe for life, & by deed grant, that if any waſte or deſtruction be done, that it ſhall be redreſſed by neighbours, and not by ſuit or plea, notwithſtanding an Action of waſte ſhall lye; for the place waſted cannot be recovered without a plea.

(x) Bracton, Fleta, and Britton, do uſe the ſame diviſion as is aforeſaid, viz. Vaſtum, Deſtructio, & Exilium, in their proper ſignification.

Now ſomewhat is to be ſpoken of exile or deſtruction of men; Exile or deſtruction of Villains, or Tenants at will, or making them poor where they were rich when the tenant came in, whereby they depart from their tenures, is waſte. (a) And yet the Statute of Glouc' ſpeaketh not of exile, but it is comprehended under the general word of Waſte. The Statute of W. 1. hath deſtructionem, the Statute of Magna Charta hath vaſtum & deſtructionem, the Statute of Merlebridge hath vaſtum, venditionem & exilium in domibus, boſcis, vel hominibus, &c.

But waſte and deſtruction in their larger ſenſe are words convertible. (b) Item de hoc quod dicit vaſtum & exilium, ſciendum eſt quod non ſunt referenda ad eundem intellectum, ſed vaſtum & deſtructio fere idem ſunt: vaſtum idem eſt quod deſtructio, & è converſo, & ſe habent ad omnem deſtructionem generaliter.

(c) Vaſtum autem & deſtructio fere æquipollent & convertibiliter ſe habent in domibus, boſcis, & gardinis; ſed exilium dici poteſt, cum ſervi mutuum ſtrantur & à tenementis ſuis injurioſe ejiciantur: fortuna autem & ignis vel hujuſmodi eventus inopinati, omnes tenentes excuſant.

(d) No perſon ſhall have an Action of waſte, unleſſe he hath the immediate eſtate of inheritance, but ſometime another ſhall joyn with him for conformity. As if a reverſion be granted to two, and to the heirs of one, they two ſhall joyn in an Action of waſte: and in like ſort the ſurviving Coparcener, and the Tenant by the courteſie ſhall joyn in an Action of waſte: and if two joyntenants be, & to the heirs of one of them, and they make a leaſe for life, they ſhall joyn in an Action of waſt. (e) If the Eſtate tail determine, hanging the Action of waſte and the plt. become Tenant in tail after poſſibility, the Action of waſte is gone. (f) If the Tenant doth waſte, and he in the reverſion dieth, the heir ſhall not have an action of waſte, for the waſte done in the life of the Anceſtor; nor a Biſhop, Maſter of an Hoſpital, Parſon, or the like, in the time of the Predeceſſor. (g) And ſo if Leſſee for years doth waſte, and dieth, an action of waſte lieth not againſt the Executor or Adminiſtrator, for waſte done before their time: But if two Coparceners be of a reverſion, and waſte is committed, and the one of them dye, the Aunt and the Neece ſhall joyn in an action of waſte.

(h) If lands be given to two and the heirs of one of them, he that hath the Fee ſhall not have an Action of waſte upon the Statute of Glouc': for that they are Joyntenants, but his heir ſhall have an action of waſte againſt Tenant for life.

Note, after waſte done there is a ſpecial regard to be had to the continuance of the reverſion in the ſame ſtate that it was at the time of the waſte done; for if after the waſte, he granteth it over, though he taketh back the whole eſtate again, yet is the waſte diſpuniſhable. So if he grant the reverſion to the uſe of himſelf & his wife, & of his heirs, yet & waſte is diſpuniſhable and ſo of the like, becauſe the eſtate of the reverſion continueth not, but is altered, and conſequently the Action of waſte done before (which conſiſts in privity) is gone.

(i) A Prohibition of waſte did lye againſt Tenant by the Curteſie, Tenant in Dower, & a Gardian in Chivalry by the Common Law, but not againſt tenant for life, or years, becauſe they

(o) 44 El 3. 4. 20 E. 3. Waſt. 32. F. N. B. 59. b. 19 E. 3. Waſt. 30.
(p) 22 H. 6. 18. b. 9 E. 4. 35. 41 E. 3. Waſt. 82. 17 E. 3. 7. 9 H. 6. 66. 2 H. 7. 24. F. N. B. 59. n. & 149. c. 20 E. 3. Waſt. 32.
(q) Anno 6 El. Of the Report of Juſtice Dalſon, In Griffins caſe, 17 E. 3. 65. Brit. fol. 168. b.
(r) 20 H. 6. 1. F. N. B. 59. n. 6 El. ubi ſupra.
(ſ) 28 H. 8. Dyer 37. 22 H. 6. 24. 10 H. 7. 5. a. 44 E. 3. 44.
(t) 16 El. Dyer 332. 21 H. 6. 47. Lib. 5. E. 4. 100. 12 E 3. Waſt. 28. 48 E. 3. 25. Temps E. 1. 123. 20 E. 3. Waſt. 32. 19 E. 3. Waſt. 30.
(u) 3 E. 3. Waſt. 5. Bract. lib. 4. fol. 315.

(x) Bracton fol. 168. Fleta lib. 1. cap. 11. 16 H. 3. Waſt. 135. 3 E. 2. tit. Waſt. 2. 17 E. 2. Waſt. 118. 10 H. 7. 2 H. 6. 11. 9 H. 6. 52. 11 E. 2. Waſt. 113. F. N. B. 56 H. & 55. c. Regiſt. judic. 25.
(a) Glouc cap. 5. W. 1. cap. 21. Magna Charta, cap. 4. Merleb. cap. 23.
(b) Bract. lib. 4. fol. 316 & 317.
(c) Fleta lib. 1. cap. 11.

(d) 7 E. 3. 54. b. 2 H. 5. 7. 22 H. 6. 24. 13 H. 7. 22 H. 8. 33. F. N. B. 59. fol. 8. R. 2. Waſt. 147.

(e) 2 H. 5. 22.
(f) 2 H. 4. 2.

(g) 10 E. 4. 1. 49 E. 3. 25. 23 H. 8. tit. Waſt. Br. 38 E. 3. 17. 4 E. 3. 8. 45 E. 3. 3. 46 E. 3. 31. 11 E. 2. Waſt. 115. 2 Mar. Waſt. 117. 8 E. 2. Waſt. 110.
(h) 24 E. 3. 27. 50 E. 3. 3. 8 H. 6. 13.

(i) Bract. lib. 4. fol. 315, 316, 317. Fleta lib. 1. cap. 11. Brict. fol. 108. Doct. & Stud. lib. 2. cap. 1. 12 H. 4. 3. 10 20 H. 3. Waſt. 142. H. 6. 1. 4 H. 3. Waſt. 140. 9 H. 3. ibid. 136.

they came in by their own act, and he might have prohibited that no waste should be done. (i) A Tenant by the Courtesie or in Dower can hold of none but of the heir, and his heirs by descent; and therefore if they grant over their whole estate, and the Grantee doth waste, yet the heir shall have an Action of waste against them, and recover the land against the Assignee: but if the heir either before the assignment had granted, or after the assignment doth grant, the reversion over, the stranger shall have an action of waste against the Assignee, because in both Cases the privity is destroyed: in all other cases the action of waste shall be brought against him that did the waste (for it is in nature of a trespasse) unless it be in the case of a ward; (k) for there if the Gardian doth waste and assigne over, the Action lieth against the Assignee. (l) A Gardian shall not be punished for waste done by a stranger, it is so penal unto him, for he shal lose the Wardship both of the body & of the land, though the waste be but to the value of twenty shillings; and if that sufficeth not to satisfie for the waste, then he shall recover damages of the waste, over & above the losse of the Ward. But Tenant by the Curtesie, Tenant in Dower, Tenant for life, years, &c. shall answer for the waste done by a stranger, and shall take their remedy over. (m) But if there be two Joyntenants of a ward and one of them do waste, both shall answer for it.

(i) (F.N.B. 56. c. & f. Temps E. 1. Walt. 122. 18 E. 3. 3. 30 E. 3. 16. 38 E. 3. 22. 11 H. 4. 18. 4 E. 3. 25. Regist. 72. lib. 3. fol. 23. Walkers case, lib. 9. fol. 142. Beaumonts case.

(k) 27 E. 3. 81. 26 E. 3. Waste 19.

(l) 12 H. 4. 3. Bract. lib. 4. 316. 317. Fleta lib. 1. c. 11. Britt. 168. 3 E. 3. Walt. 146. 44 E. 3. 27. F.N.B. 59. a. & 60. g. & T.

(m) 33 E. 3. Walt. 6.

(n) If the Gardian doth waste, and the heir within age bring an Action of waste, the Gardian shall lose the Wardship as is afore said; but if the heir bring an action of waste at his full age, then he shall recover treble damages, for then he cannot lose the Wardship.

(o) An Infant, and Baron, and Feme shall be punished for waste done by a stranger, and so shal the wife that hath a state by survivor for the waste done by the husband in his life time, if she agree to the estate, though there hath been variety of opinions in our Books.

(p) But if Feme tenant for life take a husband, and the husband doth waste, and the wife dieth, no Action of wast lieth against the husband in the Tenuit, for he was seised but in jure uxoris, & his wife was Tenant of the Freehold; but if a Feme be possessed of a term for years, and take husband, and the husband doth waste, and the wife dieth, the husband shall be charged in an Action of waste, for the law giveth the term to him.

(n) 44 E. 3. 27. 48 E. 3. 10. F.N.B. 60. f. 12 H. 4. 3. 19 E. 2. Walt. 117. 41 E. 3. Walt. 81. 3 E. 2. Walt. 5. 7 E. 3. 12.

(o) 15 H. 3. Walt. 16. temps E. 1. Walt. 128. 2 H. 4. 3. a. 3 E. 3. 18, 76. 11 Ass. 11. 21 H. 6. 24. b. 33 H. 6. 31. a. 42 E. 3. 22. 19 E. 3. breve 246. 46 E. 3. 25. 7 H. 6. 2. b. 3 E. 3. 46. 10 E. 3. 17, 18. 9 E. 3. 41. 9 E. 3. breve 246. 17 E. 4. 7. 9 H. 6. 52. F.N.B. 36 E. Doct. & Stud. lib. 2. cap. 1. 23 H. 8. Walt. 138. lib. 8. fol. 44. Willinghams case.

(p) Lib. 5. fol. 73. Cliftons case. 49 E. 3. 25. 46 E. 3. Walt. Statham. 10 H. 6. 11, 12.

(q) If tenant for life grant over his estate upon condition, and the Grantee doth waste, and the Grantor re-entereth for the condition broken, the action of waste shall be brought against the Grantee, and the place wasted recovered.

(q) 30 E. 3. 16.

(r) If a lease for life be made to a Villein, and waste is done, the Lord entreth, he shall not be punished for the waste done before; but for waste done after, he shall.

(r) 48 E. 3. 19.

(s) An Occupant shall be punished for waste, and so if an estate be made to A. and his heirs during the life of B, A. dieth, the heir of A. shall be punished in an action of waste.

(t) If a lease be made to A. for life, the remainder to B. for life, the remainder to C. in fee, in this case where it is said in the Register, and in F.N.B. that an action of waste doth lye, it is to be understood after the death or surrender of B. in the mean remainder; for during his life, no Action of waste doth lye.

But if a lease for life be made, the remainder for years, the remainder in fee, an action doth lye presently during the term in remainder; for the mean term for years is no impediment.

But if a man make a lease for life or years, and after granteth the reversion for years, the Lessor shall have no action of waste during the years, for he himself hath granted away the reversion, in respect whereof he is to maintain his action. (†) Otherwise it is, if he had made a lease in reversion, which had been but a future interest, for there an action of waste lieth during the term, and so is the Book to be understood, and the term shall be saved in that case.

(s) Lib. 5. fol. 73. Cliftons case. 49 E. 3. 25. 46 E. 3. Walt. Statham. 10 H. 6. 11, 12.

(t) 30 E. 3. 16.

(u) No action of waste lieth against a Gardian in Socage, but an account or trespasse, nor against Tenant by Statute staple, &c. or Elegit.

(w) If Tenant for life or years, or their assigne make a grant over, and notwithstanding take the profits, an action of waste lieth against him, by him in the reversion or remainder by the Statute, Nota.

(x) If waste be done sparsim here & there in woods, the whole woods shall be recovered, or so much wherein the waste sparsim is done. And so in houses so many rooms shall be recovered wherein there is waste done; but if the waste be done sparsim throughout, all shall be recovered. It hath been said, that if the Hall be wasted, the whole House shall be recovered, because the whole house is denominated of the Hall: but latter authority is to the contrary.

(i) Lib. Conf. fol. Cotes case. 3 E. 3. 18. F.N.B. 58. c. & 59. h. 50 E. 3. 3. 33 E. 3. Walt. 144. 11 E. 3. reseeit. 118. 10 E. 4. 9. Regist. 74. lib. 2. fol. 92. inter paget & Carie in Binghams case. lib. 5. fol. 76, Pagets case. lib. 10. fol. 44. Jennings case. F.N.B. 59. h. 4 E. 3. 18.

(†) 4 E. 3. 18 F. tit. Walt. 18.

(u) Merlebridge cap. 17. 21 E. 3. 30, 16 E. 3. tit. Walt. 100. 14 E. 3. Walt. 107. 2 E. 2. Walt. 1. 28 H. 6. Walt. 9. 32 H. 6. 7. F. N. B. 59. E.

(w) 11 H. 6. cap. 5. lib. 5. fol. 77. Boothes case.

(x) 8 E. 3. Walt. 112. 4 E. 6. Walt. 136. 4 E. 2. 32. 15 H. 7. 11. 15 E. 3. Walt. 134. Temps E. 1. Walt. 134. 18 H. 8. 1.

(y) There is waste of a small value, as Bracton saith, Nisi vastum ita modicum sit proper quod non sit inquisitio facienda. Yet trees to the value of three shillings and four pence hath been adjudged waste, and many things together make waste to a value. But let us now return to our Author.

(y) Bract. lib. 4. fol. 316. 38 E. 3. 7. b. 34 E. 3. Walt. 146 14 H. 4. 11. b. F. N. B. 60. c. Temps E. 1. Walt. 124. 19 H. 6. 8.

¶ *Briefe de waste.* See in the Register five severall Writs of waste; Two at the Common Law for waste done by Tenant in Dower, or the Gardian; And three by special or Statute Law, for waste done by Tenant for life, for years, and Tenant by the Curtesie.

¶ *Briefe*

(x) Vi. Bract. lib. 5. fol. 413. b. Fleta lib. 2. cap. 12. See the second part of the Institutes, W. 2. cap. 24.

*Briefe Dirra.* The Writs original of the Register (x) (as Bracton saith) formed, and of course had their first authority by Act of Parliament, and therefore without an Act of Parliament they cannot be altered or changed, which is proved by the Statute of W. 2. cap. 24. whereby remedy is provided in many cases. But hear what Bracton saith, Sunt quædam Brevia formata in suis casibus, & quædam de cursu, quæ concilio totius regni sunt approbata; quæ quidem mutari non possunt, absque eorundem contraria voluntate. Magistralia autem sæpe variantur secundum varietatem casuum &c. And this is the reason that in this case of half a year the words of the Writ shall be without change, Quod teneat ad terminum annorum; and the pl' must make a special declaration according to his case, for otherwise he should be without remedy. In this particular case the statute of Glouc' c. 5. which giveth the Action of waste against the Lessee for life or years (which lay not against them at the Common Law) speaketh of one that holdeth for term of years in the plural number, & yet here it appeareth by the authority of Littleton, That although it be a penal Law, whereby treble damages and the place wasted shall be recovered; yet a tenant for half a year being within the same mischief, shall be within the same remedy, though it be out of the letter of the law, for Qui hæret in litera, hæret in cortice, which is an excellent example, whereupon in many like cases a man may settle a certain judgment. You may observe in the said ancient Authors what remedy was given for waste at the Common law, and against whom, and what was adjudged waste, destruction and exile.

De vasto. Bract. li. 4. fo. 315, 316, 317. Fleta li. 1. ca. 11. & li. 5. ca. 33. Britton fol. 167. & 168. 46 E. 3. 31. F.N.B. 60. c. 4 E. 4. 13. 37 H. 6. 26. b. 7 H. 7. 2. 14 H. 8. 12. 18 E. 3. 27.

Vide Marlebridge cap. 23. 2. part of the Institutes.

In many cases a tenant for life or years may fell down timber to make reparations, albeit he be not compellable thereunto, & shall not be punished for the same in any action of waste. As (a) if a house be ruinous at the time of the lease made, if the lessee suffer the house to fall down he is not punishable, for he is not bound by law to repair the house in that case. And yet if he cut down timber upon the ground so letten, & repair it, he may well justifie it; and the reason is, for that the law doth favour the supportation and maintenance of houses of habitation for mankind: And therefore if two or more Joyntenants or tenants in common be of a house of habitation, and the one will not repair the house, the other shall have by the law a Writ De reparatione facienda, & the writ saith, Ad sustentationem ejusdem domus teneantur. So it is if the Lessor by his Covenant undertaketh to repair the houses, yet the lessee (if the lessor doth it not) may with the timber growing upon the ground repair it, though he be not compellable thereunto. In ỳ same manner, if a man make a lease of a house & land without impeachment of waste for the house; yet may the Lessee with the timber upon the ground repair the house, though he may utterly waste if he will, & so in many other cases. A man hath land in which there is a Mine of coals, or of the like, & maketh (b) a lease of the land (without mentioning any Mines) for life or for years; the lessee for such Mines as were open at the time of the lease made, may dig and take the profit thereof. (c) But he cannot dig for any new Mine, that was not open at the time of the lease made, for ỳ should be adjudged waste. And if there be open mines, & the owner make a lease of the land, with the mines therein, this shall extend to the open mines only, and not to any hidden mine; but if there be no open mine, and the lease is made of the land together with all mines therein; there the lessee may dig for mines, and enjoy the benefit thereof, otherwise those words should be void. I have been the more spacious concerning this learning of waste, for that it is most necessary to be known of all men.

(a) 12 H. 8. 1.

F. N. B. 127.

(b) 17 E. 3. 7. 9 H. 6. 66. 22 H. 6. 18. 9 E. 4. 35. 12 E. 4. 8. F.N.B. 149. c. & 59. n.

(c) Lib. 5. fo. 12. Sanders case.

Now hath Littleton spoken of an estate for life, and an estate for years in several persons. Now let us see how they stand simul and semel in one person.

If a man letteth lands to another for life, the remainder to him for 21 years, he hath both estates in him so distinctly, as he may grant away either of them; for a greater estate may uphold a lesser, but not è converso; and therefore if a man make a lease to one for 21 years, the remainder to him for term of his life, the lease for years is drowned.

(d) If a man make a lease for life to one, the remainder to his Executors for 21 years, the term for years shall vest in him; for even as Ancestor and Heir are correlativa, as to inheritance: (as if an estate for life be made to A. the remainder to B. in tail, the remainder to the right heirs of A. the Fee vesteth in A. as it had been limited to him and his heirs) even so are the Testators and the Executors correlativa as to any Chattel. And therefore if a lease for life be made to the Testator, the remainder to his Executors for years, the Chattle shall vest in the Lessee himself, as well as if it had been limited to him and his Executors.

(d) 19 E. 2, 2. Covenant 25. 19 E. 3. Covenant 24. 32 E. 3. Quid juris c. l. 5. 17 E. 3. 29. 46 E. 3. 3. 1. 40 E. 3. 5. 11 H. 4. 39. 14 Eliz. Dyer 309 M. 40. & 41 Eliz. in Com. Banc. Rot. 22. 15. in tresp. inter Sparke & Sparke. Hill. 2 Eliz. Sir John Savages case in Curia Wardorum.

CHAP.

## CHAP. 8. Sect. 68.

### *Of Tenant at will.*

¶ TEnant a volunt eſt ou terres ou tenements ſont leſſes per un home a un auter, a aver & tener a luy a la volunt le Leſſor, per force de quel leaſe le Leſſee eſt en poſſeſſion, en tiel cas le Leſſee eſt appel tenant a volunt, pur ceo que il nad aſcun certaine ne ſure eſtate, car le Leſſor luy poit ouſter a quel temps que il luy pleiroit: uncore ſi le leſſee emblea la tre & le Leſſor apres lembleer, & devant q̃ les blees ſont matures luy ouſta, uncore le leſſee aũra les blees, & aũra ſõ entr, egres & regres a ſcier & de carier les blees, pur ẽ q̃ il ne ſcavoit a quel temps le leſſor voloit eſtre ſur luy. Auterm̃t eſt ſi tenant pur term dans q̃ conuſt le fine de ſon terme emblea la terre, & le terme eſt luy devant que les blees ſont matures, en ceo cas le leſſor, ou celuy en la reverſion

TEnant at will is, where lands or tenements are let by one man to another to have & to hold to him at the will of the Leſſor, by force of which Leaſe, the Leſſee is in poſſeſſion, in this caſe the leſſee is called Tenant at wil, becauſe he hath no certain nor ſure eſtate, for the Leſſor may put him out at what time it pleaſeth him. Yet if the Leſſee ſoweth the land, and the Leſſor after it is ſowne, and before the Corn is ripe put him out, yet the Leſſee ſhall have the Corne, and ſhall have free entry, egreſſe and regreſſe to cut and carry away the Corne, becauſe he knew not at what time the Leſſor would enter upon him. Otherwiſe it is if Tenant for yeares, which knoweth the end of his terme, doth ſowe the land, and his Terme endeth before the corn is ripe; In this caſe the Leſſor, or he in the reverſion ſhall

¶ *TEnant a volunt eſt ou terres ou tenements, ſont leſſes per un home a un auter terra aver & tener a luy a la volant le Leſſor, &c.* Fleta lib. 3. cap. 15.

It is regularly true that every Leaſe at will, muſt in Law be at the will of both parties, and therefore when the Leaſe is made, To have and to hold at the will of the Leſſor, the Law implyeth it to be at the will of the Leſſee alſo; for it cannot be onely at the will of the Leſſor, but it muſt be at the will of the Leſſee alſo. And ſo it is when the Leaſe is made, To have and to hold at the will of the Leſſee, this muſt be alſo at the will of the Leſſor; and ſo are all the Books, that ſeem prima facie to differ, clearly reconciled.

¶ *Pur ceo que il nad aſcun certaine ou ſure eſtate, &c.* Alia poſſeſſio eſt precaria & alia pro prece conceſſa: ut ſi quis ſine ſcripto conceſſerit alicui habitationem vel uſum fructum in re ſua tenenda ad voluntatem ſuam; hæc quidem poſſeſſio precaria eſt & nuda, eo quod tempeſtive & intempeſtive pro voluntate Domini poterit revocari. 18 H. 6. 1. 38 H. 6. 24. 9 E. 4. 2. b. 10 E. 4. 18. b. 21 H. 7. 38. 13 H. 8. 16. 14 H. 8. 11. 14.

¶ *Uncore ſi le Leſſee emblea la terre, & le leſſor apres l' embleer, &c.* The reaſon of this is, for that the eſtate of the Leſſee is uncertain, and therefore leſt the ground ſhould be unmanured, which ſhould be hurtfull to the Common-wealth, he ſhall Fleta. lib. 3. cap. 15.

shall reape the Crop which he sowed in peace, albeit the Lessor doth determine his will before it be ripe. And so it is if he set rootes, or sowe hemp, or flax, or any other annuall profit, if after the same be planted, the Lessour oust the

aver les blees, pur ceo que le termor conust le certaintie de son terme quant son time serroit finy.

have the corne, because the Lessee knew the certainty of his Terme and when it would end.

18 E. 4. 18.

Temps E. 1. Br. 25.
10 Ass. pl. 6.
18 E. 3. 29.
46 E. 3. 1.
7 H. 4. 17.
7 Ass. 17.
Lib. 5 19. 6. Olands case.

lessee, or if the Lessee dieth, yet he or his Executors shall have that years crop. But if he plant young fruit trees, or young Oakes, Ashes, Elms, &c. or sow the ground with Acorns, &c. there the Lessor may put him out notwithstanding, because they will yield no present annuall profit. And this is not only proper to a Lessee at will, that when the Lessor determines his will that the Lessee shall have the corn sown, &c. but to every particular Tenant that hath an estate uncertain, for that is the reason which Littleton expresseth in these words (Pur ceo que il nad ascun certaine ou sure estate.) And therefore if Tenant for life soweth the ground, & dieth, his Executors shall have the corn, for that his estate was uncertain, & determined by the act of God. And the same Law is of the Lessee for years of Tenant for life. So if a man be seised of land in the right of his wife, and soweth the ground, & he dieth, his Executors shall have the corn, & if his wife dy before him he shall have the corn. But if the husband and wife be joyntenants of the land, and the husband soweth the ground, & the land survives to the wife, it is said (a) she shall have the corn. If Tenant pur terme dauter vie soweth the ground, and Cestuy que use dieth, the Lessee shall have the corn. If a man seised of lands in fee and hath issue a daughter & dieth, his wife being enseint with a son, the daughter soweth the ground, the son is born, yet the daughter shall (b) have the corn, because her estate was lawful, and defeated by the act of God, and it is good for the Common-wealth that the ground be sown. (c) But if the Lessee at will sow the ground with corn, &c. and after he himself determine his will, and remaineth to occupy the ground, in that case the Lessor shal have the corn because he loseth his rent. And if a woman & holdeth land Durante viduitate sua soweth the ground and taketh husband (d) the Lessor shall have the embleaments, because & the determination of her own estate grew by her own act. But where the estate of the Lessee being incertain is defeasible by a right Paramount, or if the Lease determine by the act of the Lessee as by forfeiture, condition, &c. (e) There he that hath the right Paramount, or & entreth for any forfeiture, &c. shall have the corn.

(a) 8 Ass. 21.
8 E. 3. 54.
Dyer 316.

(b) 16 H. 6. 6.
(c) Lib. 5. fol. 106. Olands case.

(d) Olands case ubi supra.

If a Disseisor sow the ground and sever the corn, and the Disseisee re-enter (f) he shall have the corn because he entreth by a former Title, & severance or removing of the corn alters not & case, for the regress is a continuation of & Freehold in him in judgement of Law from & beginning.

(e) 13 E. 3. tresp. 254.
42 E. 3. 25.
Olands case, ubi supra.
(f) 27 H. 6. 1. 37 H. 6. 6.
12 E. 4. 15. 14 E. 4. 6.
15 E. 4. 31. 2 H. 7. 1.
5 H. 7. 17. 12 H. 7. 25.
10 H. 4. 1. 28 H. 8. 32. Dyer.

(g) If Tenant by Statute Merchant soweth the ground, and then a sudden & casual profit falleth by which he is satisfied, he shall have the embleaments.

(g) 44 E. 3. 15.
Fleta lib. 3. cap. 15.

¶ *Le Lessor luy puit ouster.* There is an expresse ouster, and implyed ouster: an expresse, as when the Lessor cometh upon the land, and expressly forewarneth the Lessee to occupy the ground no longer; an implyed, as if the Lessor without the consent of & lessee enter into the land and cut down a tree, this is a determination of the will, for & it should otherwise be a wrong in him unless & Trees were excepted, and then it is no determination of the Will, for then the act is lawful albeit the will doth continue. If a man leaseth a Manor at will whereunto a Common is appendant, if the Lessor put in his beasts to use the Common, this is a determination of & will. The Lessor may by actual entry into & ground determine his will in the absence of the lessee, but by words spoken from the ground & will is not determined untill & Lessee hath notice. No more than the discharge of a Factor, Attorney, or such like in their absence is sufficient in law until they have notice thereof.

(h) 15 H. 6. 24. 21 H. 6. 9.
1 E. 4. 5. 21 E. 4. 5.
Pl. Com. Parson de Honylands case.

(a) If a woman make a lease at will reserving a rent & she taketh husband, this is no countermand of the lease at will, but the husband and wife shal have an action of debt for & Rent, & so it is if a lease be made to a woman at will reserving a Rent, & & lessee taketh husband, this is no countermand of the lease, but the lessor may have an action of debt or distrein them for the Rent: so if the husband and wife make a lease at will of the wives land reserving a Rent, and the husband dy, yet the lease continueth: In the like manner, if a lease be made by two to two others at will, and one of the lessors or of the lessees dy, the lease at will is not determined in neither of those cases which are necessary points to be known.

14 E. 4. 6.
8 E. 4. 11, &c.

(a) Lib. 5. fol. 10. Henstead case.
10 Eliz. Dyer 269. b.

¶ *Aprees lembleer, & devant que les blees sont manures.* Then put the case & the Corn is ripe and ready to be cut down, and the Lessor before & Lessee reapeth it, entreth and put out the lessee, whether shall & lessee have the corn? and it is without all question & the lessee shall have it, for by the same reason & he shall have it when he is put out before it

it be ripe, he ſhall have it when he is put out when it is ripe, Et ubi eadem eſt ratio, ibi idem Jus.

¶ *Et auxi franke entrie, egres & regres.* (b) For when the Law doth give any thing to one, it giveth impliedly whatſoever is neceſſary, for the taking and enjoying of the ſame, Quando Lex aliquid alicui concedit, concedere videtur & id ſine quo res ipſa eſſe non poteſt, and the law in this caſe giveth him not to an action for the corn, but giveth him a ſpeedy remedy to enter into the land, and to take and carry it away, and compelleth not him to take it at one time, or to carry it before it be ready to be carried; and therefore the law giveth all that which is convenient viz. free entry, egreſs and regreſs as much as is neceſſary.

(b) Temps E. 1. tit. grant. 4. 9 E. 4. 3. 5. 5 E. 3. treſp. 13. 21 H. 7. 14. b. 6 H. 8. 18. b. 2 R. 2. barre 237. 14 H. 8. 2. 27 H. 8. 18. b.

If the Leſſee be diſturbed of this way which the Law doth give unto him, he ſhall have his action upon his caſe and recover his damages, and this action the law doth give unto him; for whenſoever the Law giveth any thing, it giveth alſo a remedy for the ſame. But here is to be obſerved a diverſity between a private way, whereof Littleton here ſpeaketh, and a common way. For if the way be a common way, if any man be diſturbed to go the way, or if a ditch be made overthwart the way ſo as he cannot go, yet ſhall he not have an action upon his caſe, for this the Law provided for avoiding of multiplicity of ſuits, for if any one man might have an action, all men might have the like. But the law for this common nuſance hath provided an apt remedy, and that is by preſentment in the Leet or in the Corn, unleſs any man hath a particular damage, as if he and his horſe fall into a ditch, whereby he received hurt and loſs, there for this ſpecial damage which is not common to others, he ſhall have an action upon his caſe, & all this (c) was reſolved by the Court in the Kings Bench. And in the caſe it was ſaid that it had been adjudged in the Court between Weſtbury and Powel, that where the Inhabitants of Southwark had by cuſtome a watering place for their cattell which was ſtopped up by Powel, that in the caſe any Inhabitants of Southwark might have an action, for otherwiſe they ſhould be without remedy, becauſe ſuch a nuſans is not preſentable in the Leet or Corn: Note the diverſity.

(c) 27 H. 8. 27. 2 E. 4. 9. 5 E. 4. 2. Tr. 41 Eliz. between Finieux and Hovenden. Vid. lib. 5. fol. 72. Williams caſe.

There be three kind of ways, whereof you ſhall (d) read in our ancient Books. Firſt, a foot way, which is called Iter, quod eſt jus eundi vel ambulandi hominis, and this was the firſt way.

(d) Fleta li. 4. ca. 27. Bracton lib. 4. fol. 232.

The ſecond is a foot way and horſe way, which is called actus, ab agendo: and this vulgarly is called pack & prime way, becauſe it is both a foot way, which was the firſt or prime way, and a pack or drift way alſo.

The third is via or aditus, which contein the other two, and alſo a cart way, &c. for this is jus eundi, vehendi, & vehiculum & jumentum ducendi: and this is twofold, viz. Regia via, the Kings high way for all men, & communis ſtrata, belonging to a City or Town, or between neighbours and neighbours. This is called in our Books Chimin, being a French word for a way, whereof cometh Chiminage, Chiminagium, or Chimmagium, which ſignifieth a Toll due by cuſtome; for having a way thorow a Foreſt; and in ancient Records it is ſometime alſo called Pedaginm.

32 E. 3. barre 291. 27 E. 3. 78. 6 E. 3. 23. Charta de foreſta, cap. 14.

If the Leſſee at will by good husbandry and induſtry, either by overflowing, or trenching, or compaſſing of the meadows, or digging up of bulhes or ſuch like, make the graſs to grow in more abundance, yet if the Leſſor put him out, the Leſſee ſhall not have the graſs, becauſe the graſs is the natural profit of the earth. And the ſame Law is, if he doth ſow Hay-ſeed, and thereby encreaſeth the graſs.

¶ *Auterment eſt ſi tenant pur terme dans que conuſt le fine de ſon terme, &c.* Well ſaid Littleton (which knoweth the end of his term) that is, where the end of the term is certain, but where the leaſe for years depends upon an incertainty, as upon the death of Tenant for life being made by him, or of a husband ſeiſed in the right of his wife, or the like, there it is otherwiſe.

## *Sect.* 69.

¶ Item ſi un meſe ſoit leſſe a un home a tener a volunt per force de quel le Leſſee enter en le meſe, deins quel meſe

Alſo if a houſe be letten to one to hold at will, by force whereof the Leſſee entreth into the houſe, & brings his houſhold-

¶ *Si un meſo ſoit leſſe a un home a tener a volunt, &c.* The reaſon of this is evident upon that which hath been ſaid before.

¶ *Meſe*, or Maſ-

fon called in Legall Latine Meſſuagium, containeth (as hath been ſaid) the Buildings, Curtelage, Orchard, and Garden.

a) 31 El. ca. 1. in Doomeſday.

Cottage, Cottagium is a little houſe without land to it. (a) See 31 Eliz. cap. 1. and Cottagers in Doomeſday Book are called Cotterelli: and in ancient Records Haga ſignifieth a houſe. If a man hath a houſe near to my houſe, and he ſuffereth his houſe to be ſo ruinous, as it is like to fall upon my houſe, (b) I may have a writ De domo reparanda, and compell him to repaire his houſe. But a Præcipe lieth not de domo, but de meſſuagio.

b) Reg. 153 F.N.B. 127. 4 E. 2. Vouch. 244. Six Acres of land may be parcel of a houſe.

¶ *Per reaſonable temps.* (c) This reaſonable time ſhal be adjudged by the diſcretion of the Juſtices, before whom the cauſe dependeth; and ſo it is of reaſonable fines, cuſtomes, and ſervices upon the true ſtate of the caſe depending before them: for reaſonableneſſe in theſe caſes belongeth to the knowledge of the Law, and therefore to be decided by the Juſtices.

c) 22 E. 4. 27. 34 H. 6. 40.

Quam longum eſſe debet non definitur in jure, ſed pendet ex diſcretione Juſticiariorum; And this being ſaid of time, the like may be ſaid of things incertain, which ought to be reaſonable; for nothing that is contrary to reaſon, is conſonant to Law.

c) Brack. li. 2. ca. 52. b.

*(e) Si come home ſeiſi dun meſe en Fee ſimple, ou Fee taile, &c.* This is ſo evident, as it needeth no explanation.

c) 2 H. 6. 15. 21 H. 6. 30.

Il porta ſes utenſils de meaſon, puis le Leſſor luy ouſta, uncore il avera franke entre egreſſe & regreſſe en meſme le meſe per reaſonable tẽmps, de carrier ſes biens & utenſils. Sicome home ſeiſie dun meſe en Fee ſimple, Fee Taile, ou pur terme de vie, le quel ad certaine biens deins ſñ le meſe, & fait ſes executs, & dẽy, quecunque apres ſa mort ad l' meſe, uncor les executors aſſont franke entry egreſſe & regreſs ô carier hors de meſme le meſe les bñs lour teſtator per reaſonable temps.

ſtuffe into the ſame, and after the Leſſor puts him out, yet he ſhall have free entry, egreſſe and regreſſe into the ſaid houſe, by reaſonable time to take away his Goods and Utenſils. As if a man ſeiſed of a meſe in Fee ſimple, Fee Tail, or for life, hath certain Goods within the ſaid houſe, and makes his Executors, and dieth, whoſoever after his deceaſe hath the houſe, his Executors ſhall have free entry egreſs and regreſs to carry out of the ſame houſe the goods of their Teſtator by reaſonable time.

## *Sect.* 70.

¶ HEre it appeareth, That if a Feoffee doth enter, he is Tenant at Will, becauſe he entreth by the conſent of the Feoffor.

¶ *Et deliver a luy le fait.* Albeit the Deed be delivered upon the ground, yet doth it not amount to a livery of Seiſin of the Land; for it hath his naturall effect to make it a Deed. (f) Donationum alia perfecta, alia incepta & non perfecta, ut

f) Plet. li. 3. ca. 3. & ca. 15. 43 E. 3. tit. feof. & faits 51. 35 H. 8. Feof. Br. 27 Aſſ. 61. 38 Aſſ. 2. 39 Aſſ. 12. 41 E. 3. 17. li. 6. fol. 26. Sharps caſe.

¶ ITem ſi un home fait un fait de Feoffment a un auter de certaine terre, & deliver a luy le fait, mes nemy livere de Seiſin, en ceo caſe, celuy a que le fait eſt fait, poit enter en le Terre, & tener & occupier a la volunt celuy que fiſt

ALſo if a man make a Deed of Feoffment to another, of certain Lands, and delivereth to him the Deed, but not Livery of Seiſin; in this caſe he to whom the Deed is made, may enter into the Land, and hold and occupy it at the will of him which le

le fait, pur ceo que il eſt prove per les parols del fait, que il eſt la volunt que le autre avera la terre, mes celuy que fiſt le Fayt luy poet oustre quaunt luy pleiſt.

made the Deed, becauſe it is proved by the words of the Deed that it is his will that the other ſhould have the land; but he which made the Deed, may put him out when it pleaſeth him.

si donatio lecta fuerit et conceſſa, ac traditio nondum fuerit ſubſecuta. But if the Deed be delivered in name of ſeiſin of the land, or if the Feoffor ſaith to the Feoffee, Take and enjoy this land, according to the Deed, or enter into this land, and God give you joy: theſe words do amount to a livery of ſeiſin.

## *Sect.* 71

¶ Item ſi un meſe ſoit leſſe a tener a volunt, le leſſee neſt pas tenus a ſuſtainer ou repairer le Meaſon, il come Tenant a terme dans eſt tenus. Mes ſi le Leſſee a volunt fait voluntarie waſt, ſicome en abatement des meaſons, ou en couper des arbres, il eſt dit que le Leſſor averá de ceo enūs luy action de treſpaſſe. Sicome jeo bayle a un home mes barbits a cõpeſter ſ̄ ter̄, et il occilt mes avers, jeo puiſſoy bñ añ un act̄ ď treſs enūs luy nient obſtant l' bailement.

Alſo if a houſe be leaſed to hold at will, the Leſſee is not bound to ſuſtain or repaire the houſe, as Tenant for term of years is tyed. But if Tenant at will commit voluntary waſte, as in pulling down of houſes, or in felling of Trees, it is ſaid that the Leſſor ſhall have an Action of Treſpaſs for this, againſt the Leſſee. As if I lend to one my Sheep to tathe his Land, or my Oxen to plow the Land, and he killeth my Cattell, I may well have an Action of Treſpaſs againſt him, notwithſtanding the lending.

¶ *Si un meſe ſoit leſſe a tener a volunt le leſſee neſt paſſe tenus, &c.* For the Statute of Glouceſter above mentioned extends not to a Tenant at will, and therefore for permiſſive waſte, the Leſſor hath no remedy at all.

¶ *Mes ſi Leſſee a volunt fait voluntary waſt, &c.* (g) And true it is, that if Tenant at will cutteth down Timber trees, or voluntarily pull down and proſtrate houſes, the Leſſor ſhall have an action of Treſpaſs againſt him, quare vi & armis, for the taking upon him power to cut timber, or proſtrate houſes, concerneth ſo much the Freehold and Inheritance as it doth amount in Law to a determination of his will, (h) and ſo hath it been adjudged.

(g) 21 H.6.18. 28 E.3.25. 12 H.4.3. 22 E.4.50.

(h) Mich. 28 & 29 Eliz. Rot. 318. in Com. Banc. inter Walgrave & Somerſet. Vide Counts de Shrewsbaries caſe, li. 5. fo. 23.

(i) If Tenant at will graunteth over his eſtate to another, and the Grantee entreth, he is a Diſſeiſor, and the Leſſor may have an action of Treſpaſs againſt the Grantee, for albeit the Grant was void, yet it amounteth to a determination of his will.

(i) 27 H.6.3. 22 E.4.5.

¶ *Si come neo baile a un home mes barbits a compeſter ſon terre, &c.* And the reaſon is, (k) that when the Bailee having but a bare uſe of them, taketh upon him as an owner, to kill them, he loſeth the benefit of the uſe of them. Or in theſe caſes he may have an action of treſpaſs ſur le caſe for this converſion, at his election.

(k) V. 13 H.4.14. 1 E.4.9 b. 12 E.4.8. 21 E.4.19. & 76. 22 E.4.5. 3 H.7.4. 21 H.7.14. Flet. li. 2. ca. 1.

¶ *Treſpaſſe.* Tranſgreſſio derivatur à tranſgrediendo, becauſe it paſſeth that which is right: Tranſgreſſio autem eſt cum modus non ſervatur, nec menſura: debet enim quilibet in ſuo facto modum habere, & menſuram: Nota, In the loweſt, and the high eſt offences there are no acceſſaries, but all are principals, as in riots, routs, forcible entries, and other tranſgreſ-

sions vi & armis, which are the lowest offences; and so in the highest offence which is Crimen læsæ Majestatis, there be no accessaries, but in Felonies there be accessaries both before and after.

## *Sect.* 72.

21 H.7.39.b. 2 E.4.6.b. 7 E.1.27.2. 6 R.2. Avowrie 86.

¶ *IL poet distreyner pur le rent arere ou aver de ceo un action de debt, &c.* But if he impound the distresse upon the ground letten at Will, the Will is determined. Note, he may distrein for the Rent, & yet it is no rent service for no fealty belongeth thereunto, but a Rent distreinable of common right.

¶ NOta si le Lessor sur tiel Lease a volunt reserve a luy un annuall Rent, il poit distrainer pur le Rent arere, ou aver de ceo un action d debt a son election.

NOte, if the Lessor upon a Lease at will, reserve to him a yearly Rent, he may distreine for the Rent behind, or have for this an Action of Debt at his own election.

(l) Bracton lib. 4. f. 318. 4 E.3.39. 7 E.3.13. 24 E.3.24.38 E.3.28. 7 R.2. savour deff. 30. 8 E.4.25.4 H.6.30. 22 E.4.38. 18 E.4.25. F.N.B.201. D.203. 8 E.2. Entre 87. Temps H.8.b.15. tit. Tenant a volunt. Pl.Com. 138. 4 H.7.2.

(m) 13 H.7.10.a. 21 H.6.54.5 E.4.3. 22 R.2. tit. Discont. 48.E.3.23. Pl.Com.435. 19 E.3. bre.468. 15 E.4. Discont.30. 6 E.3.56.57.21 E.4.5. 21 H.7.38.10 E.4.18. Per Choke & Litt.

(n) Statute de Merlbridge. cap.26. Abb.Ass.220.b. F.N.B.196. 11 E.4.10.& 11. Bract.lib.4. fol.252.253.

There is great diversity between a Tenant at will, & a Tenant at sufferance, for tenant at will is always by right, & Tenant at sufferance entreth by a lawful lease, and holdeth over by wrong; a Tenant at sufferance is he y at the first came in by lawful demise, and after his estate ended continueth y possession, & wrongfully holdeth over. (l) As Tenant pur terme dauter vie, continueth in possession after the decease of Ce'que vie, or tenant for years holdeth over his term, the lessor cannot have an action of trespals before entry. Now y a writ of entry ad terminum qui præteriit lieth against such a tenant as holdeth over, is rather by admission of the demandant, than for any estate of freehold that is in him, for in judgment of law he hath but a bare possession, but against the King there is no Tenant at sufferance, but he y holdeth over in the cases abovesaid is an intruder upon y King, because there is no laches imputed to the King for not entring. (m) If tenant in tail of a rent grant the same in fee & dieth, yet the issue in tail may bring a Formedon, & admit himself out of possession. The like Law is, if a man maketh a lease at will and dieth, now is the will determined; & if y Lessee continueth in possession, he is Tenant at sufferance, and yet y heir by admission may have an assise of Mordanc' against him. (n) But there is a diversity between particular estates made by the Terretenaunt, as above is said, and particular estates created by act in Law: as if a Gardian after the full age of the heir, continueth in possession, he is no Tenant at sufferance, but an Abator, against whom an Assise of Mordancester doth ly, Et sic de similibus.

## Chap. 9. Sect. 73.

## *Tenant by Copy.*

¶ *TEnant per copie, &c.* Tenens per Copiam Rot. Cur'. Copie we call in Latine, Copiam, though Copia in his proper signification signifieth plenty, but we have made a Latine word of the French word Copie, and this is ancient; for in the Register fol. 11. there is a Writ de Copia libelli deliberanda, which is grounded upon the Statute of 2 H. 4. cap. There is no Tenant in y law,

¶ TEnant y Copie de court rol' est, deins quel manor il y ad un custome que ad esse use de temps dont memorie na court, que certain tenants deins mesm le Manor, ont use daver terres & tenements, a

TEnant by Copy of Court Roll is, as if a man be seised of a manor, within which manor there is a custom, which hath been used time out of mind of man, that certain Tenants within the same manor have used to have Lands and Tetener

tener a eux & a la lour heires in Fee ſimple, ou en Fee taile, ou a terme de vie, &c. a volunt le Saigniour ſolonque le cuſtome de meſme le manor.

nements to hold to them and their heires in Fee ſimple, or Fee taile, or for terme of life, &c. at the will of the Lord according to the cuſtom of the ſame manor.

And Britton ſaith, that ſome that be free of blood do hold land in Villenage, & Littleton himſelf in the next chapter calleth them Tenants by baſe tenure: and in F. N. B. fol. 12. C. Et ceſt terme que eſt ore a ceſt jour appel copitenaunts ou copiholders, ou tenaunts per copie, eſt forſque un novel noſme trover, car dancient temps il fuer' appelles tenants in villenage, ou de baſe tenure, &c. (b) And yet in 1 H. 5. 11. they be called Copyholders, in 14 H 4. 34. Tenant per le verge, in 42 E. 3. 25. Tenant per Roll ſolonque le volunt le Seignior; and in the Statute of 4 E. 1. called Extenta manerii, they are called cuſtumarii tenentes, and ſo doth Fleta call them; And before him Ockam (who wrote in the reign of H. 2.) ſpake of them, and how, and upon what occaſion they had their beginning.

that holdeth by copy but only this kind of cuſtomary tenant for no man holdeth by Copy of a Charter, or by copy of a fine, or ſuch like, but this tenant holdeth by copy of court roll.

(a) Bracton calleth Copyholders Villanos Sockmannos, not becauſe they were bond, but becauſe they held by baſe tenure by doing of villein ſervices.

(a) Bracton lib. 2. cap. 8. fol. 26. & lib. 4. fol. 209. Briton 165. Fleta lib. 1. cap. 8. & lib. 2. cap. 9. Item de cuſtumariis Ockam Cap. quid murdrum F. N. B. fol. 12. c.

(b) 1 H. 5. 11. 14 H. 34. 42 E. 3. 25. Vid. lib. 4. fol. 2. Brownes caſe.

(c) Terra ex ſcripto Saxonice Bockland, fundum veteres aut ex ſcripto qui Bockland. i. Bookland, aut fine ſcripto qui Folkland dicebatur, poſſidebant; quæ fuit ex ſcripto poſſeſſio commodiore erat poſſeſſione libera, atque immunis, fundus ſine ſcripto cenſum penſitabat annuum, atque officiorum ſervitute quadam eſt obligatus; priorum viri plerunque nobiles, atque ingenui, poſteriorum ruſtici fere & pagani poſſidebant.

(c) Lamb. verb. terra ex ſcripto.

¶ *Court.* Curia, Court, is a place where Juſtice is judicially miniſtred, and is derived à Curia, quia in curiis publicis curas gerebant. (d) The Court Baron muſt be holden on ſome part of that which is within the Manor; for if it be holden out of the Manor, it is void, unleſſe a Lord being ſeiſed of two or three Manors, hath uſually time out of mind kept at one of his Manors Courts for all the ſaid Manors, then by cuſtome ſuch Courts are ſufficient in law, albeit they be not holden within the ſeveral Manors. And it is to be underſtood, that this Court is of two natures, the firſt is by the Common Law, and is called a Court baron, as ſome have ſaid, for that it is the freeholders or freemans Court, (for Barons in one ſenſe ſignifie freemen) and of that Court the freeholders being ſuitors be Judges, and this may be kept from three weeks to three weeks. The ſcond is a Cuſtomary Court, and that doth concern Copyholders, and therein the Lord or his Steward is the Judge. Now as there can be no Court Baron without freeholders, ſo there cannot be this kind of cuſtomary Court without Copyholders or Cuſtomary holders. And as there may be a Court Baron of Freeholders only without Copyholders, and then is the Steward the Regiſter, ſo there may be a cuſtomary Court of Copyholders only without Freeholders, and then is the Lord or his Steward the Judge. And when the Court Baron is of this double nature, the Court Roll containeth as well matters appertaining to the Cuſtomary Court, as to the Court Baron.

(d) Vid. 4. fol. 24. inter Murrel & Smith eodem. lib. fol. 27. inter Clifton & Molineux.

Lib. 4. fol. 26. Melwitches caſe, Britton fol. 274.

And for as much as the title, or eſtate of the copyholder is entred into the Roll, whereof the Steward delivereth him a copy, thereof he is called copyholder. (e) It is called a Court Baron, becauſe amongſt the Laws of King Edw. the Confeſſor, it is ſaid: Barones vero qui ſuam habeant curiam de ſuis hominibus, &c. taking his name of the Baron who was Lord of the Manor, or for that properly in the eye of Law it hath relation to the Freeholders (f) who are Judges of the Court. And in ancient Charters and Records the Barons of London and Barons of the Cinque Ports do ſignifie the Freemen of London, and of the Cinque Ports.

(e) Lamb. fol. 128. & 136. Cambden. Brit. fol. 121. b. Britton fol. 274.

(f) Mirrour cap. 1. ſect. 3.

¶ *Seiſin dun mannor.* Manerium dicitur à manendo ſecundum excellentiam, ſedes magna fixa & ſtabilis. Lageman. i. habens ſocam & ſacam ſuper homines ſuos, &c. (g) Et ſciendum eſt quod manerium poterit eſſe per ſe ex pluribus edificiis coadjuvatum five villis, & hamlettis adjacentibus. poterit etiam eſſe manerium & per ſe & cum pluribus villis, & cum pluribus hamlettis adjacentibus, quorum nullum dici poterit manerium per ſe, ſed villæ ſuæ hamlettæ; poterit etiam eſſe per ſe manerium capitale, & plura continere ſub ſe maneria non capitalia, & plures villas & plures hamlettas quaſi ſub uno capite aut dominio uno. And afterwards, Manerium autem fieri poterit ex pluribus villis vel una, plures enim villæ poterunt eſſe in corpore manerii ſicut & una. And in theſe (h) ancient Authors you ſhall ſee the difference, inter manſionem, villam, & manerium. Concerning the inſtitution of this Court by the Lawes and Ordinances of ancient Kings, and eſpecially of King Alfred, it appeareth that the firſt Kings of his Realm had

? Domeſday.

(g) Bract. lib. 4. fol. 212. Fleta lib. 4. cap. 15. & lib. 6. cap. 49. Britton fol. 124.

(h) Bracton lib. 5. 434. Fleta ubi ſupra. Mirrour cap. 1. ſect. 3.

had all the lands of England in Demean, & les grand Manors & Royalty they reserved to themselves, and of the remnant they, for the defence of the Realm, enfeoffed the Barons of the Realm with such jurisdiction as the Court Baron now hath, and instituted the Freeholders to be Judges of the Court Baron. And herewith agreed the aforesaid law of Saint Edward. And it is to be observed that in those antient laws, under the name of Barons were comprised all the Nobility.

There may be a customary Manor granted by Copy of Court Roll, so although the word be (seisie) which properly betokeneth a Freehold yet Tenant for years, Tenant by Statute Merchant, Staple, Elegit, and Tenant at Will, Gardian in Chivalry &c. who are not properly seised, but possessed, are Domini pro tempore, not only to make admittance, but to grant voluntary copies of ancient copyhold lands which come into their hands. And therefore there is a diversity between Disseisors, Abators, Intruders, & others that have defeasible titles: for their voluntary grants of ancient copyhold lands, shall not bind the Disseisees or others that right have. And voluntary grants by Copy, made by such particular tenants as is aforesaid, shall bind him that hath the Freehold and Inheritance, because all these be lawfull Lords for the time being; but so is not a tenant at sufferance, because he is in by wrong, as hath been said, and so (i) was it adjudged, P. 29 Eliz. inter Rowse et Arteis, lib. 4. fol. 24 But admittances made by Disseisors, Abators, Intruders, Tenant at sufferance, or others that have defeasible Titles, stand good against them that have right, because it was a lawful Act, and they were compellable to do them.

(i) Lib. 4. fol. 24. p. 29 Eliz. inter Rows & Arteis.

(k) And yet in some special case an Estate may be granted by copy, by one that is not Dominus pro tempore, nor that hath any thing in the Manor. As if the Lord of a Manor by his Will in writing, deviseth that his Executor shall grant the customary tenements of the Manor according to the custom of the Manor for the payment of his debts and dieth, the Executor having nothing in the Manor, may make grants according to the custom of the Manor.

(k) Dier Mich. 7. & 8. Eliz. Manuscript.

¶ *Deins quel mannor il y ad un Custome que ad este use de temps dont memory ne court, &c.* Of this custome here spoken of, there be three supporters. The first is time, and that must be out of memory of man, which is included within this word (Custom) so as Copyhold cannot begin at this day. (l) The second supporter is that the Tenements be parcell of the Manor, or within the Manor, which appear by these words of Littleton, Que certaine tenants deins mesme le mannor, &c. The third supporter is, that it hath been demised demissible by Copy of Court Roll, for it need not be demised time out of mind by Copy of Court; but if it be demissible, it is sufficient. For example: If a copyhold tenement escheat to the Lord, and the Lord keepeth it in his hands by many years; during this time, it is not demised, but demissible, for the Lord hath power to demise it again.

(l) Vide lib. 4. fol. 24. inter Mussel & Smith.

¶ *A volunt le Seignieur solonque le custome.* So as he is not a bare Tenant at will, but a Tenant at will according to the Custome of the Manor, as shall be spoken more hereafter in this Chapter.

¶ *Certaine tenements.* What things may be granted by Copy, is necessary to be known: First, a Manor may be granted by Copy. Secondly, underwoods without the soile may be granted by Copy to one and to his heirs, and so may the herbage or vesture of land. Thirdly, generally all lands and tenements within the Manor, and whatsoever concerneth lands or tenements may be granted by Copy: as a fair appendant to a Manor may be granted by Copy, &c.

Lib. 11. 17. Sir H. Nevils Case.
Lib. 4. fol. 32. 33 inter Hoe & Taylor.

¶ *Consuetudines.* This word consuetudo being derived à consuetu, properly signifieth a Custom, as here Littleton taketh it: but in legal understanding it signifieth also Tolles, Murage, Pontage, Pavage, and such like newly granted by the King; and therefore when the King grants such things, the words be, Concessimus, &c. in auxilium villæ predict' paviand' &c. consuetudines subscriptas, viz. de quelibet summagio, &c.

And it was an Article of the Justices in Eire to inquire, De novis consuetudinibus levatis in regno, sive in terra, sive in aqua. & quis eas levavit & ubi. Where consuetudo is taken for Tolles and such like Taxes or Charges upon the subject.

Regist. F. N. B. 270. d. Vid. Mag. Carta in cap. Itin. fol. 151. Bract. li. 3. 117. Fleta lib. 1, cap. 20.

## *Sect.* 74.

¶ *Et tiel tenant ne puit aleiner sa terre, &c.* And this is

¶ Et tiel Tenant ne puit alien sa terre per fait, car

And such a tenant may not alien his land by deed, for then doth

donques le Seignior poit entre come en chose forfeit a luy, mes sil voit alien sa terre a un auter, il covient solonque ascun custome de surrender les tenements en ascun Court, &c. en le maine le Seignior, al use celuy que avera le state, en tiel form, ou a tiel effect.

Ad hanc Curiam venit *A.* de *B.* & sursum reddidit in eadem Curia, unum mesuagium, &c. in manus Domini, ad usum *C.* de *D.* & hæredum suorum, vel Hæredum de corpore suo exeuntiũ, vel pro termino vitæ sũæ, &c. Et super hoc venit prædictus *C.* de *D.* & cœpit de Domino in eadem Curia, mesuagium prædictũ, &c. Habendum & tenendum sibi & hæredibus suis, vel sibi & hæredibus de corpore suo exeuntibus, vel sibi ad terminum vitæ, &c. ad voluntatem domini, secundum consuetudinem manerii, faciendo & reddendo inde redditus, servitia, & consuetudines inde, prius debita & consueta, &c. Et dat Domino pro fine, &c. Et fecit Domino fidelitatem, &c.

the Lord may enter as into a thing forfeited unto him. But if he will alien his Land to another; it behoveth him after the custome to surrender the tenements in Court, &c. into the hands of the Lord, to the use of him that shall have the Estate in this form, or to this effect.

*A.* of *B.* commeth unto this Court, and surrendreth in the same Court a Mease, &c. into the bands of the Lord, to the use of *C.* of *D.* and his heirs, or the heires issuing of his body, or for term of life, &c. And upon that, commeth the aforesaid *C.* of *D.* and taketh of the Lord in the same Court, the foresaid mease, &c. To have and to hold to him and to his heirs, or to him and to his heires issuing of his body, or to him for term of life, at the Lords will, after the custome of the manor, to do and yield therefore the Rents, Services, and Customes thereof before due and accustomed, &c. and giveth the Lord for a fine, &c. and maketh unto the Lord his fealty, &c.

true in Case of alienation, but when a man hath but a right to a Copyhold, he may release it by Deed or by Copy, to one that is admitted Tenant de facto. Lib. intrar. 131. Lib. 4. fol. 25. b. inter Ketre & Queinton.

¶ *Alien per fait.* Here it appeareth by Littleton that there must be an alienation: for the making of the deed alone, unlesse somewhat passe thereby, is no forfeiture: as if he make a Charter of feoffment, or a deed of demise for life, and make no Livery, this is no forfeiture, because nothing passeth; and therefore no alienation, but otherwise it is of a lease for years.

¶ *Forfeit a luy.* This Adjective in Latine is forisfactus, the Verb is forisfacere, and the Noun forisfactura; they are all derived of foris (that is) extra, and facere, quasi diceret, extra legem seu consuetudinem facere, to do a thing against or without Law or Custome, and that legally is called a forfeiture. Littleton useth this word but once in all his Book. What shall be said (k) forfeitures of Copyholds, you may read at large in my Reports. (k) Lib. 4. inter les Copyhold cases, 21, 23, 25, 27, 28. Lib. 8. 92. 99. 100. Lib. 9. 75. 107. Lib. 10. 131.

¶ *En ascun Court.* (l) This is the generall custome of the Realm, that every Copyholder may surrender in Court, and need not to alleage any custome therefore. So if out of Court he surrender to the Lord himself, he need not alleage in pleading any custome, but if he surrender out of Court into the hands of the Lord by the hands of two or three, &c. Copyholders, or by the hands of the Bayliff or Reeve, &c. or out of Court by the hand of any other; these Customs are particular, and therefore he must plead them. (l) Bract. Lib. 2. cap. 8. & lib. 4. 40. 15 H. 4. 34. 1 H. 5. 11.

(m) Bracton, lib. 4. fol. 209. speaking of these kind of customary Tenants, saith, Dare autem non possunt tenementa sua, nec ex causa donationis ad alios transferre, non magis quam villani puri, & unde si transferre debeant, restituunt ea Domino vel Baliyo, & ipsi ea tradant (m) Bract. lib. 4. fol. 209. & lib. 2. cap. 8. ac. 14 H. 4. 24.

tradant aliis in villenagium tenenda, but although it be incident to the eſtate of a Copyhold, to paſſe as our Author ſaith by ſurrenders; (b) yet ſo forcible is cuſtom, that by it a Freehold and Inheritance, may alſo paſſe by ſurrender (without the leave of the Lord) in his Court, and delibered over by the Baily to the Feoffee, according to the forme of the Deed, to be inrolled in the Court, or the like.

(b) Coram rege Mich. 31 E. 3. Ranulph Huntingfields caſe. 3 E. 2. Corona 310. 11 H. 4. 83. per thorning.

¶ *Ad hanc curiam veniat* A *de* B *& ſurſum reddidit, &c.* Here Littleton putteth an example of a Surrender in Court, and in this example three (c) things are to be obſerved.

(c) Vide Lib. 4. inter les caſes de Copiholds.

Firſt, that the ſurrender to the Lord be general without expreſſing of any Eſtate, for that he is but an inſtrument to admit Ceſty a que uſe, for no more paſſeth to the Lord, but to ſet be the limitation of the uſe, and Ce' que uſe, when it is admitted, ſhall be in by him that made the Surrender, and not by the Lord.

Secondly, if the limitation of the uſe be general, then Ce' que uſe, taketh but an eſtate for life; and therefore here Littleton expreſſeth upon the declaration of the uſe, the limitation of the Eſtate, viz. in Fee ſimple, Fee tail, &c.

(d) Mich. 2. & 3. Ph. & M. in Com. Banco, by the whole Court in Conſtables caſe of Pickenham in Norfolke.

Thirdly, the Lord cannot grant a larger eſtate than is expreſſed in the limitation of the uſe, Littleton here putteth his caſe of one. If two Joyntenants be of Copyhold lands in Fee, & the one out of Court, according to the cuſtom, ſurrender his part to the Lords hands, to the uſe of his laſt Will, and by his Will deviſeth his part to a ſtranger in fee, and dieth, and at the next Court the ſurrender is preſented; by the Surrender and Preſentment the Joynture was ſevered, and the Deviſee ought to be admitted to the moity of the lands, for now by relation the ſtate of the land was bound by the Surrender.

(e) Fleta lib. 2. cap. 65. & 71.

¶ *In manus Domini.* Dominus manerii. The Lord of a Manor is deſcribed (e) by Fleta, as he ought to be, in theſe words, In omnibus autem & ſupra omnia decet quemlibet Dominum verbis eſſe veracem, & in operibus fidelem, Deum & Juſtitiam amantem, fraudem & peccatum odientem, voluntarioſque; malevolos, & injurioſos contemnentem, & apud proximos pietatum vultumque motibilem & plenum: ipſius enim intereſt potius conſilio quam viribus uti, propriove arbitrio: non cujuſlibet voluntarii juvenis meneſtralli, vel adulatoris, ſed juriſperitorum virorum fidelium & honeſtorum, & in pluribus expertorum conſilio debet favere. Qui bene ſibi vult diſponere & familiæ ſuæ, ſcire veram executionem terrarum ſuarum neceſſarium erit, ut perinde ſciat quantitatem ſuarum facultatum & finem annuarum expenſarum. And the reſidue is fit for every Lord of a Manor to know and follow, which were too long here to be recited, only this concluſion having ſpoken of the Lords revenue and expences, I will add, Quæ omnia diſtincte ſcribantur in membranis, ut perinde ſagacius vitam ſuam diſponat, & facilius convincat mendacia compoſitoriorum.

(f) See more of this lib. 4. the caſes of Copyholds. Trin. 1. Jac. Rot. 854. inter Shapland & Ridler in repl. in Com. Banc. the caſe of the Gardian in Socage adjudged.

(f) If the Lord of the Manor for the time being be leſſee for life or for years, Gardian, or any that hath any particular intereſt, or Tenant at will of a Manor (all which are accounted in law Domini pro tempore) do take a ſurrender into his hands, and before admittance, the leſſee for life dieth, or the years intereſt or cuſtody do end or determine, or the will is determined, though the Lord commeth in above the leaſe for life or for years, the cuſtody or other particular intereſt or Tenancy at will; yet ſhall he be compelled to make admittance according to the Surrender, and ſo was it holden 17 Eliz. in the Earl of Arundels Caſe, which I my ſelf heard.

¶ *Et dat Domino de fine.* For the ſignification of this word (finis) Vide ſect. 174. 183. 194. 441.

Of fines due to the Lord by the Copyholder, ſome be by the change or alteration of the Lord, and ſome by the change or alteration of the tenant: the change of the Lord ought to be by Act of God; otherwiſe no fine can be due: but by the change of the Tenant, either by act & of God, or by the act of the party, a fine may be due: for if the Lord do alleage a cuſtom within his Manor, to have a fine of every of his copyholders of the ſaid Manor, at the alteration or change of the Lord of the Manor, be it by alienation, demiſe, death, or otherwiſe; This a cuſtome againſt the Law, as to the alteration or change of the Lord by the act of the party, for by that means the Copyholders may be oppreſſed by multitudes of fines, by the act of the Lord. But when the change groweth by the act of God, there the cuſtome is good, as by the death of the Lord: And this, upon a caſe in the Chancery (g) referred to Sir John Popham chief Juſtice, and upon conference with Anderſon, Periam, Walmeſly, and all the Judges of Serjeants Inne in Fleetſtreet was reſolved, and ſo certified into the Chancery. But upon the change or alteration of the Tenant, a fine is due unto the Lord.

(g) T. 39 Eliz. between the Copyholders of the Manor of Guiltirus, in the Country of Northumberland and Armeſtrong Lord of the Manor, in Chancery.

Of fines taken of Copyholders, ſome be certain by cuſtome, and ſome be incertain; but that fine, though it be incertus, yet it muſt be rationalibilis. And that reaſonableneſſe ſhall be diſcuſſed by the Juſtices upon the true circumſtances of the Caſe appearing unto them; and if the Court where the cauſe dependeth, adjudgeth the fine exacted unreaſonable, then is not the

Copy-

Copyholder compellable to pay it. And so was it adjudged: (h) for all excessiveness is abhorred in Law. See more concerning fines of Copyholders in my Reports, (i) which are so plainly there set down, as they need not be rehearsed here.

(h) Pasch. 2 Jac. in Com. Banco Rot. 1845. inter Stallon & Brady.
(i) Lib. 4. the cases of Copyhold.

## Sect. 75.

**ET tiels tenãts sont appelles Tenants per Copy de Court Rolle, pur ceo que ils nont auter evidence concernant lour tenements forsque les Copies des Rolles de Court.**

And these tenants are called tenants by Copy of Court Roll, because they have no other evidence concerning their tenements, but onely the Copies of Court Rolls.

¶ *Ils nont auter evidence.* This is to be understood of evidences of alienation, for a release of a right by Deed a Copyholder (that commeth in by way of admittance) may have, and that is sufficient to extinguish the right of the Copyhold which he that maketh the release had.

## Sect. 76.

**ET tiels tenãts ne empledero̅t, ne serront empledes de lour tenements p̅ vieſe le Roy. Mes ils voilent empleder auters pur lour tenements, ils averont un plaint fait en le Court le Seignior en tiel forme, ou a tiel effect:** A. de B. queritur, versus C. de D. de placito terræ, videlicet, de uno mesuagio, quadraginta acris terræ, quatuor acris prati, &c. cum pertin'. et facit protestationem sequi querelam istam in natura brevis domini Regis affisæ mortis antecessoris ad communẽ legem, vel brevis Domini Regis assisæ Novæ disseisinæ ad communẽ legẽ, aut in natura brevis de for-

And such tenants shall neither implead nor be impleaded for their Tenements by the the Kings Writ, but if they will implead others for their Tenements, they shall have a plaint entred in the Lords Court in this forme, or to this effect A. of B. complaints against C. of D. of a plea of land, viz. of one mesuage, forty acres of land, four acres of meadow, &c. with the appurtenances, and makes protestation to follow this complaint in the nature of the Kings Writ of assise of Mordancester at the Common Law, or of an assise of Novel Disseisin, or Formedon in the discender at the

¶ *Iels tenants en emplederont, ne serront empledes, &c.* This is evident, and needs no explanation.

4 H. 4. 34. adjudged in Parliament.

¶ *Mes ils voilent empleder auters, ils averont, &c.* But the case that the Demandant in a pleint in nature of a realle action recovereth the land erroneously, what remedy for the party grieved? For he cannot have the Kings Writ of false judgement in respect of the baseneſſe of the estate and tenure, being in the eye of the law but a Tenant at will; and the Freehold being in another, he shall have a petition to the Lord in the nature of a Writ of false judgement, and therein assigne, errors, and have remedy according to the law.

14 H. 4. 34. 1 Hi. 5. 11. Ver. N. B. 18. 13 R. 2. tit. Faux judgement 7 E. 4. 19. 21 E. 4. 80.

¶ *De forma donationis in discendere ad communem legem.* By the opinion of Littleton, as there may be an estate tail by custome with the co-operation of the Statute of W. 2. cap. 1. so may he have a Formedon in discender, but as the Stat. without a custome extendeth not to Copyholds, so a custom

Lib. 3. fol. 8, 9. in Heynons case. Lib. 4. fol. 23, 24. 15 H. 8. Br. tit. taile.

ſtome without the Statute cannot create an eſtate taile. Now it is not a ſufficient proof that lands have been granted in taile; for albeit lands have anciently and uſually been granted by Copy to many men and to the heires of their bodies, that may be a Fee ſimple conditionall as it was at the common Law. But if a remainder have been limited over ſuch eſtates enjoyed, or if the iſſues in tail have avoided the alienation of the Anceſtor; or if they have recovered the ſame in Writs of Formedon in the Diſcender, theſe and ſuch like be proofs of an Eſtate tail. (y) But if by cuſtome, Copyhold may be intailed the ſame by like cuſtome, by Surrender may be cut off, and ſo hath it been adjudged; (z) ſome have holden that there was a Formedon in the Diſcender at the Common Law.

(y) P. 29 Eliz. inter Hill & Vpcheic. Cuſtome deins le manor de Overhall in Eſſex
21 Eliz. Dier 366.
23 Eliz. Dier 373.
(z) 10 E. 2. Formedon 55.
21 E. 3. 47. Pl. Com. 240.
4 E. 2. Formedon 50.

ma donationis in diſcendere ad Communem Legem, ou en nature dascun auter briefe, &c. Plegii de Proſequendo, F. G. &c.

Common Law, or in the nature of any other Writ, &c. Pledges to proſecute F. G. &c.

## *Sect.* 77.

¶ CAr (il eſt dit) *que ſi le Seignior, &c.* And here Littleton ſaith truly that it is ſaid ſo, for ſo it is ſaid in 13 E. 3. 13 R. 2. 32 H. 6. & 7 E. 4. 19.

13 E. 3. tit. preſcript. 20.
13 R. 2. Jeux judgment 7.
32 H. 6. tit. Subpœna 2.
7 E. 4. 19.

But he ſetteth not down his own opinion, but rather to the contrary, as hereafter in this Chapter appeareth. But now Magiſtra rerum Experientia, hath made this cleer and without queſtion, that the Lord cannot at his pleaſure put out the lawfull Copyholder without ſome cauſe of forfeiture, and if he do, the Copyholder may have an action of treſpaſſe againſt him; for albeit he is tenens ad voluntatem Domini, yet it is ſecundum conſuetudinem Manerii.

Vide Sect. 81, 82, 84, 132.

(b) And Britton, ſpeaking of theſe kind of Tenants, ſaith thus. Et ceux ſont privileges en ſiel maner que nul de les doit ouſter de

(b) Vid. 42 E. 3. 25. Brit. fol. 165.

¶ ET coment que aſcun tiels Tenants ont inheritance ſolonque le cuſtome del Manor, uncore ils nont eſtate forſque a volunt le Seignior ſolonque le courſe del Common Ley. Car il eſt dit, ſi le Seignior eux ouſta, ſils noient auter remedy forſque de ſuer a lour Seigniors per petition, car ſils averont auter remedy, ils ne ſerront vits Tenants a volunt le Seignior ſolongz le cuſtome del Manor, mes le Seignior ne poile enfreinder le cuſtome q̄ eſt reaſonable en tiels caſes.

¶ Mes Brian Chief Juſtice dit, que ſon opinion ad touts foits eſte, & unquez ſera, ſi tiel tenūt per le cuſtome payant ſes ſervices ſoit eject per le Seignior, que il avera action de trēs vers luy H. 21. Ed. 4. Et iſſint fuit lopinion de Danby chief Juſtice, M. 7 Ed. 4.

AND although that ſome ſuch Tenants have an inheritance according to the cuſtome of the Manor, yet they have but an eſtate but at the will of the Lord, according to the courſe of the common law. For it is ſaid, that if the Lord do ouſt them, they have no other remedy but to ſue to their Lords by petition; for if they ſhould have any other remedy, they ſhould not be ſaid to be Tenants at will of the Lord, according to the cuſtome of the Manor. But the Lord cannot break the cuſtome, which is reaſonable in theſe caſes.

¶ But *Brian* Chief Juſtice ſaid, that his opinion hath always been and ever ſhall be, that if ſuch tenant by cuſtome paying his ſervices, be ejected by the Lord, he ſhal have an action of treſpaſſe againſt him. *H.* 21. *Ed.* 4. And ſo was the opinion of *Danby* chief Ju-

Car

Car il dit que le ten̄ per le cuſtome eſt ci-bien inheriter de aver ſon terre ſolonque le cuſtome, come ceſtuy que ad franktenement al Common Ley.

ſtice in 7 Ed. 4. For he ſaith that Tenant by the cuſtome is as well inheritour to have his land according to the cuſtome as he which hath a freehold at the Common Law.

tiels Tenements; tant come ilz ſont les ſervices que alour tenements appendant, ne nul ne poet lour ſervices acreſtre ne change a faire autres ſervices ou pluis. And herewith agreeth Sir Robert Danby, chiefe Juſtice of the Court of Common Pleas, M. 7 E. 4. 19. and Sir Thomas Brian his ſucceſſor, M. 21 E. 4. 80. viz. ỳ the Copyhol-

der doing his cuſtomes and ſervices, if he be put out by his Lord, he ſhall have an action of treſpaſs againſt him.

## Chap. 10. Sect. 78.

*Tenant per le Verge.*

¶ Tenants ỳ le Verge, ſont en tiel nature come tenants per le copy de Court roll. Mes la caſe p̄ q̄ ils ſont appelles tenants ỳ la Verge, eſt p̄ ceo q̄ quant ils voylent ſurrender lour tenen̄ts en le main lour Seignior al uſe dun auter, ils averont un petite Verge (per le cuſtom) en lour main, le quel ils bailera al Seneſchall, ou al Bailife ſolonque le cuſtome & uſe del Mannor, & celuy que avera la terre, prendra meſme la terre en le Court, & ſon priſel ſerra enter en le roll, & le Seneſchal, ou le bailife, ſolonq̄ le cuſtome delivera a ce-

Tenants by the Verge are in the ſame nature as Tenants by copy of Court roll. But the reaſon why they be called tenants by the Verge is, for that when they wil ſurrender their Tenements into the hands of their Lord to the uſe of another, they ſhall have a little rod (by the cuſtome) in their hand, the which they ſhall deliver to the Steward, or to the Bayliff according to the cuſtome of the Manor, and he which ſhal have the land ſhal take up the ſame land in Court, and his taking ſhall bee entred upon the roll, and the ſteward or bailiff, according to the cuſtome

¶ *Tenant per le Verge.* This Tenant per le Verge is a meer Copyholder, and taketh his name of the ceremony of ỳ Verge. Tenure in Villenage, or by baſe Tenure is thus deſcribed by Britton, (a) Villenage eſt, tenide dameins de cheſcun Sſir baille a tenera ſon volunt per Villeines ſervices de enprover al opes le Seignior, & livere per verge & nient per title de eſtris, ne per ſucceſſion de heritage dont gards de marriages ne auters ſervices reals come homage & reliefes ne-ponent des ammones & demeines ne villenage eſts demand. 14 H. 4. 33.

(a) Britton fol. 165. & F. N. B. fol. 12. Liberatio per virgam.

¶ *A le Seneſchal.* (Which we call a Steward) Seneſchallus is derived of ſein a houſe or place, and Shalc, an Officer or Governor, ſome ſay ỳ ſen is an ancient word for Juſtice, ſo as Seneſchal ſhould ſignify Officiarius Juſtitiæ, and ſome ſay ỳ Steward is derived of Strewe (ỳ is) a place, and Ward, that ſignifieth a Keeper, Warden, or Governor: and others, that it is derived of Steds, that ſignifieth a place alſo, and Ward, as it were the keeper or governor of that place; but it is a word of many ſignifications,

In this place it ſignifieth an Officer of Juſtice, viz. a keeper of Courts, &c. Fleta deſcribeth the Office and Duty of this Officer at large moſt excellently: Prouideat ſibi Dominus de Seneſchallo circumſpecto & fideli, viro prouido & diſcreto & gratioſo, humili, pudico, pacifico, & modeſto, qui in legibus conſuetudinique prouinciæ & Officio ſeneſchalciæ ſe cognoſcat & jura Domini ſui in omnibus teneri affecter, quique ſub ballivos Domini in ſuis erroribus & ambiguis ſciat inſtruere & docere, quique egenis parcere, & qui nec prece vel præcio velit à tramite Juſtitiæ deviare, & perverſè judicare, cujus officium eſt curias tenere Maneriorum & de ſubtractionibus conſuetudinum, ſerviciorum, reddituum, ſectarum ad cur', mercat, molendina Domini & ad viſus franciplegg. aliarumque libertatum Domino pertinentium inquirat, &c. The reſidue pertaining to his Office is worth your reading at large. Every Steward of Courts is either by Deed or without Deed; for a man may be retained a Steward to keep his Court Baron and Leet, alſo belonging to the Manno: without Deed, and ẏ Retainer ſhall continue untill he be diſcharged. The Lord of a Manno: may make admittances out of Court, and out of the Manno: alſo, as at large appeareth in my Reports.

Vide Sect. 92. & 379. Fleta lib. 2. cap. 66. Vide Statut. de extent. Manor 14 E. 1.

Vide li. 4. Cales de Copiholds fol. 26, 27, 30.

## Sect. 79.

A *Le bailie.* This word bailie as ſome ſay cometh of the French word Bayliſe, in Latine Ballivus, but in truth Bayly is an old Saxon word, & ſignifieth a ſafe keeper or Protector, and baile or ballium is ſafe keeping or protection: And thereupon we ſay when a man upon ſurety is deliuered out of priſon traditur in ballium, he is deliuered into baile, ẏ is, into their ſafe keeping or protection from priſon: and the Sheriff ẏ hath cuſtodiam Comitatus, is called Ballivus, and the County ballivus ſua.

Vide Lamb. Expoſition of Saxon words.

*Reeve*, is vſed of ẏ Saxon word gerefa or gereve; and by contraction or rather corruption, Greve, or Reve; and is in Latine præfectus or præpoſitus. It ſignifies as much as Appruator a biſhop or director, as Hood-reeve, Hirp-reeve, Hire-reeve, &c. whereof more ſhall be ſaid hereafter. Vide Fleta lib. 2. cap. 67. where he treateth of the Office of the Bayliff, and cap. 69. de Officio præpoſiti, of the

Fleta lib. 2. cap. 67 & 69.

ET aury en diuers Seignories & Manors, il y ad tiel cuſtome, ſi tiel Tenant que tient per cuſtome voloit alener ſes terres ou Tenements, il poit ſurrender ſes tenements a le Baily, ou a le Reeve; ou a deux probes homes del Seignorie, al uſe ceſtuy que avera le terre, daver en fee ſimple, fee taile, ou pur terme de vie, &c. Et tout ceo ils preſenteront al prochein Court, & donqz celuy ẏ avera la fre ẏ copy de Court Rol, avera meſme la fre ſolonqz lentent del ſurrender.

AND alſo in divers Lordſhips and Manours there is this cuſtome, *viz.* if ſuch a Tenant which holdeth by cuſtome will alien his lands or tenements he may ſurrender his tenements to the Bailiff or to the Reeve, or to two honeſt men of the ſame Lordſhip, to the uſe of him which ſhall have the land to have in fee ſimple, fee taile, or for term of life, &c. and they ſhall preſent all this at the next court, & thē he which ſhall have the Land by Copy of Court Roll, ſhal have the ſame according to the intent of the ſurrender.

the

the office of the Reeve, and what belongeth of duty and right to either of them, which words are too long here to be inserted, only this I will take out of him, Balivus autem cujuscunque manerii, esse debet in verbo verax, & in opere diligens & fidelis, ac pro discreto appruatore cognitus plegiatus, & clericus qui de communioribus legibus pro tanto officio sufficient' se cognoscat, & quod sit ita justus, quod ob vindictam seu cupiditatem non quærat versus tenentes Domini nec alios, &c. Præpositus autem tanquam appruator & cultor optimus, &c. Domino vel ejus Senescallo palam debet presentari cur injungatur officium illud indilate; non ergo sit piger aut somnolentus, sed efficaciter & continue commodum Domini adipisci nitatur, & exarare, &c. The residue concerning both the Offices being worth your reading.

¶ *A le Bailie ou a le Reeve.* Littleton intendeth into the hands of the Lord by the hands of the Baylif or the Reeve.

¶ *Ou al deux probes homes del Seigniorie.* The custome doth guide these surrenders out of Court, and the custome must be pursued. Vide lib. 4. fol. 25. Kite & Quaintins case.

¶ *Et tout ceo ils presenteront al procheine court, &c.* By the surrender out of Court the Copyhold estate passeth to the Lord under a secret condition that it be presented at the next Court according to the custome of the Manor. And therefore if after such a surrender, and before the next Court he that made the surrender dieth, yet the surrender standeth good, and if it be presented at the next Court Ce' aque use shall be admitted thereunto; but if it be not presented at the next Court according to the custome, then the surrender becometh void, and so was it clearly holden Pasch. 14 Eliz. in the Court of Common Pleas which I my self heard.

## *Sect.* 80.

ET ils sont est acravoire, que en divers Seigniories, & divers Manors, sont pluors & divers customes en tiels cases, quant a prender tenements, & quant a pleader, & quant as auters choses & customes a faire, & tout ceo que nest pas encounter reason, poit bien estre admitte & allow.

AND so it is to be understood, that in divers Lordships, and in divers Manors, there be many and divers customes, in such cases as to take Tenements, and as to plead, and as to other things and customes to be done, and whatsoever is not against reason, may well be admitted and allowed.

¶ *Sont pluſors & divers customs.* This was cautiously set down: for in respect of the variety of the customs in most Manors, it is not possible to set down any certainty, only this incident inseperable every custom must have, viz. if it be consonant to reason, for how long soever it hath continued; if it be against reason, it is of no force in Law.

¶ *Encounter reason.* This is not to be understood of every unlearned mans reason, but of artificial and legal reason warranted by authority of Law: Lex est summa ratio.

## *Sect.* 81.

¶ *Ils sont appelles tenants per base tenures.* Of this sufficient hath been spoken before.

ET tiels tenants q̄ teignont solonqz le custome dun seignorie ou dun manor, coment que ils ont estate denheritance solonqz le custome del Seignorie ou manñ unc pur ceo q̄ ils nōt asc̄

AND these Tenants which hold according to the custome of a Lordship or Mannor, albeit they have an estate of Inheritance according to the custome of the Lordship or Mannor, yet because

frankatenement per le cours del Common Ley, ils ſont appelles Tenants per baſe tenure.

they have no Freehold by the courſe of the Common Law, they are called Tenants by baſe tenure.

## Sect. 82.

¶ *Tenant a volunt ſolonque le cuſtome puit aver eſtate denheritance, &c.* Here note that Littleton alloweth that by the cuſtom of the manor, the copyholder hath an inheritance, and conſequently the Lord cannot put him out without cauſe.

¶ *Mes ſi home, &c. voile Leſſer terres ou tenements a un auter a aver & tener a luy & ſes heires a volunt le Leſſor, ceux parolx (a les heires de le leſſee) ſont voides. Car en ceſt caſe ſi le leſſee devie; & ſon Heire enter le Leſſor avera action de treſpaſſe envers luy, &c.* By which it is proved that by the death of the Leſſee, the leaſe is abſolutely determined, which is proved by this, that if the heir enter, the Leſſor ſhall have an Action of treſpaſs, quare vi & armis, before any entry made by the Leſſor

10 E.4.18. 22 E.4.13. 2 R.2. barre 237. 11 H.7.21. 21 H.7.12.

¶ ET divers diverſities y ſont perenter tenant a volunt, que eſt eins per leaſe ſon Leſſor per le courſe del Common ley, & Tenant ſolonq; le cuſtome del Manor en le forme avantdit. Car t a volūt ſolonq; le cuſtome puit aver eſtate denheritance (come eſt avantdit) al volūt le Seignior ſolōq; le cuſtome & uſage del Manor. Mes ſi home ad Terres ou Tenements, queux ne ſont deins tiel Manor ou Seigniorie, ou tiel cuſtome ad eſte uſe en le forme avantdit, & voile leſſer tiels terres ou tenements a un auter, a aver & tener a luy & a ſes heires a le volunt le Leſſor, ceux parolx (a les heires de le Leſſee) ſont voides. Car en ceſt caſe ſi le Leſſee devie & ſon heire enter le Leſſor avera bon action de treſpaſſe envers luy, mes nemy iſnſi envers le heire le terre per le cuſtome en aſcun cas, &c. pur ceo que le cuſtome de le Manor en aſcun cas luy puit aide de barrer ſon Seignior en action de treſpaſſe, &c.

AND there are divers diverſities between Tenant at will which is in by Leaſe of his Leſſor by the courſe of the common Law, and Tenant according to the cuſtome of the Mannor in form aforeſaid. For Tenant at will according to the cuſtome may have an eſtate of inheritance (as is aforeſaid) at the will of the Lord, according to the cuſtome and uſage of the Mannor. But if a man hath Lands or Tenements which be not within ſuch a Mannor or Lordſhip, where ſuch a cuſtome hath been uſed in form aforeſaid, and will let ſuch lands or tenements to another, to have and to hold to him, and to his heirs at the will of the Leſſor, theſe words (to the heirs of the Leſſee) are void. For in this caſe, if the Leſſee dieth, and his heir enter, the Leſſor ſhal have a good Action of Treſpaſſe againſt him, but not ſo againſt the heire of Tenant by the cuſtome in any caſe, &c. for that the cuſtome of the Mannor in ſome caſe may ayd him to barre his Lord in an action of Treſpaſſe, &c.

¶ Pur

¶ *Pur ceo que le cuſtome de le Manor en aſcun caſe luy puit aider de barrer ſon ſeignior en action de treſpaſſe, &c.* Hereby it appeareth ẏ by the opinion of Littleton the Lord againſt the cuſtome of the Manor cannot ouſt the Copyholder.

## Sect. 83.

¶ Item lun tenant per le cuſtome en aſcuns lieux doit repairer & ſuſteiner ſes meaſons & lauter tenant a volunt nemy.

Alſo the one tenãt by the cuſtome in ſome places ought to repair and uphold his houſes, and the other Tenant at will ought not.

¶ *Per le Cuſtome.* For what a Copyholder may or ought to do, or not do, the cuſtom of the Manor (a) muſt direct it, for Conſuetudo Manerii eſt obſervanda. (b) But if there be no cuſtome to the contrary, waſt either permiſſive or voluntary of a Copyholder, is a forfeiture of his Copihold.

(a) Bracton lib. 2. fol. 96.

(b) Vide lib. 4. fol. 21, 22, &c. in caſes de Copiholds.

## *Sect.* 84.

¶ Item lun tenant per le cuſtõe ferra fealtie & lauter nemy. Et pluſors auters diverſities ẏ ſont perenter eux.

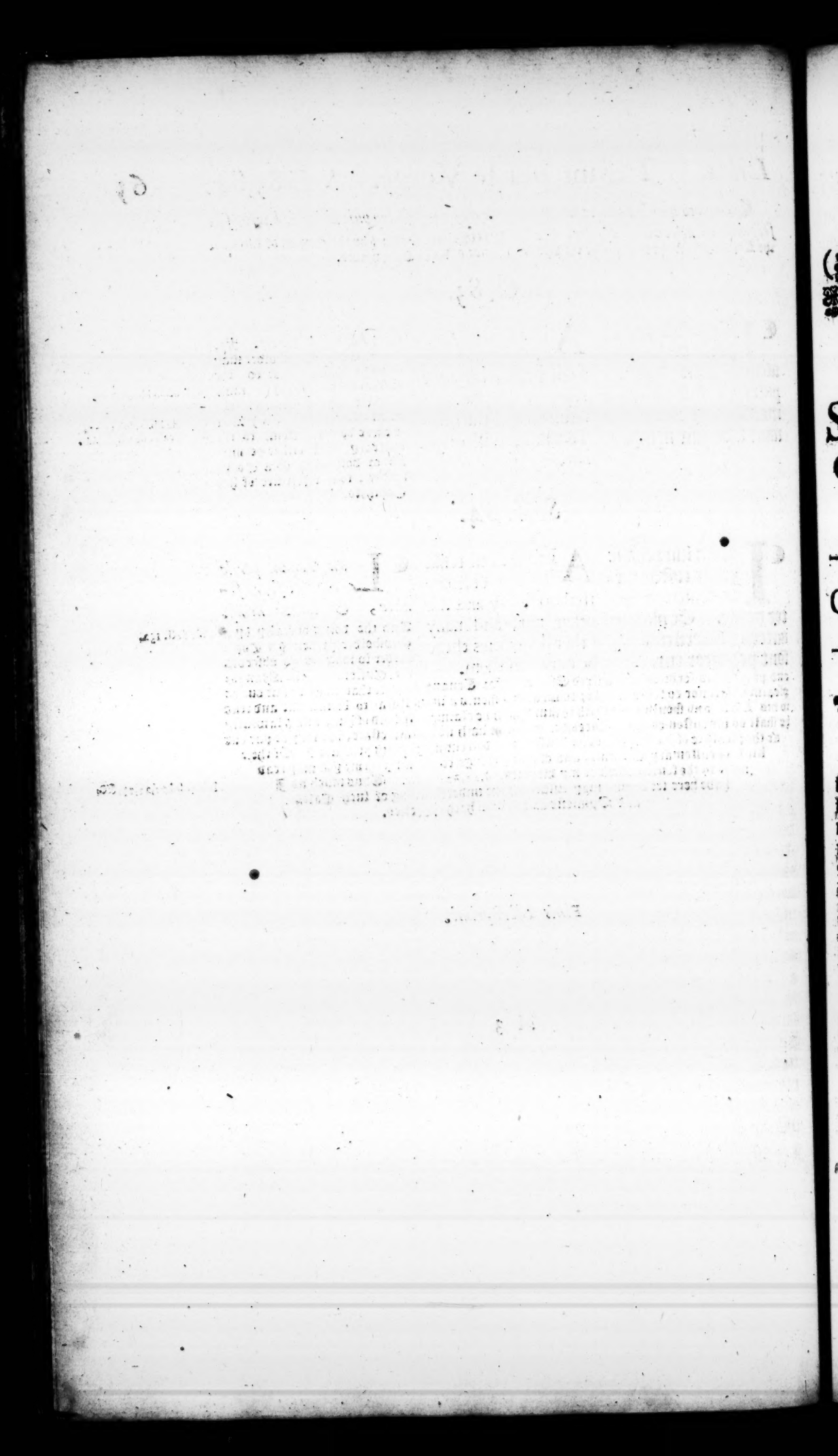
Alſo the one tenãt by the cuſtome ſhal do fealty and the other not, and many other diverſities there be between them.

¶ *Lun Tenant per le cuſtome ferra fealtie, & lauter nemy.* And the doing of fealty by a Copyholder, proveth ẏ a Copyholder ſo long as he obſerves the Cuſtome of the Manor and payeth his ſervices hath a fixed Eſtate. For Tenant at will that may be put out at pleaſure ſhall not do fealtie. For to what end ſhould a man ſwear to be faithful and true to his Lord, and ſhould bear faith to him which he claimeth to hold of him, and ẏ lawfully he ſhall do his cuſtomes and ſervices, &c. when he hath no certain eſtate, but may be put out at the pleaſure of the Leſſor, or he himſelf may determine it at his pleaſure? Of theſe kind of cuſtomary Tenants, and of many things concerning them, you may read more in the fourth Book of my Reports, fol. 21, 22, 23, &c. Thus much as I have here ſet down, may ſuffice for the underſtanding of ſuch Caſes and Opinions as Littleton hath expreſſed.

Vide Sect. 132.

Lib. 4. fol. 21, 22, 23, &c.

*Finis Libri primi.*



# THE SECOND BOOK

## Of the First Part of the *INSTITUTES* of the LAVVES of *England*.

CHAP. 1. *Homage.* *Sect.* 85.

¶ HOmage est le pluis honorable service, & pluis humble service de reverence, que Franktenant puit faire a son Seignior. Car quant le Tenant serra homage a son Seignior, il serra discinct, & son test discover, & & son Seignior serra, le Tenant genuflera devant luy sur ambideux genues, & tiendra les maines extendes, & joyntes ensembles enter les mains le Seignior, & illint dira: Jeo

HOmage is the most honorable service and most humble service of reverence that a Franktenant may doe to his Lord: For when the Tenant shall make Homage to his Lord, hee shall bee ungirt, and his head uncovered, and his Lord shall sit, and the Tenant shall kneele before him on both his knees, and hold his hands joyntly together betweene the hands of his Lord, and shall say thus: I become your man

OUr Authour having taught us in his former Booke the severall distinct estates of lands and tenements as most necessary to be known; for the understanding of these two other Bookes, doth in this second book treat of the tenures and services, whereby the said lands and tenements been holden, which he divideth into 12 parts, viz. Homage, Fealty, Estuage, Knights Service, Socage, Frankalmoigne, Homage Auncestrel, Grand Serjeanty, Petit Serjeanty, Tenure in Burgage, in Villenage, and into Rents, wherein his method is most excellent, for he beginneth with Homage, because it is the most humble service of reverence, expressing the duty of the Tenant to his Lord, and affectionate love and protection of the Lord towards his Tenant, as hereafter shall appear. Secondly, Fealty, a sacred service, expressing by oath

oath his fidelity to his Lord.

Thirdly, Elcuage, which is Servitium ſcuti, the ſervice of the Shield.

Fourthly, Knights Service, for the defence of the Realm againſt outward hoſtility and invaſions; which the better might be effected, if ſuch duty, fidelity, and love were betweẽ Lords and Tenants, as ought to be, and as the Law expecteth.

Fifthly, Socage, the ſervice of the Plough, aptly placed next to Knights Service, for that the Ploughman maketh the beſt ſouldier, as ſhall appear in his proper place.

Sixthly, Frankalmoigne, Service due to Almighty God, placed towards the middeſt for two cauſes: First, for that the middeſt is the moſt worthy and moſt honourable place: And ſecondly, becauſe the firſt five preceding Tenures and Services, and the other ſix ſubſequent, muſt all become proſperous and uſeful, by reaſon of Gods true religion and ſervice; for Nunquam proſpere ſuccedunt res humanæ, ubi negliguntur divinæ: Wherein I would have our Student follow the advice given in theſe ancient verſes, for the good ſpending of the day.

Sex horas ſomno, totidem des Legibus æquis,
Quatuor orabis, des Epuliſque duas.
Quod ſupereſt ultro ſacris largire camænis.

Seventhly, Homage aunceſtrell, ancient families, enjoying with their bloud the ancient inheritance of their forefathers, as a great bleſſing of the Almighty.

8. & 9. Serjeanty grand & petit, due to the King only, to whom the higheſt and moſt eminent honour, ligeance, and reverence of all kind is due; which hath two notable effects: Firſt, Imperii Majeſtas eſt tutelæ ſalus, according to the old rule: And ſecondly, it is an aſſured means of long continuance of Houſes and Families in proſperous eſtate, whereof our Author ſpeaketh in the Chapter before.

10. Then followeth the tenure of Burgage, of ancient Burghs and Cities, &c. which are to be ſupported for the honour of the King, and for the maintenance of trade and traffique, the life of all Common-wealths, eſpecially of Iſlands.

11. Villenage, for the performance of ſervice, yet neceſſary ſervice, for the cleanſing of Cities, Boroughs, Manors, &c. and for the better manuring of arrable grounds, and increaſe of Husbandry.

12. And laſtly, Tenure by Rents, which are called Vivi reditus, becauſe the Lords and owners thereof do live by them, which they ſhall enjoy the better, if trade and traffique be maintained, and our native commodities, which are rich and neceſſary, holden up and ſaleable at a reaſonable value. And now underſtanding his method, let us peruſe our Authors words.

And as our Author began his firſt Book with Fee-ſimple, which is the moſt principall and worthieſt eſtate, ſo he beginneth his ſecond Book with Homage; which is the moſt honourable and humble ſervice.

(a) Glanvil lib. 9. cap. 1. Bract. fol. 78. 80. Britton fol. 170. 173. Fleta lib. 3. cap. 16. Mir. c. 3. de Homage, & l. 5. ſect. 1.

*Homage*, is derived of (a) Homo, and it is called Homage, becauſe when he doth this ſervice, he ſaith, Jeo deveigne voſtre home: And in Engliſh Homage is called Manhood, ſo as the manhood of his Tenant, and the homage of his Tenant is all one, Mutua quidem debet eſſe Dominiꝰ & Homagii fidelitatis connexio, ita quod quantum homo debet Domino ex homagio, tantum illi debet Dominus ex Dominio, præter ſolam reverentiam.

(b) Lib. Rub. cap. 55.

¶ *Foyal & Loyal.* Theſe words are of great extent, for they extend to the obſervation of the Lords counſel in whatſoever is honeſt and profitable. (b) Omnis homo debet fidem Domino ſuo de vita & membris ſuis, & terreno honore, & obſervatione conſilii ſui per honeſtum & utile, (comprehended in theſe words Foyal & Loyal) ſalva fide Deo & terræ Principi.

*Service*

deveigne voſtre home de ceſtiour en avant, de vie: & de member, & de terrene honour, & a vous ſerra foyall & loyall, & foy a vous portera des Tenements que jeo claime de tener de vous, ſalve la foy que jeo doy a noſtre Seignior le Roy, & donques le Seignior iſſue ſeyant, luy baſera.

from this day forward of life and limbe, and of earthly worſhip, and unto you ſhall be true and faithfull, and beare you faith for the Tenements that I claime to hold of you (ſaving the faith that I owe unto our Soveraign Lord the King,) and then the Lord ſo ſitting ſhall kiſſe him.

¶ *Service.* (c)Servitium in Lege Angliæ regulariter accipitur pro ſervitio, quod per tenentes Dominis ſuis debetur ratione feodi ſui. But ſervicium eſt duplex, Spirituale, whereof more ſhall be ſaid in the chapter of Frankalmoigne: & Temporale, whereof our Author here treateth: And he beginneth with Homage, 1. Becauſe it is moſt honourable, for Honor plus eſt in honorante, quam in honorato. 2. It is plus humble de reverence, and both of theſe for five cauſes on the part of a Tenant. Firſt, The Tenant when he doth his homage is diſcinctus, diſarmed or ungarded. Secondly, Nudo capite, bare-headed. Thirdly, Ad pedes Domini ſuper genua projectus. Fourthly, Ambas manus junctas inter manus Domini porrigit. Fifthly, Per verba omni ſupplici veneratione plena, he ſaith, Jeo deveigne voſtre home, &c. And for three cauſes on the part of the Lord: Firſt, The Lord doth ſit. Secondly, he encloſeth his Tenants hands betwe n his own Thirdly, The Lord ſitting kiſſeth ꝧ Tenant. Prudent Antiquity did for ꝧ more ſolemnity and better memory and obſervation of ꝧ which is to be done, expreſs ſubſtances under ceremonies. (c) 2 H. 4. 6. Glanvil & Mir. ubi ſupra.

Nil ſine prudenti fecit ratione vetuſtas.

¶ 1. *Jeo deveigne voſtre home de vie & de member.* And therefore he is diſcinctus, for ꝧ he muſt never be armed againſt or oppoſite to his Lord, but both life and member muſt be ready for the lawful defence of his Lord.

¶ 2 *De terrene honour.* Expreſſed by kneeling at the feet of his Lord. 3. Debet quidem tenens manus ſuas utraſque ponere inter manus utraſque Domini ſui, per quod ſignificatur ex parte Domini protectio, defenſio, & warrantia, & ex parte Tenentis reverentia & ſubjectio. So as the holding up of the Tenants hands betokeneth reverence and ſubjection, and the Lords incloſing of his Tenants hands between his own, betokeneth protection and defence. Bract. fol. 80. Britton fol. 173. b. ac. Fleta lib. 3. cap. 16.

¶ 4 *Et a vous ſerra foyal & loyal, & foy a vous portera, &c.* This faith, Fides; or Fœdus perpetuum, this perpetual league between the Lord and the Tenant is expreſſed by the Lords kiſſing of the Tenant: And ſome ſay, that Fœdus dicitur à fide, quia fides interponitur: And ſo firm and ſtrong was this league between them, that by the ancient Law of England, Nihil facere poteſt Tenens propter obligationem homagii, quod vertatur Domino ad exhæredationem, vel aliam atrocem injuriam. Nec Dominus Tenenti è converſo quod ſi fecerint diſſolvitur & extinguitur homagium omnino & homagii connexio & obligatio, & erit inde juſtum judicium cum venerit contra homagium & fidelitatis ſacramentum, quod in eo is quo delinquunt puniantur, s. in perſona Domini, quod amittat Dominium, & in perſona Tenentis, quod amittat Tenementum. Bract. ubi ſupra. Britton fol. 174.

¶ *Des tenements queux jeo claime a tener de vous.* Britton ſaith, That (a) in doing of homage he muſt name the Lands or Tenements for which he doth homage in certainty, and the reaſon is, Ne in captione homagii, contingat Dominum per negligentiam decipi, vel per errorem. (a) Britt. ubi ſupra. Bract. ubi ſupra. Glanvil lib. 7. cap. 1. Mir. cap. 3. de Homage.

For the better underſtanding of that which ſhall be ſaid hereafter, it is to be known, That firſt, there is no land in England in the hand of any ſubject (as it hath been ſaid, but it is holden of ſome Lord by ſome kind of ſervice, as partly hath been touched before.

Secondly, All the lands (b) within this realm were originally derived from the Crown, and therefore the King is Sovereign Lord, or Lord Paramount, either mediate or immediate of all and every parcel of land within the Realm. (b) 18 E. 3. 35. 44 E. 3. 48 E. 3. 9. 8 H. 7. 12.

Thirdly, That in ancient time Lords upon the creation of their Tenures did not onely reſerve rents, ſervices, and profits, &c. for which they might diſtrein and have other remedy, but alſo took an humble ſubmiſſion of his Tenant by promiſe and oath (for to homage fealty is incident) to be true and faithfull to him for the Tenements holden of him, which ſubmiſſion is called Homage and Fealty according to the tenure reſerved.

¶ *Salve le foy que jeo doy a noſtre Seignior le Roy.* Both becauſe there is Homagium ligeum, which is due to the King onely, and alſo becauſe he is Sovereign Lord over all. Glanvil lib. 9. cap. 1. Mir. c. 3. de Fealty. Bract. ubi ſupra. Britt. ubi ſupra. Inter. Inquiſ. apud Lancelton, anno 6 E. 1. Cornub. in Thel.

I have ſeen an ancient Record in Anno 6 Edw. 1. in theſe words, Michael de North qui ſequitur pro Rege queritur, quod cum Dominus Rex ratione regiæ dignitatis & Coronæ ſuæ tale habeat privilegium quod nullus in Regno ſuo de aliquo qui ſit in Regno Angliæ alicui homagium facere debeat, vel aliquis hujuſmodi homagium ab aliquo recipere debeat, niſi facta mentione de homagio Domino Regi debito eidem Domino Regi fideliter obſervand' Walterus Exon. Epiſc. in contemptu Domini Regis & ad manifeſtam quoad privilegium prædictum ipſius Domini Regis exhæredationem, & ad damnum & dedecus ipſius Domini Regis ad valentiam decem Mill' Librarum de Henrico de Pomeray, Thoma de Kanc', Johanne de bello prato, Laurentio filio Ric. Johanne le

Soer

Soer, Willielmo de Alex', Eudone de Tranael, Rogero le gros, Johanne le Lunge, Radꝺo de Bevill, Guidone Novant, Willielmo de Rouskerrek, & Hen. Cannel, accepit ſervitia contra privilegium prædict', nulla facta mentione de homagio & fidelitate Domino Regi debitis. And judgment in the end was given againſt the ſaid Biſhop.

¶ *Roy.* Our Anceſtors the Saxons termed him Coning or Cyning, a name ſignifying power and ſkill, which by way of contraction we now call King. This name the Saxons with a ſmal alteration had from the Britains who called him Koning or Koninck: in French he is called Roy, in Italian Re, in Spaniſh Rey, all derived from the Latine (Rex); of the true ſignification whereof you ſhall read (d) plentiful matter in our old Bookes.

So as Homage is divided, 1. In homagium ligeum, & non ligeum.

2. In homagium anteceſſorium, & non anteceſſorium. It is here neceſſary to be known, what Tenant that holdeth by homage ſhal do homage. (e) Item videndum quis poteſt homagium facere. Sciendum eſt quod quilibet liber homo tam maſculus quam fœmina, clericus & laicus, major & minor, dum tamen electi in Epiſcopos, poſt conſecrationem homagium non faciunt, quicquid fecerint ante, ſed tantum fidelitatem. Conventus autem Homagium non faciet de jure, ſicut nec Abbas, nec Prior, eo quod tenent nomine alieno ſcilicet nomine Eccleſiarum.

(g) One within the age of 21 years may do homage, but Bracton ſaith he cannot do fealty, becauſe in doing of fealty he ought to be ſworn, which an infant cannot be. But ſome opinions be in our bookes to the contrary, viz. that an infant ſhall do fealty: but I take it to be meant of Homage, and herewith (h) agreeth Britton who ſaith, Et tout ſoit que enfant deins age fait homage, pur ceo ne volons nous my que il face ſerement de fealtie, jeſque a taunt que il ſoit de pleine age, & tout ſoit ceo common dit del people que fait de enfant fait deins age ne ſoit fait my a tener eſtable, volons neque dent que cheſcun home & cheſcun feme de quel age que ils ſoient, facent homage a lour Seigniour ſolonque le ſtatute de la grand charter.

¶ Glanvil ſaith, (i) women ſhall not do homage, but Littleton ſaith that a woman ſhall do homage, but ſhe ſhall not ſay, Jeo deveigne voſtre feme, but Jeo face a vous homage, and ſo is Glanvill to be underſtood, that ſhe ſhall not do compleat homage.

(d) Mir. cap. 1. ſect. 2 & cap. 2. ſect. 1. & 2. Bract. fol. 5. 107. 368, 369, 340. Fleta lib. 1. c. 5. Forteſcue c. 8. & 37. Stanf. pl. cor. 98, 99. & Prær. 65.

(e) Glanvil lib. 9. cap. 1. Bracton fol. 78. b. Britt. cap. 68. fol. 170, 171. Fleta lib. 3. cap. 16.

(g) Glanvil lib. 9. cap. 1. Britton lib. 2. 78. Fleta lib. 3. cap. 16. acc. 21 E. 3. 40. 26 E. 3. 63, 64. 32 E. 3. age 80. & tit. per quæ ſervitia 9. 13 H. 4. 5. 33 H. 6. 16. 20 E. 3. per quæ ſervic. 24.

(h) Britt. fol. 171.

(i) Glanvil lib. 9. cap. 1. F. N. B. 157. Regiſt. 296. Britt. ubi ſupra. Mirror cap. 2. ſect. 3.

## Sect. 86.

¶ NO man of Religion when (k) he doth homage ſhall ſay, Jeo deveigne voſtre home, becauſe he hath profeſſed himſelf the man of God, yet ſhall he do homage, and ſhall ſay, (l) Jeo face a vous homage, & a vous ſerra foyall & loyall &c. & note that here Religion is taken largely, for it extends not only to regular perſons, as Abbots and the like, but alſo to all Eccleſiaſticall perſons, as Biſhops, Deans, or any other ſole Eccleſiaſtical body politique, and ſo it is in uſe at this day, which alſo appears in our old bookes.

And it is to be obſerved that in old bookes and records, the homage which a Biſhop, Abbot, or other man of Religion doth, is called Fealty, for that it wanteth theſe words (Jeo deveigne voſtre home.) But yet in judgement of Law it is homage, becauſe he ſaith, I do to you homage, &c. and ſo of a woman.

(k) Glanv. lib. 1. cap. 9. in fine. Britton lib. 2. 78. Bracton cap. 68. Fleta lib. 3. cap. 16.

(l) Vide Sect. 96. & 133.

¶ MES ſi un Abbe, ou un Prior, ou auter home de religion ſerra homage a ſon Seignior, il ne dirra, Jeo deveigne voſtre home, &c. pur ceo q̃ il ad luy profeſſe pur eſtr̃ tant ſolement le home de Dieu: mes il dirra iſſint, Jeo vous face Homage & a vous ſerra foyal & loyal, & foy a vous portera des Tenements que Jeo teigne de vous, ſalve la foy que Jeo doy a noſtre Seignior le Roy.

But if an Abbot or a Prior, or other man of Religion ſhall doe homage to his Lord, he ſhall not ſay, I become your man, &c. for that he hath profeſſed himſelf to be onely the man of God. But he ſhall ſay thus, I doe homage unto you, and to you I ſhall bee true and faithfull, and faith to you bear for the Tenements which I hold of you, ſaving the faith which I do owe unto our Lord the King.

Sect.

## *Sect.* 87.

¶ *Pur ceo que nest convenient, &c.* By this it appeareth (m) that Argumentum ab inconvenienti plurimum valet in lege, as often shall be observed hereafter. Non solum quod licet sed quid est conveniens est considerandum: Nihil quod est inconveniens est licitum.

(m) For like reasons ab inconvenienti. vide sect. 138, 139. 231. 269. 440. 478. 665. 722. 730. 21 H. 7. 13. F. N. B. 230. d. 16 H. 7. 9.

¶ Item si feme sole ferra homage a son Seignior, le ne dirra, Jeo deveigne voſtre feme, pur ceo que nest convenient que feme dirra que el deviendra feme a alcun home forſqz a ſa baron quant el est espouſe: mes il dirra, ieo face a vous homage, & a vous ſerra foyall, & loyall, & foy avous portera des tenements que ieo teigne de vous, ſalve la foy que ieo doy a noſtre Seignior le Roy.

Also if a woman sole shall do homage, she shall not say, I become your woman; for it is not fitting that a woman should say, that she will become a woman to any man but to her husband when she is married: but she shall say, I do to you homage, & to you shall be faithful & true, & faith to you shall bear for the tenements I hold of you, saving the faith I owe to our Soveraign Lord the King.

## *Sect.* 88.

¶ Item home puit veier un bone note in M. 15 E. 3. lou un home & ſa feme fiet homage & fealty en le common Bank, q̃l est escrie ẽ tiel forme. Nota, que J. Leukner & Elizabeth ſa feme, fiet homage a W. Thorpe en cest maner; Lun & lauť tiendront jointiñt lour mains enter les mains W. T. & le baron dit en cest forme: Nous vous ferromus homage, & foy a vous porterons, pur les tenements q̃ nous teignomus de A. vñe conuſor q̃ a vous ad graūt noſtre ſervices en B. & C. & autres villes, &c. encounť touts gents: ſalve la foy que nous devous a noſtre Seig-

Also a man may see a good note in M. 15 E. 3. where a man and his wife did homage and fealty in the Common Place, which is written in this forme: Note, that *I. Lewknor* and *Eliz.* his wife did homage to *W. Thorpe* in this manner, The one and the other held their hands joyntly between the hands of *W. T.* and the Husband saith in this forme: We do to you Homage, and faith to you shall bear for the tenements which we hold of *A.* your Conusor, who hath granted to you our services in *B.* and *C.* and other Townes, &c. against all Nations, saving the faith which we owe to our Lord the King and to his heirs, and to our

¶ In this (n) Record three things are to be observed.

(n) Mich. 15 E. 3. tit. Avowry 109.

2. How necessary and profitable Records and observations are; albeit they were not published in print, for at the time when Littleton wrote, this Record was not printed.

2. That the Husband and Wife doing homage, the Husband shall speak the words for them both, viz. We do to you homage, &c.

3. That the Homage which the Husband and Wife do, is the very homage which the Wife would do alone; but this joynt Homage done by the Husband and Wife, is intended to be before Issue had between them, whereof more shall be said hereafter. And it is to be observed, that very few Cases ruled or resolved in the Reign of Edward the third, but the same or the like, had

had been ruled or resolved in the reignes of Edward the second, Edward the first, or before; as for example, for warrant hereof, vide Hill. 17 E. 2. Rot. Parl. &c.

Hill. 17 E. 2, Rot. Parl. &c.

nior le Roy, & a ses heires, & a nostr autrs Seigniors: & lun & lauter luy baseront. Et puis ils fiet fealty, & lun & lauter tiendront lour mains sur un lieur, & le baron dit les paroir, & ambō baseront le lieur.

other Lords, and both the one and the other kissed him. And after they did fealty, and both of them hold their hands upon the Booke, and the Husband said the words, and both kissed the Book.

## Sect. 89.

*Et a mes autres Seigniors.* This saving for other Lords is good for explanation, albeit the homage is referred only to the tenements which he holdeth of him to whom he doth the homage.

NOta, si un hōe ad several tenancies queux il tient de severals Seigniors, s. chescun tenancie per homage, donq̄ quant il fait homage a un des Seigniors, il dirra en le fine de son homage fait, Salve la foy q̄ jeo doy a nostr Seignior le Roy, & a mes outers Seigniors.

NOte, if a man hath severall Tenancies which he holdeth of severall Lords, that is to say, every tenancy by homage, then when he doth homage to one of his Lords, he shall say in the end of his homage done, Saving the faith which I owe to our Lord the King, and to my other Lords.

## Sect. 90.

*EN droit dun auter.* As the Husband and wife in the right of his wife, the Bishop in right of his Bishoprieke, &c. the Abbot or Prior in right of his Monastery, &c. (p) But no Corporation aggregate of many persons capable, be the same Ecclesiasticall or Temporall, can do homage, as a Deane and Chapter, Maior and Commonalty; and such like, albeit they be seised in fee of lands holden by homage, yet shall not they do homage. And the reason is, because that homage must be done in person, and a Corporation aggregate of many cannot appear in person; for albeit the bodies natural, whereupon the body politique consists may be seen, yet the body Politique or Corporate it self cannot be seen, nor do any act but by Atturney, and homage must ever be done in person, &c. And albeit an

(p) 33 H. 8. tit. Fealtie, Bract. 15. Lib. 1. fol. 11. Lib. 7. fol. 10. Lib. 10. fol. 31.

NOte, none shal do homage, but such as have an estate in fee simple, or fee taile in his own right, or in the right of another. For it is a Maxime in Law, that he which hath an estate but for terme of life, shall neither do homage or take homage. For if a woman hath lands or tenements in Fee simple or in Fee taile which she holdeth of her Lord by homage, and taketh Husband, & have issue, then the Husband in the life of the wife shall do ho-

NOta, que nul ferra homage, mes tiel que ad estate en Fee simple, ou en Fee taile, en son droit de meisme, ou en droit dun auter. Car il est un Maxime en Ley que il q̄ ad estate forsq̄ pur terme de vie, ne ferra homage, ne prendra homage. Car si feme ad terres ou tenements en Fee simple, ou ē fee taile, queux il tient de son Seignior per homage, & prent baron, & ont issue, donque le Baron en la vie la feme ferra homage,

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pur ceo que il ad title daver les tenements per le curtesie Dengleterre sil survesquist la feme, & aury il tient en droit de sa feme. Mes si la feme deby devant homage fait per le baron en la vie sa feme, & le baron soy tient eins come tenant per le curtesie, donques il ne serra homage a son seignior pur ceo que il adonque nad estate forsque pur terme de vie.

¶ Plus serra dit de homage & le tenure per homage Auncestrel.

mage, because he hath title to have the tenements by the courtede of *Eng.* if he surviveth his wife, and also he holdeth in right of his wife; but if the wife dies before homage done by the husband in the life of his wife, and the husband holdeth himself in as tenant by the courtesie, then he shall not doe homage to his Lord, because he then hath an estate but for terme of life.

¶ More shall be said of homage in the tenure of homage ancestrell.

Abbot and Covent is a Corporation aggregate of many, yet because the Covent are all dead persons in Law, the Abbot alone in nature of a sole Corporation shall do homage.

¶ *Un maxime en Ley.* A Maxime is a proposition, to be of all men confessed and granted without proof, argument, or discourse: Contra negantem principia non est disputandum. But of this somewhat hath ben said before.

¶ *Il que ad estate forsque per terme de vie.* (q) A Parson or Vicar of a Church that hath a qualified Fee, (r) and yet to many intents upon the matter but an estate for life can neither receive homage nor do homage as a Bishop, an Abbot, or any such like that hath a Fee absolute may. (s) So if a man and his wife be seised in Fee of a Seignior in the right of his wife, the husband shall not receive homage alone, but he and his wife together. (t) But if the husband in that case hath issue by his wife, then he shall receive homage alone during the life of his wife, and the reason is, because he by having of issue is intitled to an estate for term of his own life, in his own right, and yet is seised in Fee in the right of his wife, so as he is not a bare tenant for life. But if his wife dy, then he hath only but an estaee for life, and then he cannot receive homage. Yet Tenant for life or years of a Seignior (u) shall have Ward, Marriage and Relief, & shall suppose that the Tenant died in the Fealty of the Pl. (x) Fieri possunt homagia libera homini tam masculo quam fœminæ, tam majori quam minori, tam clerico quam laico.

q) Glanvil lib.9.cap.1. Britton fol.170. Temps E.1.tit. Juris utrum 13.
r) 8 E.2.28.39 E.3.152. 3 E.3. Avowry 175.
s) 2 E.2.Avowry 183. F.N.B.257. gard.39.
t) 27 Ass.p.51. F.N.B.257. 13 H.6.Avowry 21. 43 E.3.13. 44 E.3.41. 3 E.3. Avowry 175. 13 E.3.2.gard.39. 22 E.3.fol.19. gurd.44.
u) 6 E.2.gard.122. 13 E.3.gard.39. 22 E.3.gard.44.
x) Glanvil lib.9.cap.3. 18 E.3.7.43 E.3.13. 44 E.3.41. 13 H.6.Avowry 21. 3 H.6.13. 7 E.4.27. F.N.B.257.

¶ *Et ount issue, donque le baron ou la vie la feme serra homage.* The reason hereof is rendred before; and also that after the death of his wife he being but a bare Tenant for life shall do no homage: for regularly it is true, that he that cannot receive homage in respect of the weakness of his estate in the Seignior, shall not do homage if he ha ha like estate in the Tenancy.

If a man hold of the King and hath issue divers daughters, and dieth, the King shall have homage of every one of these daughters. And this (a) appeareth by the statute de Hibernia anno 14 H.3. to be the Common Law; for ỳ Act saith, In Regno nostro Angliæ talis est lex & consuetudo, quod si quis tenuerit de nobis in capite, & habuerit filias hæredes ipso patre defuncto, antecessores nostri habuerunt & semper nos habuimus & cepimus homagium de omnibus hujusmodi filiabus, & singulæ earum tenerent de nobis in capite, in hoc casu. And therefore where by the (b) statute De Prærogativa Regis, it is provided, si una hæreditas, &c. that is but an affirmance of the Common Law. (c) But this is to be understood where the coheirs be of full age; for if they be within age, and in ward to the King, Primogenita tantum faciet homagium pro se & sororibus suis, & aliæ sorores cum ad ætatem pervenerint facient servitia Dominis feodorum per manum primogenitæ. (d) And therefore if a man holds of a common person by the service of homage, and hath issue divers daughters and dieth, the eldest daughter only shall do homage for her and all her sisters. And this appeareth also by the statute of Hibernia, Primogenita tantum faciet homagium Domino pro se & omnibus sororibus suis. And the reason is there rendred afterward, Quia omnes sorores sunt quasi unus hæres de una hæreditate. (e) But if the Coparceners in ỳ case make partition, then every one shall do homage, because now it is not una sed diversa hæreditas. (f) And so it is if one make a feoffment in

a) 14 H.3.tit. prærog.5.
b) Prærog. Regis cap.5.
c) Statut. de homagio capiendo. Temps E.1.
d) Glanvil lib.7.cap.3. & lib.9.cap.2. Bract. lib.2. de homag.capiend.& lib.2. tol.78,80. Britton.fol.168.b. 171,172. Fleta lib.2. cap.16. & lib.2.cap.60. & lib.5.cap.9. F.N.B.101.159.259. Stanf.prær.23.24.
e) F.N.B 162. Vide 11 E.3.Avowry 101.
f) 45 E.1. 22. 14 E.1.73. Marlbridge cap.9. F.N.B.162.

(g) 2 E. 2. Avowrie 179.

fée (which is a partition in law for that part) the feoffée shall do homage, for every Tenant in common shall do several services. And it hath been adjudged (g) in our Books, that if the eldest Coparcener do homage to the Lord, and afterward the younger sister maketh a feoffment in fée of her part, the Lord shall have homage for the part of the younger sister: for which was una hæreditas, one Inheritance by law, by the alienation which is her act, is (as hath been said) divided and become in gross, and the Coparcenary defeated.

(h) 7 E. 4. 27. 28. 14 H. 4. 38. 1 H. 5. grant. 43. 31 E. 3. gard. 116.
(i) 48 E. 3. 8. 15 E. 4. 13. 5 E. 4. 3.

But if Tenant enfeoff divers men in fée jointly, (h) all these jointenants shall jointly do their homage and their fealty also. (i) If homage be due by the Tenant, and he maketh a feoffment in fée, the feoffor shall not do homage, because albeit he is supposed to be Tenant in some cases, quand al avowrie, yet the Feoffée is very Tenant, and homage shal ever be done by the very Tenant, but that very Tenant néeth not to be very Tenant of the land, & therefore the Meine because he is very Tenant to the Lord Paramount (though he be not Tenant of the Land) shall do homage. And so it is of the Disseisée, & of Tenant in Tail, after a feoffment in fée, for in that case ꝑ Donée is very Tenant to the Donor.

(k) 22 E. 4. 22.

If a Tenant that holdeth by homage maketh a Feoffment in fée of part, (k) that Feoffée shall do homage, and so shall every Feoffée of what part soever.

(l) 3 E. 2. Avowrie 187. 13 H. 4. 5. 13 R. 2. tit. avowrie 89. 8 H. 3. tit. prescription 38. Hill. 22 E. 2. coram Rege Rot. 43.

If there be two Coparceners or Joyntenants of a Seignior, if the Tenant doth homage and fealty to one of them (l) he shall be excused against the other.

If homage be parcell of a tenure, it is a presumption that the tenure is by Knights Service, unless the contrary be proved, but of it self it maketh not Knights service. And yet by custome the heir of him that holds by homage only may be in Ward.

More shall be said of homage in the title of Homage Ancestrel.

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# Chap. 2. *Fealtie.* Sect. 91.

(a) Bracton lib. 2. fol. 80. a. Brit. fol 173. Britton Regist. origin. 502. Mirror cap. 3. deserement. & de fealt. statut. de 17 E. 2. tit. homage.

Fealtie in french is feaulty, and is (a) derived of the Latine word Fides or fidelitas.

*Et quant Franktenant.* Every Freholder, except Tenant in Frankalmoign shall do fealty. (b) And yet some have not Tenants of any Fréhold shal do fealty, as a Tenant for years shall do fealty. Bracton saith, De mullo tenemento quod tenetur ad terminum sit homagii, sit tamen inde fidelitatis sacramentum.

(b) Bracton lib. 2. fol. 80. Fleta lib. 3. cap. 16. Littleton fol. 29. nu. 132. 40 E. 3. 34. 9 H. 6. 43. 10 H. 6. 13. 5 H. 5. 12. 9 E. 4. 1. 21 E. 4. 29. 5 H. 7. 11.

*Que a vous ſerra foyal & loyal, &c. & foy a vous portera des Tenements que jeo claime a tener de vous, & que loialment a vous ſerra les cuſtomes & ſervices, &c.*

Fealty, idem est quod Fidelitas en Latin. Et quant frãktenant ferra fealty a son Seignior, il tiendra sa maine dexter sur ũ Lieur & durra iſsint; Ceo oyes vous mon Seignior, q̃ jeo a vous ſerra foyãl & loyal, & foy a vous portera des teneñts q̃ jeo claiñ a tener ô vous, & q̃ loyalment a vous ſerra les cuſtoms & ſervices queur fair a vous doy as termes aſsignes, ſi come moy aide Dieu & ſes Saints, & baſera le Lieur. Mes il ne genulera quãt il fait Fealty, ne ferra tiel hũble reverẽce, come avant eſt dit ẽ homage.

Fealty is the same that *Fidelitas* is in Latine. And when a Freeholder doth fealty to his Lord, he shall hold his right hand upon a Book, and shall say thus, Know ye this, my Lord, that I shall be faithful and true unto you, and faith to you shall bear for the Lands which I claim to hold of you, and that I shall lawfully do to you the customes and Services which I ought to do at the termes assigned: so help me God and his Saints, and hee shall kisse the Book. But he shall not kneele when hee maketh his Fealty, nor shall make such humble Reverence as is aforesaid in Homage.

(c) Fealty is a part of homage, for all the words of fealty are comprehended within homage, and therefore Fealty is incident to homage. (c) Mirror cap. 3. de ser. & de fealtie.

¶ *Sicome moy aide Dieu.* As homage is the more honourable service, so Fealty is a service more sacred, because he is sworn thereunto. And the reason wherefore the Tenant is not sworn in doing his homage to his Lord, is, for that no subject is sworn to another subject to become his man of life and member but to the King onely, and that is called the oath of Allegeance or Homagium ligeum. And those words for that purpose are omitted out of fealty which is to be done upon oath. And Littleton said well (when a Freholder doth Fealty) (d) for the Fealty of him that holdeth in Villenage differeth from the fealty of the Freholder. For the Villein holding his right hand upon the book shall say thus to his Lord, Hear you my Lord A. that I A.B. from this day forward shall be to you true and faithful, and shall owe you Fealty for the Land that I hold of you in Villenage, and shall be justified by you in body and goods, so help me God, &c. as by the act appeareth. (d) Stat. de 17 E. 2. tit. Homage in le Abridgement.

## *Sect.* 92.

¶ Et graund diversity y ad p enter fealsans de fealtie & de homage, car homage ne poit estre fait forsque al Sñr m̃: Mes le Seneschal de court le Sñr, ou Balife, puit prender fealtie pur le Seignior.

And there is great diversity between the doing of Fealty, & of Homage; for Homage cannot be done to any but to the Lord himself: but the Steward of the Lords Court, or Bailife, may take Fealty for the Lord.

¶ Bracton lib. 2. folio saith thus; Sciendum est quod non per procuratores nec per literas fieri poterit Homagium, sed in propria persona tam Domini quam Tenentis, capi debet & fieri. Bracton lib. 2. fo. 8. 21 E. 4. 17. acc. 2 E. 3. 10. 32 H. 6. 21. lib. 9. fo. 76.

¶ *Mes le Seneschal, &c. ou Bailife poet prender fealtie.* This is so evident as it needeth no explanation. Vid. For the signification of Seneschal and Bailife. sect. 78, 79, 248, & 379.

## *Sect.* 93.

¶ Item Tenant a terme de vie ferk fealtie, & uncore il ne ferra homage. Et divers autes diversities y sont perenter homage and fealtie.

Also Tenant for term of life shall do Fealtie, and yet he shall not do homage. And divers other diversities there be between Homage and Fealty.

¶ The Tenant must do Fealty in person because he must be sworn unto it, and no man can swear by the Common Law by Attorney or Proctor. Lib. 9. fol. 76.

## *Sect.* 94.

¶ Item home poit veir 15 E. 3. coment home & la feme fierent homage & fealtie en common banke, que lest escript devant en Tenure de homage.

Also a man may see in 15 E. 3. how a man and his wife shall do Homage and Fealty in the common place, which is written before in the Tenure of Homage.

¶ This is evident and appeareth before: and if Lords knew what benefit they may reape by receiving of Homage and Fealty, they would not neglect them, (e) for by the receiving of either of them, it is a sufficient seisin of all manner of services, as by the words (f) of either of them appeareth. Now, if it be demanded, what (e) Lib. 4. fol. 8. & 9. Bevils case. 13 E. 4. 5. (f) Vid. sect. 118. 130. 13 H. 8. 8.

what difference is between the oath of Fealty, when it is done to the King in respect of a Tenure, and the oath which every Subject ought to take in respect of his Allegeance, Littleton here setteth down the oath of Fealty. Now the

(g) Britt. cap. 29. Calvins case, lib. 7. fol. 6. 6. 12 H. 7, 18.

(g) Oath of Allegeance is thus, You shall swear, &c.

Plus serra dit de Fealtie en le Tenure en Socage, & en le Tenure en Frankalmoigne, & en le Tenure per Homage Auncestrel.

More shall be said of Fealty in the Tenure in Socage, and in Frankalmoign, and in the Tenure by Homage Auncestrel.

Then it may be demanded, Where & when is this oath to be taken? and it is answered, That whosoever is above the age of 12. years, is to be sworn in the Court, unless he be within some Act, & then in the Act: And I read amongst the Laws of Saint Edward, Quod hanc Legem invenit Arthurus, qui quondam fuit inclitissimus Rex Britannorum, & ita consolidavit & confœderavit Regnum Britanniæ universum semper in unum. Hujus legis authoritate expulit Arthurus prædictus Saracenos & inimicos à regno. Lex enim ista diu sopita fuit & sepulta donec Eadgarus Rex Anglorum excitavit, & erexit in lucem, & illam per totum Regnum observari præcepit. Which Law in some manner is observed at this day. But to return to Littleton.

Lambert. 139.

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(a) Mir. cap. 1, sect. 3. Britt. fol. 162. &c. Ockam, cap. Quid sit. scytagium.

¶ *Escuage.* (a) In Latine Scutagium (id est) Servitium scuti, Service of the Shield, hereby it appeareth that right Interpretations and Etymologies are necessary: For, Ad rectè docendum oportet primum inquirere nomina, quia rerum cognitio à nominibus rerum dependet.

Nomina si nescis, perit cognitio rerum.

And herewith agreeth that which is said, Primò excutienda est verbi vis ne sermonis vitio obstruatur oratio, sive Lex sine argumentis.

(b) Bract. lib. 2. fol. 36. a. Flet. lib. 3. cap. 14. Ockam, ubi supra, 27. Ass. 52. 31. Ass. 38.

Scutum in French is Escue, and thereof commeth the Escuer, i.e. Scutifer, which we usually call Armiger. (b) Of this Bracton saith, Item Scutagium dicitur quòd talis præstatio pertinet ad scutum quòd assumitur & servitium militare. And Fleta saith, Sunt quædam servitia forinseca, & dici possunt regalia quæ ad scutum præstantur, & inde habemus scutagium, & ratione scuti pro feodo militari reputatur. And Ockam saith, Hæc itaque summa, quia nomine scutorum solvitur, scutagium nuncupatur.

¶ Escuage est appell en Latine Scutagium, cestascavoir, Servitium Scuti. Et tiel tenant que tient sa terre per escuage, tient per service de Chivaler. Et auri il est communement dit, que ascun tient per un fee d'service de Chivaler, & ascun per le moitie dun fee de Service de Chivaler, &c. Et il est dit, que quant le Roy face voyage Royal en Escoce pur subduer les Scotes, donqs il que tient per un Fee de Service de Chivaler, covient estre ove le Roy per 40 jours, bien & convenablement array pur le Guerre. Et celuy que tient sa Terre per le

Escuage is called in Latine, *Scutagium*, that is, Service of the Shield: and that Tenant which holdeth his Land by Escuage, holdeth by Knights Service. And also it is commonly said, That some hold by the Service of one Knights Fee, and some by the halfe of a Knights Fee. And it is said, That when the King makes a voyage Royal into Scotland to subdue the Scots, then he which holdeth by the Service of one Knights Fee, ought to be with the King forty dayes, well and conveniently arrayed for the Warr: and he which holdeth his Land by the moitie of a Knights

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moitie dun. Fee de Chivaler covient esse ove le Roye per 20 jours. Et il que tient son terre per le quart part dun Fee de Chivaler covient esse ove le Roy per 10 jours, e issint que pluis, pluis; e que meins, meins.

Fee ought to be with the King twentye dayes: and he which holdeth his Land by the fourth part of a Knights Fee, ought to be with the King ten dayes, and so he that hath more, more; and he that hath lesse, lesse.

¶ (c) *Et tiel tenant que tient son terre per Escuage tient per Service de Chivaler.* (d) For as Fealty is incident to Homage, so Homage and Knights Service be incident to Escuage, and by the grant of services, Escuage passeth with the rest. Every Tenure by Escuage is a Tenure by Knights service: but every Tenant that holdeth by Knights service, holdeth not by Escuage, as shall be said hereafter. What

(c) Mirr. cap. sect. 3.

(d) 2 E. 3. 8. b. 19 E. 3. avowry 394. 29 H. 8. 1. a. 20 E. 3. per quæ servic. 11. 43 E. 3. 2. F. N. B. 83, 84.

note here the wisdom of Antiquity, (e) Mavult enim Princeps domesticos quam stipendiarios belicis apponere casibus, that is, to be served in his warrs by his own subjects rather than by stipendary Forreiners.

(e) Lib. rub.

¶ *Un fee de servico de Chivaler.* (f) There is a great diversity of opinions concerning the contents of a Knights fee, that is, how much land goeth to the livelyhood of a Knight; for some say that a Knights Fee consisteth of eight hides, and every hide containeth an hundred acres, and so a Knights Fee should contain eight hundred acres: others say that a Knights Fee containeth six hundred and eighty acres: others say that an Organg of land containeth fifteen acres & eight Organgs make a Plowland; by which account a Plowland contains an hundred and twenty acres, and that Virgata terræ, or a Yard land containeth twenty acres. But I hold that a Knights Fee, an Hide or Plowland, a Yard land or Organg of lands do not contain any certain number of acres. But a Knights fee is properly to be esteemed according to the quality and not according to the quantity of the land; that is to say, by the value, & not by the content. And therefore it is very true which Master Camden in his Britannia, pag. 136. saith, viz. Subsequenti ætate ex sensu, ut colligitur, facti fuerunt equites, &c. And antiquity thought that twenty pound land was sufficient to maintain the degree of a Knight as appeareth in the ancient treatise De modo tenendi Parliamentum tempore Regis Ed. filii Regis Etheldredi. Where it appeareth that Comitatus, (to wit) an Earldom, constat ex viginti feodis unius militis, quolibet feodo computato ad viginti libratas: Baronia constat ex 13 feodis, & 3 parte unius feodi militis secundum computationem prædictam; Unum feodum militis constat ex terris ad valentiam 20 l. which antiquity I cite, for that it concurreth with the act of Parliament, anno 1 E. 2. de militibus, by which act Cessam militaris, the state of a Knight is measured by the value of 20 pounds per annum, and not by any certain content of acres; and with this agreeth the Statute of W. 1. cap. 36. and F. N. B. fol. 81. where twenty pound of land in Socage is put in equipage of a Knights Fee, & this is the most reasonable estimate, for one acre may be better than many others, so as he which hath 680 or 800 acres of some barren land had not according to the ancient account a sufficient revenue to maintain the degree of a Knight, and he which had a less number of acres of some land of the value of 20 li. per annum had a sufficient livelihood in these dayes for the maintenance of a Knight. So antiquity thought that 400 marks of land per annum was a competent livelihood for a Baron, & 400 pounds per annum, Ad sustinendum nomen & onus of an Earle, and of late time 800 Marks per annum of a Marquess, and 800 pound per annum of a Duke, so that their yearly Revenue was estimated by the value & not by the content. And one Plowland, Carucata terræ, or a Hide of land, Hida terræ, (which is all one) is not of any certain content, but as much as a plow can by course of husbandry plow in a year. And therewith agreeth Lambert, verbo Hide. And a plowland may contain a messuage, wood, meadow, and pasture, because by them the plowmen and the cattell belonging to the plow are maintained. Vide Temps E. 1. tit. Briefe 860. 4 E. 3. 47. Pl. Com. in Hill and Granges case, fol. 168. Vid. 6 E. 3. fol. 42. & 39 H. 6 8. 2. And venerable Beda called a plowland, Familiam, a family, because it containeth necessary things for the maintenance of a family And Pisor wel saith in 35 H. 6. fol. 29. that a plow may till more land in a year in one Country than in another, and therefore it stands with reason, that a plowland should be less in one place than in another, 41 E. 3 tit fine 40. and 13 E. 3. fine 67. A fine shall not be received De una Virgata terræ, for the uncertainty. Vide 39 H. 6 8. But an acre of land is certain by statute De terris mensurandis. Note also (Reader) that every plowland of ancient time was of the yearly value of five nobles per annum, and this was the living of a Plowman or Yeoman, and Ex duodecem carucatis constabat unum feodum militis, which amount to 20 pound per annum. And this you may see Termino Pasch. anno 3 E. 1. Coram Rogero de Seyton & sociis suis Justiciariis apud

(f) Lib. 9. fol. 123. in Lowes case.

Vide Lib. 7. fol. 33, 34. Nevils case.

Weſt. Ebor. Ro. 10. Radulphus de Norman villæ petens inbrevi de medio queritur contra Luciam de Kyme quod cum ipſa teneat de ipſo duas carectatas terræ in Coningſton per homagium & ſervitium militare, unde duodecim carucatæ terræ faciunt unum feodum militis pro omni ſervitio, ipſa diſtrinxit ipſum ad faciendum ſectam ad curiam ſuam de Thorneton in Craven, &c.

And it is to be obſerved, that the relief of a Knight, and all above him which be noble, is the fourth part of their yearly revenue, as of a Knight five pound, which is the fourth part of 20 pound. So una Baronia conſtat ex 13 feodis militum & de 3 parte unius feodi militis, which amount to 400 Marks, and therefore his relief is the fourth part of this, viz. 100 Marks: and an Earledome conſiſts of twenty Knights fees, which amount to 400 pound (as before it appeareth by the ſaid ancient Record, De modo tenendi Parliamentum, &c.) and therefore his relief is 100 pound. And this alſo appeareth by the Statute of Magna Charta, cap. 2. and by the equity of this Statute, inſomuch as a Marquiſdome which conſiſts of the revenue of two Baronies which amount to 800 Marks, ſhall pay according to that juſt proportion for his relief 200 Marks; and becauſe a Dukedome conſiſts of the revenues of two Earldomes, viz. 800 pound per annum, a Duke ſhall pay 200 for a relief, which is alſo the fourth part of his Revenue, and with this agree the Records of the Exchequer.

Note, (Reader) At the time of the making of the Statute of Magna Charta, 5. 9 H. 3. there was not any Duke, Marqueſſe, or Viſcount in England (& therefore the Statute could not make mention of them) and Edward the eldeſt ſon of King E. 3. called the black Prince, was the firſt Duke in England after the Conqueſt, & Robert Earl of Oxford in the reign of R. 2. was the firſt Marqueſs, Sic enim inter ordines Angliæ in ſua Britania teſtatur Cambden ubi ſupra. Et titulus Marchionis ſerius ad nos devenit, nec ante R. 2. tempora cuiquam delatus; ille enim Robertum Vere Oxoniæ comitem delicias ſuas primum Marchionem Dubliniæ deſignavit, meritumque eius honoris nomen. Hæc ille. And before the reign of H. 6. there was not any Viſcount. Sic enim idem Author ubi ſupra aſſerit. Poſt comites vicecomites ordine ſequuntur, Viſcounts nos vocamus; hæc vetus officii ſed nova dignitatis appellatio, & H. 6. tempore ad nos primum advita, Hæc ille. Et dominus de Bello monte was the firſt Viſcount created by King H. 6. Vide Caſſianeum in gloria mundi, parte 4. conſid. 55. that this dignity of a Viſcount is of great antiquity in other Realms.

Bracton lib. 2. 36. Item ſunt quædam ſervitia quæ dicuntur forinſeca, quamvis ſunt in carta de feoffamentis expreſſa & nominata, & quæ ideo dici poſſunt forinſeca, quia pertinent ad dominum regem, & non ad dominum capitalem, niſi cum in propria perſona protectus fuerit in ſervitio, vel niſi cum pro ſervitio ſuo ſatisfecerit domino regi, &c.

7 H. 4. 9. 31 Aſſ. 30. 26. Aſſ. 66, 27. Aſſ. 52. 8 E. 3. 154.

¶ *Voyage Royal.* A voyage Royal, is not only when the King himſelf goeth to War, as Littleton here ſaith, but alſo when his Lievetenant, or Deputy of his Lievetenant goeth. And what ſhall be ſaid a Voyage Royal ſhall be adjudged in this caſe by the Judges of the Common Law as an incident to Eſcuage, and not by the Conſtable and Marſhall, or any other: & ſic de ſimilibus.

7 E. 3. 29. 11 H. 4. 7. F. N. B. 28. b. & 83. g. 3 H. 4. 16. 28 H. 6. 1. b. 39 H. 6. 38. 1 R. 2. protection 46. 19 R. 2. gard, 165. 17 H. 6. protect. 56. 7 E. 4. 27. 11 H. 4. 7. 3 H. 4. 16.

There is alſo another kind of Voyage Royal, viz. when one goeth with the Kings daughter beyond ſea to be married, &c. for ſuch a Voyage is for the good of the whole Realm, (for more profit for the Realm cannot be, than to make alliance with another Nation) but of this Voyage Royall Littleton ſpeaketh not here, but only of the Voyage Royal to War: ſo as there is a Voyage Royal of War, and a Voyage Royal of Peace and Amity. And it is to be obſerved, that he that holdeth by Caſtle-gard or Coynage, holdeth by Knights ſervice; and yet he ſhall pay no Eſcuage, becauſe he holdeth not to go with the King to War.

¶ *En Eſcoce.* In Scotland, this is put but for an example, for if the tenure be to go in Walliam, Hiberniam, Vaſconiam, Pictaviam, &c. it is all one. See an ancient Record, Rot. de finibus Termino Mich. 11 E. 2. Sir Richard Rockeſly Knight did hold lands at Seaton by Serjeanty to be Vantrarius Regis, that is, to be the Kings fore-man when the King went into Gaſcoigne, donec peruſus fuit pari ſolutarum, precii 4 d. that is, untill he had worn out a pair of ſhoes of the price of four pence. And this ſervice being admitted to be performed when the King went to Gaſcoigne to make war, is Knights ſervice.

Lib. Rub. in Scac. 47, 48. 19 R. 2. gard. 95. 6 R. 2. protection 46. 6 H. 2. Avowry 247. Vide Rot. Claus. 8 H. 3. & Fin. 8 H. 3. & patent. 9 H. 3. multi ſolverunt ſcutagium pro exercit. in William. memb. 30. & ante, clauſ. 6 H. 3. memb. 3.

¶ *Il que tient per unfee de ſervice de chivalier covient eſte ove le Roy per 40 jours.* But this is to be underſtood of a Tenant that holdeth of the King immediately, for every man is bound by his tenure to defend his Lord, and both he and his Lord the King and his Countrey & therefore if the Lord goeth not, his Tenant is excuſed. But yet if the Tenant peradventure goeth with the King, it excuſeth all the means.

And it is to be obſerved, that for every pound of the ancient value of a Knights fee accounting twenty pound land, the Tenant muſt go with the King two dayes, which commeth juſt to 40 dayes for a whole Knights fee: by the ſtatute of Magna Charta it is provided that Scutagium de cætero capiatur ſicut capi conſuevit tempore Hen. regis avi noſtri.

Magna Charta, cap. 37. Fleta lib. cap. 66.

*Sect.*

## *Sect.* 96.

¶ MEs il appiert p les plees & arguments faits en un bon plee ſur briefe de Detinue de un eſcript Obligatorie port per un H. Gray, T. 7 E. 3. que ne beſoigne a celuy q̄ tient per Eſcuage de aler ove le Roy luy meſm̄, ſil voile trover unauter perſon able pur luy convenablement array pur le guerre, de aler ove le Roy. Et ceo ſemble eſtre bon reaſon, car poit eſtre q̄ celuy que tient per tiels ſervices eſt languiſhant, iſſint q̄ il ne poit aler ne chivaucher. Et auxy un Abbe, ou auter home de Religion, ou feme ſole q̄ tient per tiels ſervices, ne doit en tiels cas aler en proper perſon. Et Sir W. Herle, adonque chiefe Juſtice d̄ Common Bank, diſoit en tiel plee, que eſcuage ne ſerra graunt, mes ſou le Roy a laſt luy meſne en ſon proper perſon. Et fuit demurre en judgement en meſme le plee, le quel les xl. jours ſerront accompts de le primer jour del mu-

But it appeareth by the Pleas and Arguments made in a Plea upon a Writ of Detinue of a writing Obligatorie brought by one *H. Gray*, *T.* 7 *E.* 3. that it is not needfull for him which holdeth by Eſcuage, to go himſelf with the King, if he will finde another able perſon for him conveniently arrayed for the warre to go with the King. And this ſeemeth to be good reaſon. For it may be, that he which holdeth by ſuch ſervices is languiſhing, ſo as he can neither go nor ride. And alſo an Abbot or other man of Religion, or a feme ſole, which hold by ſuch ſervices, ought not in ſuch caſe to go in proper perſon. And Sir *William Herle* then Chief Juſtice of the Common-Place, ſaid in this Plea, That Eſcuage ſhall not be granted, but where the King goes himſelf in his proper perſon. And it was demurred in judgment in the ſame Plea, whether the 40 dayes ſhould be accounted from the firſt day of

¶ TR. 7 E. 3. &c. This is the firſt Book at large that our Author hath cited, and it is to be obſerved, that this point is not debated in the ſaid Book, but only it is there admitted; and yet is good authority in law, for our Author ſaith, that it appeareth by this Book, now both by Littleton himſelf, and by the Book of 7 E. 3. it is apparant, that albeit the tenure is, that he which holdeth by a whole Knights fee, ought to be with the King, &c. to do a corporall ſervice, yet he may find another able man to do it for him. T. 7 E. 3. fol. 29.

By the Statute of Magna Charta, cap. 20. it is provided that no Knight that holdeth by Caſtle-gard ſhall be diſtreined to give money for the keeping of the Caſtle, Si ipſe eam facere voluerit in propria perſona ſua vel per alium probum hominem faciet ſi ipſe eam facere non poſſit propter rationabilem cauſam.

Some have thought that he that holds by Eſcuage is taken by the equity of this Statute, that ſpeaketh onely of Caſtle-gard, but it is holden that this Statute is but an affirmance of the common Law. For where that Act ſaith (propter rationabilem cauſam) that reaſonable cauſe is referred to the Tenants own diſcretion and choice, and the cauſe is not materiall or iſſuable no more than in the caſe that Littleton here putteth, as hereafter appeareth. And I would adviſe our Student, that when he ſhall be enabled and armed to ſet upon the Year Books, or Reports of Law, that he be furniſhed with all the whole courſe of the Law, that when he heareth a Caſe vouched and applied either in Weſtminſter Hall, (where it is neceſſary for him to be a diligent hearer, and obſerver of caſes of Law) or at readings or other exerciſes of learning, he may find out

out and read the caſe ſo bouched; for that will both faſten it in his memory, and be to him as good as an Expoſition of that caſe; but that muſt not hinder his timely and orderly reading, which (all excuſes ſet apart) he muſt bind himſelf unto, for there be two things to be avoided by him, as enemies to learning, præpoſtera lectio, and præpropera praxis. But let us now hear what our Author will ſay:

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¶ *Et ceo ſemble bone reaſon, &c.* Here Littleton ſheweth three reaſons wherefore the Tenant ſhould not be conſtrained to do his ſervice in perſon.

Firſt, It may be the Tenant is ſick, ſo as he is able neither to go nor rule. And ever ſuch conſtruction muſt be made in matters concerning the defence of the Realm or common good, as the ſame may be effected and performed. To the former diſability may be added, where a Corporation aggregate of many, as Dean and Chapter, Mayor and Communalty, &c. or an Infant being a Purchaſer, for theſe alſo muſt find an able man. But it may be objected, that in theſe particular Caſes the Tenant might find a man, but not when he himſelf is able without all excuſe or impediment; To this it is anſwered, that Sapiens incipit a fine. And the end of this ſervice is for defence of the Realm, and ſo to be done by an able and ſufficient man, the end is effected.

Secondly, Seeing there are ſo many juſt excuſes of the Tenant, it were dangerous, and tending the hinderance of the ſervice, if theſe excuſes ſhould be iſſuable, Multa in jure communi contra rationem diſputandi pro communi utilitate introducta ſunt.

Laſtly, both Littleton, and the Book in the ſeventh of Edward the third, giveth the Tenant power, without any cauſe to be ſhewed to find an able and ſufficient man, and oftentimes Jura publica ex privato promiſcue decidi non debent.

¶ *Un Abbe ou auter home de religion.* Note, that if the King had given Lands to an Abbot and his Succeſſors to hold by Knights Service, this had been good, and the Abbot ſhould do homage and find a man, &c. or pay Eſcuage; but there was no Wardſhip or Relief, or other incident belonging thereunto. And though the Law ſaith, that this was a Mortmaine, that is, that they held faſt their Inheritance; yet if the Abbot with the aſſent of his Covent, had conveyed the land to a natural man and his heirs: now Warſhip and Relief, and other incidents belonged of common right to the Tenure. And ſo it is if the King give Lands to a Mayor and Communalty, and their Succeſſors to be holden by Knights Service. In this caſe the Patentees (as hath been ſaid) ſhall do no Homage, neither ſhall there be any Wardſhip or Relief, only they alſo ſhall find a man, &c. or pay Eſcuage. But if they convey over Lands to any natural man and his heirs, now Homage, Ward, Marriage, and Relief, and other Incidents belong hereunto. And yet this poſſibility was remota potentia, but the reaſon hereof is, Ceſſante ratione legis ceſſat ipſa lex, the reaſon of the immunity was in reſpect of the Body politique, which by the conveyance over ceaſeth, which is worthy of obſervation.

And it is to be obſerved, that every Biſhop of England hath a Barony, and that Barony is holden of the King in Capite, and yet the King can neither have Wardſhip or Relief.

If two Joyntenants be of Land holden by Knights Service; if one goeth with the King, it ſufficeth for both, and both of them cannot be compelled to go; for by their Tenure one man is only to go.

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¶ *Ou feme ſole.* Seeing that a feme ſole, that cannot perform Knights ſervice, may ſerve by deputy, it may be demanded wherefore an Heir male being within the age of 21 years

yeares may not ſerve alſo by Deputy, being not able to ſerve himſelf.

To this it is anſwered, that in caſes of Minority, all is one to both ſexes, viz. if the heir male be at the death of his Anceſtor under the age of one & twenty, or the heir female under the age of 14. they can make no deputy, but the Lord ſhall have wardſhip as an incident to the Tenure: therefore Littleton is here to be underſtood of a man ſole of full age, & ſeiſed of land holden by Knights Service either by purchaſe or deſcent.

¶ *Covenablement array per le guerre.* So as here are four things to be obſerved.

Firſt, (as hath been ſaid) that he may find another.

Secondly, that he by is found muſt be an able perſon.

Thirdly, he muſt be armed at the coſts & charge of the Tenant, and herein is to be noted, Quod non definitur in jure, with what manner of Armor the Souldier ſhall be arrayed with, for time, place, and occaſion do alter the manner and kind of the Armor.

Fourthly, he muſt have ſuch Armor, as ſhall be neceſſary, and ſo appointed in readineſs, Fleta lib.1.cap.42.

Herdwit is a Saxon word, & ſignifieth quietanciam murderi in exercitu. Weiſeet is an old Engliſh word and ſignifieth, Liberum eſſe de oneribus armorum.

It is truly ſaid, Quod miles hæc tria curare debet, corpus ut validiſſimum & perniciſſimum habeat, arma apta ad ſubita imperia, cetera Deo, & Imperatori curæ eſſe. Livius.

Sapiens non ſemper it uno gradu, ſed una via; non ſe mutat ſed aptat. Qui ſecundos optat eventus, ſimucet arte non caſu. In omni conflictu non tam prodeſt multitudo quam virtus. Vegetius.

Eſt optimi ducis ſcire & vincere, & cedere prudenter tempori. Multum poteſt in rebus humanis Occaſio, plurimum in bellicis. Polybius.

Quid tam neceſſarium eſt quam tenere ſemper arma quibus tectus eſſe poſſis. But I will take my leave of theſe excellent Authors of Art Military, and refer them to thoſe the ſame, and will return to Littleton. Vegetius.

¶ *Muſter.* I find this word in the Statute of 18 H.6. cap.19. and the ancient Military Order is worthy of obſervation; for before and long after the ſtatute, when the King was to be ſerved with Souldiers for his warr, a Knight or Eſquire of the Country, that had Revenues, Farmors, & Tenants would covenant with the King by Indenture inrolled in the Exchequer to ſerve the King for ſuch a term for ſo many men (ſpecially named in a Liſt) in his warr, &c. an excellent inſtitution that they ſhould ſerve under him, whom they knew and honoured, and with whom they muſt live at their return; theſe men being muſtered before the Kings Commiſſioners, and receiving any part of their wages, and their names ſo recorded, if they after departed from their Captain within the Term, contrary to the form of the Statute, it was Felony. But now the ſtatute is of no force, becauſe that ancient and excellent form of military courſe is altogether antiquated: but latter ſtatutes have provided for that miſchief. Lib.6.fol.27, the Souldiers caſe.

To muſter is to make a ſhew of Souldiers well armed and trained before the Kings Commiſſioners in ſome open field, Ubi ſe oſtendentes præludunt prælio. In Latine it is cenſere, ſeu luſtrare exercitum.

By the Law before the Conqueſt, Muſters and ſhewing of Armour ſhould be Uno eodem die per univerſum Regnum, ne aliqui poſſint arma familiaribus & notis accomodare, nec ipſi illa mutuo accipere, ac juſtitiam Domini Regis defraudare, & Dominum Regem & Regnum offendere. Lamb. fo. 135.b.

Concerning the point of Law, demurred in judgment, in the ſeventh of Edward the third, here mentioned by our Author: The Law accounteth the beginning of the forty dayes after the King entreth into the forraign Nation, for then the warr beginneth, and till he come there, he and his Hoſt are ſaid to go towards the warr, and no military ſervice is to be done, till the King and his Hoſt come thither.

¶ *Sir William Herle.* A famous Lawyer conſtituted Chief Juſtice of the Common Pleas by Letters Patents, dated 2. die Martii anno 5 E. 3. It appeareth by Littleton, & by the Record, the he was a Knight, againſt the conceit of thoſe that think, That the chief Juſtices of the Court of the Common Pleas were not Knighted till long after.

Our Student ſhall obſerve that the knowledg of the Law is like a deep Well out of which each man draweth according to the ſtrength of his underſtanding. He that reacheth deepeſt, he ſeeth the amiable and admirable ſecrets of the Law, wherein I aſſure you the Sages of the Law in former times (whereof Sir William Herle was a principal one), have had the deepeſt reach. And as the bucket in the depth is eaſily drawn to the uppermoſt part of the water, (for Nullum elementum in ſuo proprio loco eſt grave) but take it from the water, it cannot be drawn up but with great difficulty. So albeit beginnings of this ſtudy ſeem difficult, yet when the Profeſſor of the Law can dive into the depth, it is delightful, eaſy, and without any heavy burthen, ſo long as he keep himſelf in his own proper element.

¶ *Juſtice.*

out and read the caſe ſo bouched; for that will both faſten it in his memory, and be to him as good as an Expoſition of that caſe; but that muſt not hinder his timely and orderly reading, which (all excuſes ſet apart) he muſt bind himſelf unto, for there be two things to be avoided by him, as enemies to learning, præpoſtera lectio, and præpropera praxis. But let us now hear what our Author will ſay:

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yeares may not serve also by Deputy, being not able to serve himself.

To this it is answered, that in cases of Minority, all is one to both sexes, viz. if the heir male be at the death of his Ancestor under the age of one & twenty, or the heir female under the age of 14. they can make no deputy, but the Lord shall have wardship as an incident to the Tenure: therefore Littleton is here to be understood of a male sole of full age, & seised of land holden by Knights Service either by purchase or descent.

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First, (as hath been said) that he may find another.

Secondly, that he is found must be an able person.

Thirdly, he must be armed at the costs & charge of the Tenant, and herein is to be noted, Quod non definitur in jure, with what manner of Armor the Souldier shall be arrayed with, for time, place, and occasion do alter the manner and kind of the Armor.

Fourthly, he must have such Armor, as shall be necessary, and so appointed in readiness, Fleta lib.1.cap.42.

Herewit is a Saxon word, & signifieat quietanciam murderi in exercitu. Weiscet is an old English word and signifieth, Liberum esse de oneribus armorum.

It is truly said, Quod miles hæc tria curare debet, corpus ut validissimum & pernicissimum habeat, arma apta ad subita imperia, cetera Deo, & Imperatori curæ esse. Livius.

Sapiens non semper it uno gradu, sed una via; non se mutat sed aptat. Qui secundos optat eventus, eimicet arte non casu. In omni conflictu non tam prodest multitudo quam virtus. Vegetius.

Est optimi ducis scire & vincere, & cedere prudenter tempori. Multum potest in rebus humanis Occasio, plurimum in bellicis. Polybius.

Quid tam necessarium est quam tenere semper arma quibus tectus esse possis. But I will take my leave of these excellent Authors of Art Military, and refer them to those & prokels the same, and will return to Littleton. Vegetius.

¶ *Muster.* I find this word in the Statute of 18 H.6. cap.19. and the ancient Military Order is worthy of observation; for before and long after & statute, when the King was to be served with Souldiers for his warr, a Knight or Esquire of the Country, that had Revenues, Farmors, & Tenants would covenant with & King by Indenture inrolled in the Exchequer to serve the King for such a term for so many men (specially named in a List) in his warr, &c. an excellent institution that they should serve under him, whom they knew and honoured, and with whom they must live at their return; these men being mustered before & Kings Commissioners, and receiving any part of their wages, and their names so recorded, if they after departed from their Captain within the Term, contrary to the form of & Statute, it was Felony. But now & statute is of no force, because that ancient and excellent form of military course is altogether antiquated: but latter Statutes have provided for that mischief. Lib.6.fol.27. the Souldiers ca.c.

To muster is to make a shew of Souldiers well armed and trained before & Kings Commissioners in some open field, Ubi se ostendentes præludunt prælio. In Latine it is censere, seu lustrare exercitum.

By the Law before the Conquest, Musters and shewing of Armour should be Uno eodem die per universum Regnum, ne aliqui possint arma familiaribus & notis accomodare, nec ipsi illa mutuo accipere, ac justitiam Domini Regis defraudare, & Dominum Regem & Regnum offendere. Lamb.fo.135.b.

Concerning the point of law, demurred in judgment, in the seventh of Edward & third, here mentioned by our Author: The Law accounteth the beginning of the forty dayes after the King entreth into the forraign Nation, for then the warr beginneth, and till he come there, he and his Host are said to go towards the warr, and no military service is to be done, till & King and his Host come thither.

¶ *Sir William Herle.* A famous Lawyer constituted Chief Justice of the Common Pleas by Letters Patents, dated 2. die Martii anno 5 E. 3. It appeareth by Littleton, & by the Record, & he was a Knight, against the conceit of those that think, That the chief Justices of the Court of the Common Pleas were not Knighted till long after.

Our Student shall observe that the knowledg of the Law is like a deep Well out of which each man draweth according to the strength of his understanding. He & reacheth deepest, he seeth the amiable and admirable secrets of the Law, wherein I assure you the Sages of the Law in former times (whereof Sir William Herle was a principal one), have had & deepest reach. And as the bucket in the depth is easily drawn to the uppermost part of & water, (for Nullum elementum in suo proprio loco est grave) but take it from & water, it cannot be drawn up but with great difficulty. So albeit beginnings of this study seem difficult, yet when the Professor of the Law can dive into the depth, it is delightful, easy, and without any heavy burthen, so long as he keep himself in his own proper element.

¶ *Justice.*

Glanvile lib. 2. cap.6. &c:

¶ *Juſtice.* In Glanvil he is called Juſtitia in ipſo abſtracto, as it were Juſtice it ſelf, which appellation remains ſtill in Engliſh and French, to put them in mind of their duty and functions. But now in legal Latine they are called Juſticiarii, tanquam juſti in concreto; and they are called Juſticiarii de Banco, &c. and never Judices de Banco, &c.

¶ *Common Banke.* Banke is a Saxon word, and ſignifieth a Bench or high ſeat, or a Tribunall, and is properly applied to the Juſtices of the Court of Common Pleas, becauſe the Juſtices of that Court ſet there as in a certain place: for all Writs returnable into ỹ Court are Coram Juſticiariis noſtris apud Weſtmon. or any other certain place where the Court ſet; and legal Records term them Juſticiarii de Banco. But Writs returnable into the Court called the Kings Bench are Coram nobis (i. Rege) ubicunque fuerimus in Anglia. And all judicial Records there, are ſtiled Coram Rege. But for diſtinction ſake it is called the Kings Bench, both becauſe the Records of ỹ Court are ſtiled (as hath been ſaid) Coram Rege, and becauſe Kings in former times have often perſonally ſet there. For the antiquity of ỹ Court of Common Pleas, they erre ỹ hold, That before the ſtatute of Magna Charta there was no Court of Common Pleas, but had his Creation by or after that Charter: for the learned know, ỹ in the ſix and twentieth year of Edward the third, the Abbot of B. in a Writ of Aſſize brought before the Juſtices in Eire, claimed Conuſance, & to have Writs of Aſſize, and other original Writs out of the Kings Court by preſcription, time out of mind of man, in the reigns of Saint Edmond and Saint Edward the Confeſſor, before the Conqueſt. And on the behalf of the Abbot were ſhewed divers allowances thereof in former times in the Kings Courts, and ỹ King Henry the firſt confirmed their uſuages, and ỹ they ſhould not have Conuſance of Pleas, ſo ỹ the Juſtices of the one Bench, or the other, ſhould not intermeddle. And the ſtatute of Magna Carta, erecteth no Court, but giveth direction for the proper juriſdiction thereof, in theſe words, Communia placita non ſequantur Curiam noſtram, ſed teneantur in aliquo certo loco. And properly the ſtatute ſaith, non ſequantur; for that the Kings Bench did in theſe dayes follow the King, ubicunque fuerit in Anglia, and therefore enacteth ỹ Common Pleas ſhould be holden in a Court reſident in a certain place. In the next Chapter of Magna Charta (made at one and ỹ ſame time) it is prohibited: Et ea quæ per eoſdem (s. Juſticiarios itinerantes) propter difficultatem aliquorum articulorum terminari non poſſunt, referantur ad Juſticiarios noſtros de Banco, & ibi terminentur. And in ỹ next to that, Aſſiſæ de ultima preſentacione ſemper capiantur coram Juſticiariis de Banco, & ibi terminentur. Therefore it manifeſtly appeareth, that at the making of the ſtatute of Magna Charta, theſe were Juſticiarii de Banco, which all men confeſſe to be the Court of Common Pleas. And therefore that Court was not erected by or after that Statute. For the Authority of this Court, it is evident by that which hath been ſaid, that it hath juriſdiction of all Common Pleas. But let us return to Littleton.

26 Aſſ. p. 24. 4 E. 3. fo. 19. Bracton lib. 3. fol. 107. b. Britton fol. 1. & 2. Fleta lib. 2. cap. 2. Mirror cap. 5. ſect. 1. Forteſcue cap. 51. See in the preface to the third part of my Reports.

¶ *Demurre en judgiment.* A Demurrer commeth of the Latine word Demorari, to abide; and therefore he which demurreth in Law, is ſaid, he that abideth in Law, Maratur, or Demoratur in lege. Whenſoever the Counſel learned of the party is of opinion, that the Court or Plea, of the adverſe party is inſufficient in Law, then he demurreth or abideth in Law, and referreth the ſame to the judgment of the Court; and therefore well ſaith Littleton here, demurre en judgement, the words of a Demurrer being Quia narratio, &c. materiaque in eadem contenta minus ſufficientes in lege exiſtit, &c. and ſo of a Plea, Quia placitum, &c. materiaque in eodem contenta minus ſufficiens in lege exiſtit, &c. unde pro defectu ſufficientis narrationis ſive placiti, &c. perit judicium, &c. But if the Plea be ſufficient in Law, and the matter of fact be falſe, then the adverſe Party taketh iſſue thereupon, and that is tried by a Jury; for matters in law are decided by the Judges, and matters in fact by Juries, as elſe where is ſaid more at large.

Mirror cap. 5. ſect. 2. Fleta lib. 2. cap. 54.

Now as there is no iſſue upon the fact, but when it is joyned between the parties; ſo there is no Demurrer in Law, but when it is joyned: and therefore when a Demurrer is offered by the one Party as is aforeſaid, the adverſe party joyned with him (for example) ſaith, Quod Placitum prædictum, &c. materiaque in eodem contenta bonum & ſufficiens in lege exiſtunt, &c. & petit judicium, and thereupon the Demurrer is ſaid to be joyned, and then the Caſe is argued by Counſell learned of both ſides; and if the points be difficult, then it is argued openly by the Judges of that Court; and if they or the greater part concurr in opinion, accordingly judgement is given; and if the Court be equally divided, or conceive great doubt of the Caſe, then may they adjorne it into the Exchequer Chamber, where the Caſe ſhall be argued by all the Judges of England, where if the Judges ſhall be equally divided, then (if none of them change their opinion) it ſhall be decided at the next Parliament by a Peere, two Earles, and two Barons which ſhall have power and commiſſion of the King in that behalf, and by advice of themſelves, the Chancellor, Treaſurer, the Juſtices of the

Vid. Bract. lib. 5. fo. 351. b.

5. 4 E. 3. cap. ſtatut. 1.

the one Bench and the other, and other of the Kings Councel, as many and such as shall seem convenient, shall make a good judgment, &c. And if the difficulty be so great as they cannot determine it, then it shall be determined by the Lords of the upper House of Parliament. See the Statute, for it extends not only to the case abovesaid, but also where judgments are delayed in the Chancery, Kings bench, Common bench, and the Exchequer, the Justices assigned, and other Justices of Oyer and Terminer, sometime by difficulty, sometime by divers opinions of Justices, and sometime for other causes. (a) Before which Statute, if judgments were not given by reason of difficulty, the doubt was decided at the next Parliament, (which then was to be holden once every year at the least) (b) Si autem talis nunquam prius evenerint obscurum & difficile sit eorum judicium, tunc ponatur judicium in respectum usque ad magnam [illegible], ut ibi per concilium curiæ terminetur. But hereof thus much shall suffice. (c) He that demurreth in Law confesseth all such matters of fact as are well and sufficiently pleaded. If there be a demurrer for part, and an issue for part, the more orderly course is to give judgment upon the demurrer first, but yet it is in the discretion of the Court to try the issue first if they will. After demurrer joyned in any Court of Record, the Judges shall give judgment according as the very right of the cause and matter in Law shall appear, without regarding any want of form in any Writ, Return, Plaint, Declaration, or other pleading, Proces, or course of proceeding, except those only which the party demurring shall specially and particularly set down and expresse in his demurrer. (a) Now what is substance and what is form, you shall read in my Reports.

Rot. Parlia. 14 E. 3. nu. 3. a proceeding in Sir John Stantons case upon difficulty in the Court of Common Pleas.
Vide Britt. fol. 41.
21 E. 3. 37, 38.
39 E. 3. fol. 1. 21. 35. 40 E. 3. 34.
13 H. 4. 3. 4.
(a) 4 E. 3. cap. 14.
(b) Bracton lib. 1. cap. 2. nu. 7. Brit. fol. 3. 2 E. 3. 7, 8. 2 E. 3. 6, 7.
(c) 27 E. 3. 50. b. 47 E. 3. 13. 14. 5 H. 7. 1, 13 E. 4. 7. b. Pl. Com. 85. 4. 11. 172. 48 E. 3. 15. 2 R. 2. inquest. 2, 38 E. 3. 25. 11. H. 4. 5. 75. 3 E. 4. 2.

And in some cases a man shall alleage special matter, and conclude with a Demurrer, (b) as in an action of trespasse brought by J.S. for the taking of his horse; the defendant pleads that he himself was possessed of the horse untill he was by one J.S. dispossessed, who gave him to the plaintiff, &c. the plaintiff saith that J.S. named in the barre, and J.S. the plaintiff were all one person, and not divers, and to the plea pleaded by the Defendant in the manner he demurred in Law, & the Court did hold the plea and demurrer good, for without the matter alleaged, he could not demurr. Now as there may be a demurrer upon counts & pleas, so there may be of Aid prier, Voucher, Receit, waging of Law, & the like. (c) By that which hath ben said, it appeareth, that there is a general demurrer, that is, shewing no cause, and a special demurrer which sheweth the cause of his demurrer. Also by that which hath ben said, there is a demurrer upon pleading, &c. and there is also a demurrer upon evidence. (d) As if the plaintiff in evidence shew any matter of Record, or Deeds, or Writings, or any sentence in the Ecclesiastical Court, or other matter of evidence by testimony of witnesses, or otherwise, whereupon doubt in law ariseth, & the defendant offer to demurr in law thereupon, the plaintiff cannot refuse to joyn in demurrer no more than in a demurrer upon a count, replication, &c. and so E converso, may the plaintiff demur in Law upon the evidence of the Defendant.

(a) Lib. 3. fol. 57. Linc. Coll. case lib. 5. fol. 74. Wymekes case. Lib. 10. fol. 88. usque 98. Doctor Leyfields case.
(b) 13 E. 4. 7. 31 E. 3. estoppel. 244. 33 H. 6. 9. 10. 22 E. 4. 50. 1 H. 7. 21.
(c) 14 H. 4. 31. 37. H. 6. 6.
(d) Lib. 5. fol. 104. 8. Bakers case.

But if evidence for the King in an Information, or any other suit be given, and the Defendant offer to demur in Law upon the Evidence, the Kings counsell shall not be inforced to joyn in Demurrer: but in that case, the Court may direct the Jury to find the speciall matter.

(c) 38 H. 8. Dyer 53.

¶ *En judgment.* For the signification of this word, Vide sect. 366.

## *Sect.* 97.

¶ ET apres tiel voyage royall en Escoce, il est communement dit, que p authoritie de Parliament lescuage serra assessee & mis en certeine, s. certeine sume dargent, quant chescun que tient per entire fee de service de chivaler, q̃l ne fuit

AND after such a Voyage royall into Scotland, it is commonly said, That by authority of Parliament, the escuage shall bee assessed and put in certaine, s. a certaine summe of money; how much every one which holdeth by a whole Knights fee,

¶ *Apres voyage royall, &c. il est communement dit, que per Authoritie de Parliament escuage serra assesse.* Nota, here is a secret of Law, included, that albeit Escuage incertain be due by Tenure; yet because the assessement thereof concerned so many and so great a number of the subjects of the Realm, it could not be assessed by the King or any other but by Parliament:

(a) and

(a) 13 H. 4. 5.

(b) 8 H. 3. Rot. Clauſ. & Rot. finium memb. 3. & ante.

(a) and this was by the common Law.

(b) No Escuage was aſſeſſed by Parliament ſince the Reign of Edward the ſecond, and in the eighth year of his Reign Escuage was aſſeſſed.

Staff. p. 14 E. 1. de banco.

If the Tenant goeth with the King, and dieth in exercitu, in the Hoſt or Army, he is excuſed by Law, and no Escuage ſhall be demanded.

F. N. B. 84.

And it is to be obſerved, that if he that holds of the King by Escuage, goeth, or findeth another to go for him with the King &c. then he ſhall have Escuage of his Tenants that hold of him by ſuch ſervice, which muſt be aſſeſſed by Parliament.

Bract. lib. 2. 36. 2.

F. N. B. 84.

But if the Kings Tenant goeth not with the King, then he ſhall pay for his default Escuage, and ſhall have no Escuage of his Tenants.

Ro. Parl. R. 2 num. 40.

Richard the ſecond making a voyage Royal into Scotland, at the petition of his Commons, pardoned the payment of Escuage.

per luy meſme, ne per un auter pur luy ove le Roy, payera a ſon Seignior de que il tient la Terre per eſcuage. Sicome mittomus, que il fuit ordaine per authoritie de la Parliament, que cheſcun que tient per entire fee d' Service de chivaler, que ne fuit ove le Roy, payera a ſon Seignior 40. ſ. donque celuy que tient per moitie dun fee de chivaler ne payera a ſon Seignior forſque xx. ſ. & celuy que tient p la quart part de fee de chivaler ne payera forſque x. ſ. & ſic que pluis, pluis; & que meins, meins.

who was neither by himſelf, nor by any other, with the King, ſhall pay to his Lord, of whom he holds his Land by Escuage. As put the caſe that it was ordained by the authority of the Parliament, That every one which holdeth by a whole Knights fee, who was not with the King, ſhall pay to his Lord forty ſhillings; then he which holdeth by the moity of a Knights fee, ſhall pay to his Lord but twenty ſhillings; and he which holdeth by the fourth part of a Knights fee, ſhall pay but x. s. and he which hath more, more; and which leſſe, leſſe.

## Sect. 98.

Vide ſect. 20.

¶ *A Scuns teignont per cuſtome, &c.* Nota, that Escuage is directed by cuſtome.

15 E. 2. tit. Avow. 215. 26. Aſſ. 65. 30 E. 3. 23. b. Lib. 4. fol. 88. in Luttrels caſe.

¶ *Mes autrement eſt de Eſcuage certaine.* Here it appeareth, that Escuage is twofold, viz. Escuage uncertaine, whereof Littleton here ſpeaks, and escuage certaine, Quemadmodum incertitudo ſcutagii facit ſervitium militare, ita certitudo ſeu-

¶ ET aſcuns teignont per la cuſtome que ſi leſcuage courge per authoritie de Parliament a aſcun ſume de money, & ils ne paieront forſque la moitie de ceo, & aſcuns teignōt & ils ne payeront forſque le quart part de ceo. Mes pur ceo que leſcuage & ils paierōt eſt non certain pur ceo & neſt certain coment le Parliamēt

And ſome hold by the Cuſtome, that if Escuage be aſſeſſed by authority of Parliament at any ſumme of money, that they ſhall pay but the moity of that ſumme, and ſome but the fou-th part of that ſumme. But becauſe the Escuage that they ſhould pay, is uncertain, for that it is not certaine how the Parliament will aſſeſſe the Escuage, they hold by Knights-ſer-

aſſeſſera

assessera lescuage cur reign ont per service de Chivaler. Mes auterment est de lescuage certaine, de q̃ serra parle en le tenure de Socage.

vice. But otherwise it is of Escuage certain, of which shall be spoken in the Tenure of Socage.

ragü facit Socagium. But more of this in the Chapter of Socage, Sect. 120.

¶ *Per Parliament.* Of the Antiquitie and Authority of this Court, see Sect. 164.

## Sect. 99.

¶ ET si hõe parle generalment descuage, il serra entendue p̃ le common parlance descuage noncertaine, que est Service de chivaler, & tiel escuage trait a luy homage, & homage trait a luy Fealtie, car Fealtie est incident a chescun manner de service forsque a le Tenure en Frankalmoigne, come serra dit apres en le Tenure de Frankalmoigne. Et issint il que tient per Escuage, tient p̃ Homage Fealty & Escuage.

AND if one speak generally of Escuage, it shall be intended by the common speech of Escuage incertaine, which is Knights Service: And such Escuage draweth to it Homage, and Homage draweth to it Fealtie; for Fealtie is incident to every manner of service, unlesse it be to the Tenure in Frankalmoign, as shall be said afterward in the Tenure of Frankalmoigne. And so he which holdeth by Escuage, holds by Homage, Fealtie and Escuage.

¶ *ET si home parle generalment descuage il serra intend per le common parlance descuage non certain.*

Verba æquivoca & in dubio posita intelliguntur in digniori & potentiori sensu. Tenure in capite ex vi termini is a Tenure in Grosse, and it may be holden of a Subject, but being spoken generally, it is secundum excellentiam, intended of the King, for he is Caput Reipublicæ.

Entendments en Ley. Sect. 100. 110. 367. 377. 393. 400. 462, 463. 5 E. 2. Ref. 165. 20 H. 6. 23. 21 H. 3. 8. 37 H. 39. 13 H. 4. 4. 6 El. Dyer 236. 10 I. 4. 11. 32 E. 3. Card. 41.

Litt. lib. 163.

¶ *Et tiel Escuage troit a luy Homage & Homage trait a luy Fealtie, car Fealtie est incident a chescun manner de service forsque a Tenure en Frankalmoigne.*

40 E. 3. 21. 8 H. 7. 4.

## Sect. 100.

This is gathered by the effects of their tenure, for essences are found out by properties, fountains by rivers, and causes by effects: for amongst others, the Lords shall have Escuage. Of their Tenants, &c. as it followeth.

CEST est assavoire, Que quant escuage est tielment assesse pur authoritie de Parliament chescun Seignior de que le terre est tenus per Escuage, avera lescuage issint assesse per Parliament pur ceo que il est in-

AND it is to be understood, that when Escuage is so assessed by authority of Parliament, every Lord of whom the Land is holden by Escuage, shall have the Escuage so assessed by Parliament, because it is intended by the Law, That at

tendus p la Ley, q̃ al cõmencemẽt tiels teneñts fuer dones p les Sñrs a les tenants de tener per tiels ſervices a defender lour Sñrs, auxy bien come le Roy, & mitter en quiet lour Sñrs & le Roy, de les Scotes avantdits.

the beginning, ſuch Tenements were given by the Lords to the Tenants, to hold by ſuch ſervices to defend their Lords as well as the King, and to put in quiet their Lords and the King from the Scots aforeſaid.

## *Sect.* 101.

F.N.B.84. Regiſter 88.de Scutagio habendo.

¶ *Les ſeigniors averont leſcuage, &c.* This is evident.

¶ *Briefe le Roy.* This cometh of the Latine word Breve.

Fitzh. in his preface to his N.B. ſaith of them, that they be thoſe foundations whereupon the whole Law doth depend.

(a) Bracton lib. 5. fol. 413. Fleta lib. 2. cap. 12. Britton fol. 122, 227.

(a) Bracton deſcribeth a Writ thus, Breve quidem cum ſit formatum ad ſimilitudinem regulæ juris, quia breviter & paucis verbis intentionem proferentis exponit & explanat, ſicut regula juris rem quæ eſt breviter enarrat, non tamen ita breve eſſe debeat quin rationem & vim intentionis contineat.

Of writs ſome be original, Brevia originalia, and ſome be judicial, Brevia judicialia.

Alſo of originals, quædam ſunt formata ſub ſuis caſibus & de curſu, & de communi conſilio totius regni conceſſa & approbata, quæ quidem nullatenus mutari poterunt abſq; conſenſu & voluntate eorum; & quædã ſunt Magiſtralia, & ſæpe variantur ſecundum varietatem caſuum, factorum, & querelarum, as for example, Actions upon the caſe which vary according to the variety of every mans caſe, and the like; and theſe being not of courſe, the maſters being learned men did make: Item brevium originalium alia ſunt realia, alia perſonalia, alia mixta. Item brevium originaliũ, alia ſunt patentia ſive aperta, & alia clauſa. Certain it is, that the original Writs are ſo artificially and briefly compiled, as there is nothing redundant or wanting in them, of which an honourable Secretary of ſtate once ſaid, that it was not poſſible to comprehend ſo much matter, ſo perſpicuouſly in fewer words: of all theſe kinds of Writs you ſhall read plentifully in the Regiſter, whereof Littleton maketh mention in this place, and alſo in Fitz. N.B.

Bracton ubi ſupra. Britton ubi ſupra. Regiſt. 88. F.N.B. 84.

¶ *Sicome appiert per le Regiſter.* Regiſter, is the name of a moſt ancient book and of great authority in Law, containing all the original Writs of the Common law, of which Book ſee more in the Preface to the ninth part of my Reports, and containeth alſo Brevia judicialia quæ ſæpius variantur ſecundum varietatem placitorum proponentis & reſpondentis.

F.N.B. 84.

Alſo it appeareth by the Regiſter that the King ſhall have Eſcuage of his Tenants which hold of him as of a manor which he hath in ward, or by reaſon of a vacation of a Biſhoprick. And ſo ſhall a common perſon, if he hath an eſtate for life or for years of a Seigniory.

Sect.

And becauſe ſuch tenements came firſt from the Lords, it is reaſon that they ſhould have the Eſcuage of their Tenants. And the Lords in ſuch caſe may diſtrein for the Eſcuage ſo aſſeſſed, or they in ſome caſes may have the Kings Writs directed to the Sheriffs of the ſame Counties, &c. to levy ſuch Eſcuage for them, as it appeareth by the Regiſter. But of ſuch tenants as hold of the King by Eſcuage, which were not with the King in Scotland, the King himſelf ſhall have the Eſcuage.

¶ ET pur ceo que tiels teneñts devienoront pñmes des Seignions, il eſt reaſon q̃ ils averont leſcuage de lour Tenants. Et les Seignions en tiel caſe purront diſtreiñ pur leſcuage iſſint aſſeſſe, ou ils en aſcuns caſes purront aũ bẽe le Roy, direct as Vicõts de ñ les Counties, &c. de levier tiel Eſcuage pur eur, ſicome appiert p le Regiſter. Mes ô tiels Tenants queux teignont per Eſcuage de Roy, qux ne fueront oue le Roy en Eſcoce, le Roy meſme avera leſcuage.

## *Sect.* 102.

¶ Item en tiel caſe avandit, lou le Roy face un voyage royall en Eſcoce, & leſcuage eſt aſſeſſe per Parliament, ſi le Sñr diſtreine ſon tenant que tient de luy per ſervice dentier fee de Chivaler pur leſcuage iſſint aſſeiſe, &c. & le tenant plede, & voit averrer que il fuit ove le Roy en Eſcoce, &c. per xl. jours, & le Seignior voit averrer le contrarie, il eſt dit, que il ſerra trie per le certificat del Marſhall del Hoſt le Roy en eſcript ſouth ſ̃ ſeale q̃ ſerra mis a les Juſtices.

Item, in ſuch caſe aforeſaid, where the King maketh a voyage royall into Scotland, and the Eſcuage is aſſeſſed by Parliament, if the Lord diſtraine his Tenant that holdeth of him by ſervice of a whole Knights fee, for the Eſcuage ſo aſſeſſed, &c. and the Tenant pleadeth, and will aver that hee was with the King in Scotland, &c. by 40. dayes, and the Lord will averre the contrary, it is ſaid, that it ſhall be tryed by the certificate of the Marſhall of the Kings hoſt in writing under his ſeal, which ſhall be ſent to the Juſtices.

¶ *Et voit averrer, que il fuit ove le Roy en Eſcoce per* 40. *jours, &c.* (a) *Il eſt dit que il ſerra trie per le certificat del Marſhall.* This is a triall appointed by the Law, Ne Curia Regis deficeret in Juſtitia exhibenda. (b) Herewith agreeth the Regiſter, where the Marſhall is called Conſtabularius exercitus noſtri.

(a) 2 E. 4. 11. 4 E. 4. 10. 21 E. 4. 10. F. N. B. 85. 11 H. 7. 5. Lib. 9. fol. 32. Caſe de Strat. Marc.

(b) Regiſt. 88. F. N. B. 84. 2 E. 1. 4 E. 4. 10. 9 H. 4. 3. 11 H. 7. 5. 21 H. 6. 50. 33 H. 6. 1. 45.

¶ *Marſhall de hoſt le Roy.* Mareſchallus exercitus; in Saxon, Mariſchalk, i. Equitum magiſter. This word Marſhall is either derived of Mars, or of Marc an Horſe and ſchale which ſignifieth in the Saxon tongue, a Maſter or Governor. (c) In the laws before the Conqueſt it is ſaid, Mareſchalli exercitus ſeu Ductores exercitus Heretoches per Anglos vocabantur, illi ordinabant acies denſiſſimas in prælijs, & alas conſtituebant prout decuit, & prout ei melius viſum fuerit ad honorem Coronæ & ad utilitatem Regni. (d) And here it is to be obſerved, that his Certificate in this caſe is a trial in law. I read of ſix kinds of certificates allowed for trials by the Common law; the firſt whereof Littleton here ſpeaketh of, in time of War out of the Realm. 2. In time of peace out of the Realm: (e) As if it be alledged in avoidance of an Outlawry, that the Defendant was in priſon at Burdeaux in the ſervice of the Major of Burdeaux, it ſhall be tried by the Certificate of the Major of Burdeaux. 3. For matters within the Realm (f) the cuſtom of London ſhall be certified by the Major and Alderman by the mouth of the Recorder. 4 By certificate of the Sheriff upon a writ to him directed (g) in caſe of priviledge if one be a Citizen or a Forreigner. 5. Trial of Records by Certificate of the Judges in whoſe cuſtody they are by law. All theſe be in temporal cauſes. 6. In cauſes Eccleſiaſtical, as loyalty of marriage, general baſtardy, excommengement, proſeſſion. Theſe and the like are regularly to be tried by the Certificate of the Ordinary.

(c) Lamb. fol. 136.

(d) 2 E. 4. 1. b. 4 E. 4. 20. 23 E. 4. 47. F. N. B. 85.

(e) 4 E. 10.

(f) 5 E. 4. 30. 21 E. 4. 16.

(g) 10 H. 6. 10.

And there be divers other trials allowed by the Common law, than by a Jury of twelve men, which you may read at large in the ninth Booke of my Reports, fol. 30, 31. &c. in the caſe of the Abbot of Strata Marcella, which are as plainly ſet down there as they can be here: and in this caſe if the trial ſhould not be by Certificate, it ſhould want trial, which ſhould be inconvenient: Only in this place I will add ſomething of a forreign trial which I find not in any of the Treatiſes lately publiſhed againſt ſingle combats, becauſe it may deter men from that ungodly and unlawful kind of revenge, whereupon many murders have enſued, & prevent all hope of impunity for default in trial in that caſe.

If a ſubject of the King be killed by another of his ſubjects out of England in any forreign Country, the wife or heir of his dead may have an appeal for this murder or homicide before the Conſtable and the Marſhal, whoſe ſentence is upon teſtimony of witneſſes or combat. And accordingly where a Subject of the King was ſlain in Scotland by others of the

Stat. de 1 H. 4. cap. 14. 13 H. 4. fol. 5. Vide Rot. Parliam. 8 H. 6. nu. 38. Stanf. pl. Cor. fo. 55.

Kings Subjects, the wife of the dead had her appeal therefore before the Conſtable and the Marſhal. And ſo it was (†) reſolved in the reign of Queen Elizabeth in the caſe of Sir Francis Drake who ſtrook off the head of Dowtie, in partibus tranſmarinis, that his brother and heir might have an Appeal, Sed Regina noluit conſtituere Conſtabularium Angliæ, &c. & ideo dormivit appellum.

(†) Anno 25 Eliz.

If a man be mortally wounded in France, and dieth thereof in England, it is ſaid that an Appeal doth lye upon the ſaid ſtatute, for it is not puniſhable by the Common Law, and the proceeding there (as hath been ſaid) is upon witneſſes or combate, and not by Jury, and the mortal wound was given out of the Realm.

## CHAP. 4. Sect. 103.

## *Knights Service.*

(a) Clanvil lib. 7. cap. 10.

(b) Regiſt. a. 30 E. 3. 24.

(c) Glanvil lib. 7. cap. 14.

(d) Glanvil lib. 7. c. 9, &c. Fleta lib. 1. fol. 85. Britton fol. 162. & fol. 28. & 95. Ockam in diverſis locis. Mirror cap. 1. ſect. 3. Sud. Diton.

*Service de Chivaler*: Nota, it appeareth by (a) Regiſter, that it is (b) ſaid unum feodum militis, and not feodum unius militis, as it was ſaid, (c) by ſome of old, and ſo duo feoda militis, &c. and ſometime theſe Fees are called feoda militaria. Our Author having before treated of Homage, Fealty, and Eſcuage, now commeth to Knights Service it ſelf. In Domeſday it is thus recorded, Epiſcop. Baiecenſis ille qui tenet de Modardo reddit ei 50. s. & ſervitium unius militis.

¶ *Chivaler*. i. Eques; Knight is a Saxon word, and by them written, Cnite. Chivaler taketh his name from the Horſe, becauſe they alwayes ſerved in warres on Horſeback. The Latines called them Equites; the Spaniards, Cavalleroes; the Frenchmen, Chivaliers; the Italians, Cavallieri; and the Germanes, Reiters, all from the horſe. It is neceſſary to be ſeen by what Names this Service of a Knight is called. It is called (e) Servitium forinſecum quia pertinet ad Dominum Regem & non ad capitalem Dominum niſi cum in propria perſona profectus fuerit in ſervitio, & niſi cum pro ſervitio ſuo, ſatisfecerit Domino Regi, &c. Ideo forinſecum dici poteſt, quia ſit & capitur foris ſive extra ſervitium quod fit

(e) Bract. lib. 2. fo. 36 & 37. Britton fol. 164, 165. Fleta lib. 3. cap. 14. 19 E. 2. Avowrie 224. 26 Aſſ. 65 31 Aſſ. 30. 30 E. 3. 23. 8 E. 3. 67. 7 H. 4. 19.

¶ Tenure p homage, Fealtie, Eſcuage, eſt a tener p ſervice de chiuler, & trait a luy garde, mariage, & reliefe. Car quant tiel tenant mourt, & ſon heire male eſt deins lage de 21. ans, le Seignior aura la terre tenus de luy tanque al age del heire de 21. ans, le quel eſt appel pleine age, pur ceo que tiel home per intendement del ley neſt pas able de faire tiel ſervice de Chivaler, devant lage de 21. ans: Et aury ſi tiel heire ne ſoit marie al temps de mort de tiel Auncеſter, donque le ſeignior aura le garde & le marriage de luy. Mes ſi tiel Tenant devie, ſon heire female eſteant dage de 14. ans, out de plus donque le Seignior

Tenure by Homage, Fealtie and Eſcuage, is to hold by Knights Service, and it draweth to it Ward, Marriage, and Reliefe. For when ſuch Tenant dyeth, and his heire male be within the age of 21. years, the Lord ſhall have the Land holden of him untill the age of the heire of 21. years, the which is called full age, becauſe ſuch heire by intendment of the Law, is not able to doe ſuch Knights ſervice before his age of 21. yeares. And alſo if ſuch heire be not married at the time of the death of his Anceſtor, then the Lord ſhall have the wardſhip and marriage of him. But if ſuch Tenant dieth, his heire female being of the age of 14. yeares, or more, then the Lord

navera my le garde del terre ne de corps pur ceo que feme de tiel age poit aver Baron able de faire Service de chivaler. Mes si tiel heire female ſoit deins lage de 14. ans, & nient marie al temps de la mort ſon Auncester, donque le Seignior avera le garde de la terre tanq; al age de tiel heire female de 16. ans, pur ceo q̄ il eſt done per le Statute de Westm. 1. Cap. 22. Que per 2. ans procheine enſuant les dits 14. ans, le Seignior poit tender cōvenable mariage ſauns diſparagement a tiel heire female. Et ſi le Seignior deins les dits 2. ans ne luy tend tiel mariage, &c. donque el al fine des dies 2. ans, poit enter & ouſter ſon Seignior. Mes ſi tiel hēre female ſoy marie deins lage de 14. ans en la vie ſon anceſter, & ſon Auncester deuy el eſteant deins lage de 14. ans, le Seignior navera forſq; la garde de la terre, jeſques a fine de 14. ans, dage de tiel heire female, & donq; ſhall not have the wardſhip of the Land, not of the body, becauſe that a woman of ſuch age may have a husband able to doe Knights Service. But if ſuch heire female be within the age of 14. years, and unmarried at the time of the death of her anceſtors, the Lord ſhall have the wardſhip of the Land holden of him, untill the age of ſuch heire female of 16. yeares. For it is given by the Statute of W.1. Cap. 22. that by the ſpace of two years next enſuing the ſaid 14. yeares, the Lord may tender convenable marriage without diſparagement to ſuch heire female. And if the Lord within the ſaid two yeares do not tender ſuch marriage, &c. then ſhe at the end of the ſaid two years may enter, and put out her Lord; but if ſuch heire female bee married within the age of 14. years in the life of her Anceſtor, and her Anceſtor dieth, ſhe being within the age of 14. yeares, the Lord ſhall have onely the Wardſhip of the Land untill the end of the 14. years of age of ſuch

Domino capitali. And it is called Scutagium as it appeareth (f) by Littleton and many Authorities before recited. Sometime droit de eſpee. Alſo it is called (g) Regale ſervitium, quia ſpecialiter pertinet ad Dominum Regem. Ut ſi dicatur in Carta, faciendo inde forinſecum ſervicium, vel Regale ſervitium, vel ſervitium Domini Regis, quod idem eſt, &c. And another ſaith: Et ſunt quædam ſervitia forinſeca quæ dici poterunt Regalia quæ ad ſcutum præſtantur, & inde habemus Scutagium, & ratione ſcuti pro feodo militari reputatur, &c. So as in reſpect of him that doth it, it is called Servitium militis, but in reſpect of him for and to whom it is done, viz. to the King, and for the Realm, it is called Servitium Regale, or Servitium Domini Regis, &c. (h) In ancient time they which held by Knights ſervice were called Milites, qui per loricas, &c. defendunt, & deſerviunt, &c. and ſometime this ſervice is called ſervitium hauberticum. And in ancient time ſuch as held by Knights Service for the defence of the Realm had many priviledges granted to them by Law: as for example, they might have a Writ De eſſend' quiet' de tallagio, the effect whereof was (i) Si Th. filius Ranulphi terram ſuam teneat per ſervitium militare, ſicut Domino Regi monſtravit, tunc nullum ab eodem Th. capiant tallagium, nec pro eo dando ipſum diſtringant, vel homines ſuos qui per conſimile ſervitium teneant. And this agreeth with the ancient charter of King Henry the 1. before mentioned, which he made on the day of his Coronation for the Reſtitution of the ancient Laws. (k) Militibus qui per loricas terras ſuas defendunt & deſerviunt terras Dominicarum carucar' ſuarum quietas ab omnibus gildis, & omni onere &c. concedo: and the reaſon thereof is there yielded, Sicut tam magno gravamine allevati ſint, ita equis & armis ſe bene inſtruant

(f) Bracton ubi ſupra. Fleta lib. 2. cap. 14.

(g) Britton fol. 187. Bracton ubi ſupra.

(h) Carta Hen. prim. Mat. Paris. Mirror cap. 2. ſect. 77.

(i) Rot. clauſ. 19 H. 3. m. 12.

(k) Carta H. 1. in libro Rub. fol. 41. in ſcaccario.

inſtruunt ut apti & parati ſint ad ſervitium meum, & defenſionem Regni mei. But theſe Priviledges and Mutttances are diſcontinued, and the charge remaineth.

(l) Glanvill lib.7.ca.9,10. Fleta lib.7. cap.8.& 9. & lib. 3.cap. 16,17,&c. Bracton lib.2.cap.16. Mirror cap.5.ſect.2. Britton 162.

It is called commonly in (l) our Books, Servitium militare, &c. or Servitium militis. And this ſervice was created and provided for the defence of the Realm, to perform which Service the Heirs are not accounted in Law able till the age of one and twentie years. Therefore during their minority, the Lord ſhall have the cuſtody of them, not for benefit onely, but that the Lord might ſee, that they be in their young years taught the Deeds of Chivalry, and other vertuous and worthy Sciences.

(m) Forteſcue cap.44.

(m) Si hæreditas teneatur per Servitium militare, tunc per leges infans ipſe, & hæreditas ejus, &c. per Dominum feodi illius cuſtodientur, &c. Quis, putas, infantem talem in artibus bellicis, quos facere, ratione tenuræ ſuæ, ipſe aſtringitur Domino feodi ſui, melius inſtruere poterit, aut velit, quam Dominus ille, cui ab eo ſervitium tale debetur, & qui majoris potentiæ & honoris æſtimatur, quàm ſunt alii amici propinqui tenentis ſui? Ipſe namque, ut ſibi ab eodem Tenente melius ſerviatur, diligentem Curam adhibebit, & melius in his eum erudire expertus eſſe cenſetur quam reliqui amici juvenis, &c. Et revera non minimum erit Regno accõmodum, ut incolæ ejus in armis ſint experti; nam audacter quilibet facit, quod ſe ſcire ipſe non diffidit.

(n) Lamb.fol.135.2.

(n) Amongſt the Lawes of Saint Edward the Confeſſor, it is thus provided. Debent enim univerſi liberi homines, &c. ſecundum feodum ſuum, & ſecundum Tenementa ſua, arma habere, & illa ſemper prompta conſervare ad tuitionem Regni, & Servitium Dominorum ſuorum juxta præceptum Domini Regis explendum & peragendum. And William the Conqueror confirmed that Law in theſe words: Statuimus & firmiter præcipimus, ut omnes Comites, & Barones, & Milites, & Servientes, & univerſi liber

ſon baron & luy poient enter en la terre & ouſte le Seignior, car ceo eſt hors de cas de le dit eſtatute, entant que le Seignior ne poit tender mariage a luy que eſt marie, &c. Car devant le dit eſtatute Weſtm. 1. tiel iſſue femele que fuit deins age de 14. ans, al temps de mort ſon Aunceſter, & puis que el avoit accompliſh lage de 14. ans, ſans aſcun tender de mariage per le Seignior a luy, tiel heire femele donque puiſſoit enter en le terre, & ouſte le Seignior ſicome appiert per le reherſall & parolr de le dit Statute, iſſint que le dit Statute fuit fait en tiel cas, tout pur ladvantage de Seigniors come il ſemble. Mes uncore ẽ touts foits eſt entendue per les parolr de m̃ le Statute que le Seignior navera les deux ans apres les 14. ans, come eſt avantdit, mes lou tiel heire femele ſoit deins lage de 14. ans, nient marie al temps de mort s̃ Anceſter.

heire female, and then her husband and ſhee may enter into the land, & ouſt the Lord: For this is out of the caſe of the ſaid ſtatute, inſomuch as the Lord cannot tender mariage to her which is maried, &c. For before the ſaid Statute of W. 1. ſuch iſſue female which was within the age of 14. years at the time of the death of her anceſtor, & after ſhe had accompliſhed the age of 14. years, without any tender of marriage by the Lord unto her, ſuch Heire Female might have entred into the land, and ouſted the Lord, as appeareth by the rehearſall and words of the ſaid Statute, ſo as the ſaid Statute was made (as it ſeemeth) in ſuch caſe altogether for the advantage of Lords. But yet this is alwayes intended by the words of the ſame Statute, that the Lord ſhall not have theſe two yeares after the 14. yeares as is aforeſaid, but where ſuch heir female is within the age of 14. years, and unmarried at the time of the death of her Anceſtor.

liberi homines totius Regni noſtri prædicti habeant & teneant ſe ſemper in armis & in equis ut decet, & oportet, & quod ſint ſemper prompti & parati ad ſervitium ſuum integrum nobis explendum & peragendum cum ſemper opus adtuerit, ſecundum quod nobis debent de feodis & tenementis ſuis de jure facere, &c. Out of theſe two Laws the ſtudious and learned Reader will gather divers notable things. And th refore if after the Lord hath the Wardſhip of the body and the land, the Lord doth releaſe to the Infant his right in the Seignory, or the Seignory deſcendeth to the infant, he ſhall be out of ward both for the body and the land, for he was in ward in reſpect he was not able to do thoſe ſervices which he ought to do to his Lord, which now are extinct, and Ceſſante cauſa, ceſſat cauſatum. And our Author ſaith that the Tenure by Knights Service drawеth unto it Ward, Marriage, &c. ſo as there muſt be a Tenure continuing. As if the Conuſor in a Statute Merchant be in execution, and his land alſo, and the Conuſee releaſe to him all debts this ſhall diſcharge the execution, for the debt was the cauſe of the execution, and of the continuance of it till the debt be ſatisfied, therefore the diſcharge of the debt which is the cauſe, diſchargeth the execution which is the effect.

See W.1.ca.48. The ſecond part of the Inſtitutes.

20 Aſſ.p.7.

¶ *Et trait a luy gard, marriage, & reliefe.* So as regularly there be ſix incidents to Knights Service, (viz.) two of honour and ſubmiſſion, as Homage and Fealty. And four of profit, viz. Eſcuage, whereof he hath treated before, Ward, (i. Wardſhip of the land) Marriage, and Reliefe; of all which our Author hath ſpoken. But there be other incidents to Knights Service beſides theſe, (a) as Aide pur fair fits Chivalier, & aide pur file marier, &c. Which at the Common Law were uncertain, and were called rationabilia auxilia, becauſe if they were exceſſive and unreaſonable in the judgment of the Court where they were queſtioned, they ought not to be paid: But now as well in the Kings caſe, as in the caſe of the ſubject, they are by Acts of Parliament reduced to certainty, which are worthy your reading.

(a) Grand cuſt. de Normandie, ca.25. Regiſt. orig. fol. 87. Glanvil lib.9. ca.8.35. Fleta lib.2. cap.40. & lib.3.ca.14. Mirror ca.1. ſect.3. Britton fo.55.& 70. F.N.B.82.b. W.1. ca.31. 25 E.3. ca.11. 11 H.4.34. 5 E.3.11. Vid.ſect.130.

¶ *Gard*, or Ward, in Latine Cuſtodia, and hereof the Lord is called Gardian, Cuſtos, and the minor is called a Ward, or one in ward. (b) And albeit (as our Author ſaith) Knights ſervice draweth with it Ward, &c. yet by cuſtome the Heir of him that holdeth in Socage may be in ward.

(b) 8 H.3. Preſcript. 38. Paſch. 21 E.1. Coram rege Rot. 43. Nota pro Hibernia Prior del St. Trinitie de Dublins caſe.

¶ *Marriage.* Mariagium betokeneth not the copulation of man and wife in marriage, but alſo (as in this place here) the intereſt of the Gardian in beſtowing of a Ward in marriage, which the Law gave to the Lord, not for his benefit only, but that he ſhould match him vertuouſly and in a good family without diſparagement, as ſhall be ſaid hereafter, which is the principal foundation of his eſtate.

¶ (c) *Reliefe.* Relevium, is derived from the Latine word Relevare; for ſo (d) ancient Authors ſay, and give this reaſon, Quia hæreditas quæ jacens fuit per Anteceſſoris deceſſum, relevatur in manus hæredum, & propter factam relevationem facienda erit ab hærede quædam præſtatio quæ dicitur relevium. And in Domeſday it is called Relevamentum and Relevario.

(c) Vid. ſect. 112.
(d) Bracton lib.2. ca.36. fol.84. Fleta lib.1. ca.10. & lib.3. ca.16.7. Britt ca.69.70. Glanvil lib.9. ca.4. & lib.7. ca.9. Ockam de differentiis relevиorum.

The Relief of a whole Knights fee is five pound, and ſo according to that rate. And this Relief was as ſome hold certain by the common law, (†) But the Relief of Earls and Barons were incertain, and therefore were called Relevia rationabilia, but the ſtatute of Magna Carta, cap 2. limits them in certain, and mentioneth alſo a Knights fee. But I read in the Book of Domeſday, Quod Tainus vel miles regis dominicus moriens pro relevamento dimittebat regi omnia arma ſua & equum unum cum ſella & alium ſine ſella, quod ſi eſſent ei canes vel accipitres, præſtabantur regi, ut ſi vellet, acciperet.

(†) Ockam ubi ſupra. Bracton lib.3. fol.85.

Since Littleton wrote (e) there is a good Law made againſt fraudulent Feoffments Gifts, Grants, &c. contrived of fraud to hinder or defraud Lords, &c. of their Reliefs and Heriots amongſt other things: for the expoſition of which ſtatute read the authorities quoted in the margent. And it is to be be obſerved that the words of the ſaid Act of 13 Eliz. are (be it therefore declared, ordained, and enacted,) and therefore like caſes, and in ſemblable miſchief ſhall be taken within the remedy of this Act by reaſon of this word (declared) whereby it appeareth what the Law was before the making of this ſtatute.

(e) 13 Eliz. ca.5. 17 E.3. Reliefe 2. 7 E.3. lib.11. lib.3. fo.80.&c. Twines caſe. Lib.5. fo.60. Gooches caſe. Lib.6. fo.18. Pakemans caſe. Lib.10. fo.56.b. See alſo the Statutes of 3 H.7. c.4. & 50 E.3. ca.6. Vid. Mich.12 & 13 Eliz. Dyer 295.

¶ *Son heire.* (f) For regularly by the Common Law the heir ſhall not be in ward unleſs he claim as heir by deſcent. The ſtatute of Merton, De iis qui primogenitos feoffare ſolent (g) did help Feoffments by colluſion in certain caſes. And Britton ſaith that Robert de Walrand a Sage of the Law did adviſe the great Lords of the Realm to make the ſaid ſtatute, which when it was paſt, the ſame Act took his firſt effect in the heir of Walrands own heir, whereof Britton maketh a ſpecial remembrance. But now (h) by the ſtatutes of 32 and 34 H.8. of wills, he which holdeth lands by Knights Service may by Act executed in his life time, or by his laſt Will in Writing diſpoſe two parts, as by the ſaid Acts appeareth. If he diſpoſe all by Act executed, then it ſhall ſtand good againſt the heir ſo

(f) Britton 168. Fleta lib.1. cap.9.
(g) Merton ca.6. Bract. fo.85. Britt. fo.65. 9 H.4.6. 4 H.7. ca.17. 27 H.8.7.89. Partridges caſe. pl. com. 82.
(h) 32 H.8. ca.1. 34 H.8. ca.5.

ſo as nothing ſhall deſcend unto the heir. But in caſe of a deviſe by his laſt will, a third part ſhall deſcend to the heir, though all be deviſed away: and if the Tenant leave a third part to diſcend, then the Deviſe is good for the reſidue. (i) But theſe things require ſo many diverſities grounded upon evident reaſons, & are ſo plainly expreſſed in my Commentaries, as they (being very long) ſhall not need to be repeated here. (k) And ℔ the Tenure by Knights Service draweth to it Ward, Marriage, & Relief, is of great antiquity, for ſo it was in the time of King Alfred.

(i) Lib.8.fo.25,26. in Butlers caſe. Lib,6.fo.75. in Sir George Curſons caſe. Lib.8.fo.163. Mights caſe. Eod.lib.fo.171. in Vigil Parkers caſe.
(k) Mir. ca.1. ſect.3.

¶ *Quant tiel tenant mort.* Here Littleton ſpeaketh not of a dying ſeiſed by the Tenant, for in many caſes the heir ſhall be in ward, albeit the Tenant died not ſeiſed, &c. nor in the homage of the Lord. As if the Tenant maketh a feoffment in fee upon condition, and ℔ Feoffor dieth, after his death the condition is broken, the heir within age entreth for the condition broken, he ſhall be in ward, and yet the Feoffor had no eſtate or right in the land at the time of his death but only a condition and which was broken after his deceaſe. (†) But becauſe the condition reſtoreth ℔ Tenant to the land in nature of a deſcent, (for he ſhall be in by deſcent) by the ſame reaſon ſhall it reſtore the Lord to the wardſhip, ſeeing now (as Littleton ſaith) the heir of his Tenant is within age, and not able to do him ſervice, and no default in the Lord to barre him of his wardſhip.

(†) 39 E.3.26.tit.Gard.92. 33 E.3.Gard.162. 1 H.7.12.19 E.3.1. Gard.104. 18 Aſſ.18. 40 Aſſ.36.20 El.362. 4 H.6.16 b. F.N.B. 143. 6 H.4.4.2.

(l) And ſo I do take it, ℔ if the heir within age recover in a Dum non fuit compos mentis, or Formedon en diſcender, or remainder as heir, or ſuch like, the heir ſhall be in ward, for theſe be ſtronger caſes than the former, for here a right doth deſcend to the demandant, which right being by courſe of Law reſtored to the poſſeſſion of the heir within age, by conſequence the Lord is to have the Wardſhip of him: but in the caſe of the condition no right at all deſcended to the heir, as hath been ſaid.

(l) 7 H.4.12. 11 H.7.12. 22 E.4.6,7.40 E.3.43. 4 M.136. 15 E.4. 10,11.

And ſo if Tenant in Tail, ℔ Remainder in fee, maketh a Feoffment in fee, & dieth leaving the iſſue in Tail within age, if the Feoffee infeoff the iſſue in Tail, whereby he is remitted, he ſhall be in Ward to the Lord: for as he is reſtored to the Title of the land as heir, ſo is ℔ Lord reſtored to his title of Wardſhip as Lord of the Fee. And as to this purpoſe herein I take no difference between a right of action and a right of entry deſcending, when by action the right of the land is lawfully recovered by the heir within age, to his Tenant, and albeit he died not in his homage, yet there was a right of homage, and no default or laches was in ℔ Lord, or act done by him to prejudice himſelf thereof.

33 E.3.Gard,162.

But if one levy a fine executory (as Sur grant & render) to a man and his heirs, and he to whom the land is granted and rendred, before execution, dieth, his heir being within age entreth, he ſhall not be in ward, for his Anceſtor was never Tenant to the Lord: and ſo there is a manifeſt diverſity between this and the other caſes, Et ſic de cæteris.

11 H.7.12.

But if the Tenant maketh a Feoffment in Fee of lands holden by Knights Service, to the uſe of the Feoffee and his heirs, until the time that the Feoffor pay to the Feoffee or his heirs a hundred pounds, for the which a time and place is limited, the Feoffee dieth, his heir within age, the Lord ſhall have the Wardſhip of the body of the heir, and of the lands of ℔ Feoffe, conditionally, for he cannot have a more abſolute intereſt in the Wardſhip, than the heir hath in the Tenancy: therefore if the Feoffor pay the money at the day and place, and entreth into the land, in this caſe both the Wardſhip of the body and lands is diveſted, becauſe the Lord had no abſolute intereſt in neither of them, but doth depend upon the performance or not performance of the condition.

13 El. Dyer 298.

(†) So if the Conuſor of a fine executory of lands holden by Knights Service dieth, his heir within age, the Lord ſhall have the Wardſhip of the body and land: but if the Conuſee entreth, the heir is diſherited, and the Lord hath loſt the whole benefit of his Wardſhip.

(†) 12 H.4.16. per Thirning.

If the Diſſeiſee dieth, his heir being within age, (m) the Lord ſhall have the Wardſhip of the heir of the body of the Diſſeiſee. (n) But put the caſe that in that caſe the Diſſeiſor dieth ſeiſed, and his heir within age, the Lord may ſeiſe the Wardſhip of his heir alſo, and of the land alſo: but the doubt is, whether the heire of the Diſſeiſee ſhall after the deſcent to the heir of the Diſſeiſor, continue in ward, for that after the diſcent the heir of the Diſſeiſor is become his lawful Tenant, and the heir of the Diſſeiſee is not Tenant unto him until he hath recovered the land.

(m) 41 E.3.225.
(n) 15 E.4.11.

If Ceſti que uſe before the ſtatute of 27 H. 8. had died, his heir within age, the Lord (o) ſhould have the Wardſhip of his heir: and if the Feoffee had died his heir within age, ℔ Lord ſhould have had the Wardſhip of his heir alſo, and ſo a double Wardſhip for one and ℔ ſame land; the one by ℔ ſtatute of 4 H.7. the other by the Common Law.

(o) 14 H.8.5. 4 H.7.cap.

(p) Tenant by Knights Service maketh a gift in tail, the Remainder in fee, Tenant in tail maketh a feoffment in Fee, and dieth his heir within age, the Lord ſhall have ℔ Wardſhip of him: and if the Feoffee dieth, his heir within age, the Lord ſhall have the Wardſhip alſo of his heir, and of the land.

(p) 41 E.3.26.tit.Avowrie 264.20 A.6.9. 48 E.3.8.b. 10 E.3.26.31 E.3.tit. Gard,116,18 E.3.7. 14 H.4,38.1 H.5. Grant 43. 5 E.4.3. 7 E 4.27. 15 E.4.13.2 E.2.avow.181.

It

If Tenant by Knights ſervice maketh a gift in tail, and the Donee maketh a feoffment in fee, and the Donee dieth, his heir within age, the Donor ſhall have the Wardſhip of him, becauſe he is his Tenant in right. (q) But if the Feoffee dieth, his heir within age, the Donor ſhall not have the wardſhip of his heir, but the Lord Paramount, becauſe he is Tenant in fait to him; neither ſhall the Donee avow upon the feoffee or his heir, for the ſervice due unto him, becauſe he muſt in his avowry ſhew the reverſion in fee to be out of him by the feoffment, and conſequently the ſervices incident to the reverſion are alſo out of him, but he ſhall avow upon the Donee and his iſſues: and thus are all the Bookes, that ſeem to be at variance, either anſwered or reconciled.

q) So was it holden Tr. 18 El. in Com. Banco per Cur, which my ſelf heard and noted, in Sr Thomas Wyats Caſe.
r) So it was reſolved in Sir Thomas Wyats ubi ſupra.

(a) *La terre tenus de luy, &c.* Littleton here ſpeaketh of lands holden of a ſubject: for if a man hold land of the King by Knights Service in capite, and other lands of other Lords, and dieth his heir within age, the King ſhall have the wardſhip of all the lands by his Prerogative: and this was due to the King by the Common Law, the fees of certain excepted, as in the Statute of Prærogativa Regis, cap. 1. appeareth.

a) Glanvil lib. 7. cap. 16. Bract. lib. 2. fo. 85. 86, 87. Brit. l. 1. c. 2. Fleet. l. 1. c. 10. 9 H. Prærog. 25. 21 H. 3. lib. 26. Rot. Finium 6. Johan. Stat. Prærog. Reg. c. 1.

But if a man holdeth lands of the King by Knights ſervice, as of an Honor or Manor, &c. (b) in that caſe the King ſhall only have the lands holden of him and not of any other. Yet by reaſon of Tenures of the King by Knights ſervice, of certain Honors, (while they were in the Kings hands) the King (as ſome have ſaid) had (as it were by preſcription) his Prerogative, viz. Raleigh haggener bonony and Peverel, and ſo of lands holden by Knights ſervice of the Duchy of Lancaſter in the County Palatine.

b) Bract. ubi ſupra. Mag. Carta cap. 31. 1 E. 6. ca. 4. 5 E. 3. 5. 47 E. 3. 21. 29 H. 8 Br. tit. Liver. 58. 28 el. 8. ibid. 55.

(c) When a Heir hath been in ward to the King by reaſon of a Tenure in Capite, after his full age he muſt ſue livery, which is half a years profit of his lands holden. But if he be of full age at the time of the death of his Anceſtor, then he ſhall pay for lands in poſſeſſion a whole years profit for Primer ſeiſin: but if it be of a Reverſion expectant, upon an eſtate for life, as Tenant in Dower, Tenant by the Curteſie, or tenant for life, then he ſhall pay but the moity of one years profit.

c) Lib. 8. fol. 172. Hales' caſe 38 H. 8. Br. tit. Livery 60. Vid. ſect. 254.

(d) If the heir be in ward by reaſon of a Tenure, of an Honor or Manor (except as before) he ſhall not ſue livery, but an Ouſter le maine cum exitibus, albeit he never made tender. (e) If it be of full age, the King ſhall have no Primer ſeiſin, but relief. But where the Tenure is in Capite, there the King ſhall have the mean profits untill the tender be made, and if the tender be made, and not duly purſued, the King ſhall alſo have all the mean profits.

d) 1 El. Dier 168.
e) 32 H. 8. tit. Lib. Br. 62.

(f) He that holdeth of the King by Socage in chief, and dieth, his heir of full age, the King ſhall have Livery and Primer ſeiſin only of the lands ſo holden, & not of the lands holden of other. (g) But if the heir of ſuch a Tenant in Socage in chief, be within the age of fourteen at the death of his Anceſtor, he ſhall neither ſue Livery, nor pay Primer ſeiſin, either then or any time after: and the reaſon thereof is, for that the cuſtody of his body and lands in that caſe, belong to the Prochein amy, as Gardian in Socage. (h) Neither ſhall the King have Primer ſeiſin of lands holden in Burgage, (as ſome have ſaid) for that it is no Tenure in Capite.

f) 38 H. 8. Liver. Br. 60. 45 E. 3. 11. 35 H. 6. 52. Stant. 13. b.
g) 20 El. Dier 360. F. N. B. 259. b.
h) F. N. B. 263. 7 E. 4. 17. Stant. Prær. 13. Br. tit. Liv. 65.

Note, there is a generall Livery, and a ſpeciall Livery: A general livery hath two properties.

First, it is full of charge to the heir, for he muſt find an office in every County where he hath land, or elſe he cannot ſue a general Livery, and he muſt ſue out his Writ of Ætate probanda, &c.

(i) The ſecond property is, that it is full of danger: First, it concludeth the heir for ever after to deny any Tenure found in the office. Secondly, If Livery be not ſued of all and of every parcel which the King ought to have, whether it be found in the office or not found (for a general Livery could not be ſued by parcels) the livery is void, and the King may reſeiſe the lands, and be anſwered of the mean profits. So it is if the Office be inſufficient, or the Proceſs whereof the livery was made be inſufficient, or the like, the King ſhall reſeiſe as is aforeſaid. (a) Therefore for the caſe of the heir, and for avoiding of ſuch danger, the heir for the moſt part ſueth out a ſpecial Livery, which containeth a beneficiall pardon, and ſaveth the ſaid charges, and preventeth the ſaid concluſion, and other dangers, which being of grace, and not of right as the general Livery is, the King may well and juſtly take more for a ſpecial Livery, than for a generall, for the cauſes aforeſaid, but ever with ſuch moderation as the heir may cheerfully go through therewith.

i) 49 E. 3. 33. 47 E. 3. 21. 31 H. 6. 29. b. 33 H. 6. 30. 29 Aſſ. 8. P. Com. Gounteis of Leic. caſe. 44 E. 3. 18. 25 12 R. 2. Liv. 28. 2 H. 7. fol. 12.
a) 1 H. 4. 6. b. 37 H. 8. Biſhop. Br. 218. 7 E. 6. ib. 212. Scurfields caſe. Tr. 8 ja. in cur. Ward. 23 El. Dier 377 28 H. 8. Br. tit. Livery 56.

Note that a Livery is in nature of a Reſtitution, which is to be taken favourably: for if Livery be made of a Manor cum pertinentiis, the heir ſhall thereby have the Advowſon appendant; otherwiſe it is in Grants by Letters Patents.

41 E. 3. 5. 5 E. 6 27 Aſſ. 48 P. Com. 352. 26 El. Di. 360.

Since the time that Littleton wrote (c) there is a Court of Wards and Liveries erected by authority of Parliament concerning the order of the Kings Wards, &c. to be holden before the Maſter of the Wards, and the Counſel of that Court appointed by thoſe Acts. This hath made

c) 32 H. 8. 46. 33 H. 8. c. 22.

made ſuch a manifold alteration, as were too long here to be inſerted, & doth belong to another Treatiſe mentioned in the Epiſtle of the Juriſdiction of Courts, where it were neceſſary, that the true Juriſdiction of that Court ſhould be ſet down, a matter of no great difficulty, ſeeing it began ſo late by authority of Parliament. And ſince Littletons time, (d) there is a right profitable Statute made concerning the finding of Offices and other things, not only concerning the Kings Wards, or their rights and poſſeſſions, but ſome other proviſions very beneficial for the ſubject, in all to the number of twelve. (e) Firſt, that ſuch perſons as hold for term of years, or by copy of Court-Roll, or have any rent, common, or profit apprender out of any lands, found in any office, whereby the King is intituled to the wardſhip of the lands or tenements, or to the forfeiture of the lands or tenements upon attainder of treaſon, felony, Præmunire, or any other offence; yet may they have, hold, enjoy, and perceive their ſeveral eſtates, intereſts, and profits, although they be not found in the office. And this being a beneficial Law, the eſtates of tenant by Statute Staple, Merchant, and Elegit, and Executors that hold lands for payment of debts are taken to be within the benefit of the clauſe: (f) and ſo it is a doubt in 14 El. Dier cleared.

(d) 2 E. 6. cap. 8.

(e) 4 E. 23. 32 H. 8. tit. Entre congeable Br. 125.

(f) 14 Eliz. Dier fol. 319.

2. Where it is found, that the heir is of fewer years than in truth he is, he ſhall not be concluded hereby, (g) but every ſuch heir at his very full age may proſecute a Writ of Ætate probanda, and ſue his Livery or Ouſter le maine, in which caſe he had no remedy by the Common Law.

(g) 5 Mar. Dier 136.

(a) 3. Where one perſon or more be found heir, where another perſon is heir, the party grieved had no remedy.

(a) 24 E. 3. 31. 38. 9 H. 6. 18. 12 E. 4. 16. 30. Aſſ. 28. li. 4. f. 56. & 60. Sadlers caſe. Stan. prerog. 58. b. 52. 5 E. 4. 4. 16 E. 4. 4. 1 H. 7. 14. 2 H. 7. 18. 4 H. 7. 15. 8 H. 7. 11. F. N. B. 262. 12 R. 2. Livery 28. F. N. B. 233. Lib. 7. fol. 44, 45. Kens caſe.

4. Or where one perſon or more be found heir in one County, and another perſon or perſons found heir in another County, there could have been no interpleading.

5. Or if any perſon be untruly found by office lunatick, or Idiot, or dead, the party grieved may traverſe the ſaid offices; and you may read in Kens caſe how the office ſhall be traverſed upon this act.

(b) 6. Where it is untruly found by office that any perſon attainted of Treaſon, Felony, or Præmunire, is ſeiſed of any lands, &c. the party grieved having juſt title of Freehold, ſhall have his traverſe or Monſtrans de droit, (without being driven by this double matter of record to his petition of right, as he was before this Statute) which is much more ſpeedy than the petition; for upon the petition there be four writs of ſearch, and every one muſt have forty dayes before the ſerving, and now but two writs of ſearch.

(b) 4 E. 4. 23. 10 H. 6. 19. Lib. 4. fol. 56. &c. Sadlers caſe. 32 H. 8. Entre cong. Br. 125. 14 E. 3. cap. 14.

7. Where an office is found by theſe words or the like, quod de quo vel de quibus tenementa prædicta tenentur, juratores præd' ignorant, or holden of the King per quæ ſervitia juratores ignorant, it ſhall not be taken for any immediate tenure of the King in chief, but in ſuch caſes a Melius inquirendum, to be awarded as hath been accuſtomed of old time. This branch hath been well (d) expounded; for if the firſt office find a Tenure of the King per quæ ſervitia, &c. yet if upon the Melius inquirendum, the tenure be found of a ſubject, the firſt office hath loſt his force per ſenſum hujus ſtatuti, and need not be traverſed, and the Melius, &c. is in nature of the Diem clauſit extremum or mandamus, &c. and this was but a declaration of the ancient Common law, as by the words of the Statute (as hath been accuſtomed of old) it appeareth; but if upon the melius it be found again as uncertaintly as before is ſaid, then it is in judgment of Law, a Tenure in Capite, and ſo it was before the making of this Act, and ſo are the Books that ſpeak hereof to be intended, but if upon the Melius, a tenure be found of the King ut de manerio per quæ ſervitia &c. and it ſhall be taken for Knights Service.

(c) Vid. lib. 6. fol. 6. Wheelers caſe.

(d) 12 Eliz. Dier f. 292. 2. lib. 8. f. 168. Paris Stoughters caſe.

8. Where it is found that Lands, &c. are holden of the King immediately, where in truth they are holden of a common perſon, and not of the King immediately, and that the heir is within age, ſuch heir within age ſhall have his traverſe, &c. which he could not have had by the Common Law.

13 Eliz. Dier 306. 4 H. 6. 13. 10 H. 4. 2. b.

9. The mean Lord of whom the lands are holden, which the King hath by his prerogative, during the minority of the heir, ſhall receive and take ſuch rents as are due unto them by the hands of ſuch of the Kings Officers as receive the profits of the ſame lands, where before that Act, the Lords uſed to ſpare the Rents due, &c. during the Kings poſſeſſion, and after livery ſued, charged the heir with all the arrerages.

10. There is a proviſion for Offices found before the ſtatute, or before the 20 day of March next after the Act.

11. A ſpecial clauſe is, That a Scire fac' ſhall be awarded upon every Traverſe by force of this Act, and where the party was put to his petition, there upon the Traverſe there ſhall be two Writs of ſearch granted.

12. And laſtly, if judgment ſhall be given againſt the King upon a Traverſe by vertue of this act, all former Rights appearing of record are ſaved to the King. But albeit theſe points are moſt neceſſary to be known, yet let us now return to Littleton.

15 E. 4. 12. 46 E. 3. 12. 21 H. 6. 11. 3 H. 7. 5.

Littleton warily and materially treating of a common perſon, ſaith tenus de luy holden of him, for he ſhall have nothing in ward but that which is holden of him. But the King by his pre-

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prerogative shall not only have such lands and tenements which (as hath been said) the heir of his Tenant by Knights Service in capite holdeth of others, but such inheritances also as are not holden at all of any, as Rent Charges, Rent Seeke, Fairs, Markets, Warrens, Annuities, and the like; and so is the law clearly holden at this day, as it hath been resolved; and so experience teacheth, that the King by his prerogative given to him by the ancient Common law shall have those inheritances not holden, and so the quære made by (o) Stanford is cleared and made without question. (o) Stanf. prær fol. 8.

The law is changed since Littleton wrote in many cases, both for the marriage of the body, and for the wardship of the lands, and a far greater benefit given to the Lords then the Common Law gave them; and some advantage given to the heirs, which before they had not, which shall be touched briefly.

If the Father had made an estate for life, or a gift in tail of lands, holden by Knights service to his eldest Son, or other heir apparant within age, the remainder in fee to any other, and died, the heir should not have been in ward, for this was out of the Statute of Merlebridge: But at this day the heir shall be in that case in ward for his body, and a third part of his land. Merlebridge, cap. 1. Pl. Com. 82. 27 H. 10. 33 H. 6. 14.

(a) So if the father had infeoffed his eldest son within age, and a stranger and the heirs of the son, and died, the son should have been out of ward; but at this day he shall be in ward for his body, and for a third part of his moity. (b) So if the father had infeoffed any of his younger sons or others for the making of his wife a Joynture, or for the advancement of his daughters, or for the payment of his debts, and after infeoff and convey the land to his heir, and died, his heir within age, his heir should not have been in ward, because he was bound by the Law of Nature and Nations to provide for them; but now in all these cases the heir shall be in ward for his body, and a third part of the land, and all this groweth by construction upon the Statutes of 32 and 34 H. 8. (c) But if either the eldest son, or any of the younger sons purchase lands of his father which are holden by Knights service, bona fide for the reasonable value; this is out of those Statutes, and the heir shall neither be either in ward, nor pay Primer seison. (a) 31 E. 3. Collusion 29. 33 H. 6. 14. (b) 33 H. 6. 14. 27 H. 8. 7. Lib. 6. fol. 76, 77. Sir George Curſons case. 10 Eliz. 260. 3 Eliz. 193. 20 Eliz. 361. 19 Eliz. 276. 5 Mariæ 158. (c) Lib. 8. fol. 83. Leonard. Loveys case.

And in all the cases abovesaid, (for example) if a Feoffment be made to the use of his wife for life, or to the use of any of his younger sons for life, or to the use of some persons for life for payment of debts, and upon all these estates a remainder is limited over; if the wife or tenant for life die in the life of the father, (d) or if it be conveyed to the use of the wife or younger children in fee, or fee tail, or in fee for payment of debts, and these lands are conveyed away in the life time of the father, after the decease of the father no wardship accrueth by force of any of the said Statutes, for such estates must continue till the title of wardship do grow. (d) Lib. 2. fol. 91. Binghams case, lib. 6. ubi supra 84. Lib. 8. fol. 165. Digbyes case.

(e) If the father convey his lands holden by Knights service, either of the King or of any mean Lord to his middle son in tail, the remainder to the youngest Son in fee, and dieth, the eldest being within age, and the King or Lord seize the body and two parts of the land, if the middle brother die without issue, the King or the Lord shall not have any benefit of the Statute against him in remainder, for the Statute was once satisfied, and the Statute extendeth not to him in remainder. (e) 14 Eliz. Dyer 308. 3 Mariæ Dyer 130. Lib. 2. fol. 93, 94. Binghams case, and Northcots case. Lib. 10. fol. 80. b. Leonard. Loveys case.

(f) If there be a grandfather, father, and divers sons, and the grandfather in the life of the father convey his lands holden by Knights Service to any of the sons, this is out of the Statute of 32 H. 8. and if the grandfather die, there is neither wardship nor Primer seison due, for the father hath the immediate care of his sons; but if the father be dead, then the care of them belongs to the grandfather, and then if the grandfather convey any of the lands to any of the sons, it is within the said Statute; (g) and a conveyance to the use of any of his collateral bloud, which is not his heir apparant is out of the said Statute. And so are conveyances either by father or mother, to or for the use of bastard children out of the Statute, for quicquid damnato coitu nascuntur, inter liberos non computentur. And the Preamble speaketh of lawfull generations. If a man seised of Lands holden in Socage, convey them to the use of his wife, or of his children, or payment of his debts, and after purchase lands holden by Knights service in capite, and dieth, his heir within age, the King shall have no part of the Socage land. (h) But if in that case he had by his will in writing devised his Socage lands in Fee, and after purchased lands holden in capite, and dieth, the King shall have so much of the Socage lands as will make a full third of all. The benefits that grew to the subject by those Acts of Parliament were, that Tenants in Fee simple might devise their lands by their last wills in writing in such manner and form, as by the said Acts appeareth. Also that the father might infeoffe his eldest son or other heir lineal, or collateral of his lands holden by Knights service, and two parts of the lands shall be out of ward. And in † Mights case you shall read excellent matter, of estates made upon collusion. ( f) Lib. 6. fol. 77. Sir George Curſons case, 2 Eliz. Dyer 181. 8 Eliz. Dyer 252. (g) Lib. 10. fol. 83. Leonard. Loveys case. 18 Eliz. Dyer 385. (h) Leon. Loveys case, ubi supra. Butler & Bakers case, lib. 3. fol. 25, &c. † Lib. 8. fol. 163. Mights case.

And both the Statutes of 32 and 34 H. 8. concerning Wills and Wardships are many wayes prejudicial to the heirs, as take one example for many. If Tenant by Knights service

ſervice make a feoffment in fee to the uſe of his wife and her heirs, or to the uſe of a younger ſon and his heirs, or wholly for the payment of his debts. In theſe caſes, although nothing at all of the lands ſo holden deſcend to the heir, but he is diſherited of the ſame, yet his body ſhall be in ward: but this for a little taſte may ſuffice, more hereof you may read in my Report in the ſeveral caſes noted in the margent.

Leon. Louyee caſe ubi ſupra. 22 Eliz. Dyer. 367.

¶ *Pleine age.* Full age regularly is one and twenty years.

32 E. 3. gard. 61.

¶ *Entendment de Ley.* Intendment, i. Intellectus, the underſtanding or intelligence of the Law. Regularly Judges ought to adjudge according to the common intendment of Law.

2 H. 5. 4.

By intendment of Law, every Parſon or Rector of a Church is ſuppoſed to be reſident on his Benefice, unleſſe the contrary be proved.

10 H. 6. 8. 21 E. 3. 33. a. 27 H. 8. fol. 10.

Of common intendment one part of a Manno; ſhall not be of another nature than the reſt.

Of common intendment a Will ſhall not be ſuppoſed to be made by colluſion. In facto quod ſe habet ad bonum & malum, magis de bono, quam de malo, lex intendit. Lex intendit vicinum vicini facta ſcire. Nulla impoſſibilia aut inhoneſta ſunt præſumenda, vera autem & honeſta, & poſſibilia. Lex ſemper intendit quod convenit rationi. As in this caſe, the Gardian ſhall have the cuſtody of the land, until the heir come to his full age of one and twenty years, becauſe by intendment of Law the heir is not able to do Knight ſervice before that age, which is grounded upon apparant reaſon. There note, that the full age of a man or woman to alien, demiſe, let, contract, &c. is one and twenty years, the Civil Law five and twenty years, for then the Romans accounted men to have plenam maturitatem, and the Lombards are eighteen years.

Vide Britton fol. 169.

¶ *Si le heire ne ſoit marie al temps del mort de tiel Auncеſter, &c.* Auncеſter is derived of the Latine word Anteceſſor, and in Law there is a difference between Anteceſſor and Prædeceſſor. For Anteceſſor is applied to a natural perſon, as J. S. & Anteceſſores ſui, but Prædeceſſor is applied to a Body Politique or Corporate, as Epiſcopus London & prædeceſſores ſui. Rector de D. & prædeceſſores ſui, &c.

Glanvil lib. 7. cap. 1. Mirrour, cap. 5. ſect. 2. Britton. fol. 168. b. 39 H. 6. cap. 2.

¶ *Mes ſi tiel tenant devie ſon heire female eſteant del age de* 14 *ans, &c.* And the reaſon as I find in antiquity, wherefore the Law gave the marriage of the heir female if ſhe were within the age of fourteen, and that ſhe ſhould not marry her ſelf, was Pur ceo que les heires females de noſtre terre ne ſe marieront anous enemies, & dount il nous coveindroit lour homage prendre, ſi eux ſe puiſſent marier a lour volunt. This is a ſpecial age for an heir female to be out of ward, if ſhe attain unto it in the life time of her Anceſtor, for at that age, ſhe may have a husband able to do Knights ſervice. A woman hath ſeven ages for ſeveral purpoſes appointed to her by Law: as ſeven years for the Lord to have aid pur file marier: nine years to deſerve Dower, twelve years to conſent to marriage, untill fourteen years to be in Ward, fourteen years to be out Ward, if ſhe attained thereunto in the life of her Anceſtor, ſixteen years for to render her marriage, if ſhe were under the age of fourteen at the death of her Anceſtor, and one and twenty years to alienate her lands, goods and chattells.

35 H. 6. 40. Bract. lib. 2. cap. 37.

A man alſo by the law for ſeveral purpoſes hath divers ages aſſigned unto him, viz. twelve years to take the Oath of Allegeance in the Toune or Leet: fourteen years to conſent to marriage, fourteen years for the heir in Socage to chuſe his Gardian, and fourteen years is alſo accounted his age of diſcretion: fifteen years for the Lord to have aid pur faire firs Chivaler: under one and twenty to be in Ward to the Lord by Knights ſervice: under fourteen to be in Ward to Gardian in Socage: fourteen to be out of ward of Gardian in Socage, and one and twenty to be out of Ward of Gardian in Chivalry, and to alien his lands, goods and chattels.

34 E. 1. ſtat. 3. Glanvil lib. 7. cap. 9. Dyer 5 Mary 162. Bracton lib. 2. cap. 37. F. N. B. 202.

¶ *Mes ſi tiel heire female ſoit deins lage de* 14. *ans & nient marie, &c. Le Seignior avera la gard del terre.* But put caſe the Lord cannot have the wardſhip of the land, as if the Lord before the age of fourteen granteth over the Wardſhip of the body, in this caſe the Grantee of the body cannot enjoy the benefit of the two years, becauſe he cannot hold over the land, and the Lord which hath the Wardſhip of the land onely ſhould loſe the benefit of the two years, becauſe he hath the lands only and cannot tender any marriage; therefore in this caſe the heir female ſhall enter into her land at her age of fourteen years. So if a Tenant holdeth of one Lord by priority, and of another by poſterity and dieth, his heir female within the age of fourteen years, the Lord by poſteriority ſhall have the lands but untill her age of fourteen years, becauſe the marriage belongeth not to him. Alſo if the Lord marrieth the heir female within the two years, her husband and ſhe ſhall preſently enter into the lands: For, Ceſſante cauſa, ceſſat effectus: & ceſſante ratione legis, ceſſat beneficium legis.

35 H. 6. 52. tit. grad. 7. Stanford. 3. b. F. N. B. 256. 259. 35 H. 6. 40.

Britton fol. 169. 35 H. 6. 52.

If

If the Lord tender a conuenable marriage to the heir within the two years, and ſhe marry elſewhere within thoſe two years, the Lord ſhall not have the forfeiture of the marriage, for the Statute giueth the two years only to make a tender. 35 H. 6. 52. 35 H. 6. tit. gard. 71. Lib. 6. fol. 71. the Lord Darcies caſe.

¶ *Et ſi le Seignior deins les dits* 2. *ans ne luy tender tiel marriage, &c. donque el al fine del dits* 2. *ans poet entrer, & ouſte le Seignior.* This is ſo euident, as needeth no explication.

¶ *Mes ſi tiel heire female ſoit marie deins lage de* 14. *ans en la vie ſon Anceſter, & ſon Anceſter devie il eſteant deins age de* 14. *ans, le Seignior navera la gard forſque de la terre ieſque al age de* 14. *ans, &c.* Note, albeit the heir female be married at the age of twelue yeares in the life of her Anceſtor, (at which age ſhe may conſent to matrimony) to a man of full age, that is able to do Knights ſeruice; yet if the Anceſtor die before her age of fourteen, the Gardian ſhall haue the land vntill her age of fourteen, becauſe (as it hath been ſaid) that is the time appointed by the Common law. And ſo if the heir male be married in the life of the Anceſtor at his age of fourteen yeares, and the Anceſtor dieth, the Lord ſhall haue the land vntill the Ward commeth to the age of one and twenty. F. N. B. 143.

¶ *Car ceo eſt hors del caſe del dit ſtatute, inant que le Seignior ne poet tender mariage a luy que eſt marie.*

Natura non facit vacuum, nec lex ſupervacuum. The Law doth neuer enforce a man to do a vain thing.

And where the ſaid Statute of W. 1. giueth vnto the Lord the ſaid two years, thereby is implied, that if he dieth within the two years, his Executors or Adminiſtrators ſhall haue the ſame. For when the Statute veſteth an intereſt in the Lord, the Law giueth the ſame to his Executors or Adminiſtrators. Then put caſe, That a Lord hath the Wardſhip of the body and land of an heir female, and maketh his Executor, and dieth before her age of fourteen yeares, whether the Executor ſhall haue the two yeares, becauſe the Executor is not Lord: But I take it, the Executor hauing the Wardſhip of the body and land, ſhall in that caſe haue the two yeares, for that they were veſted in the Lord. 27 H. 8. 3. 1 E. 3. Exec. 77. 4 E. 3. 55. 28. Aſſ. p. 7.

It is further prouided by the ſaid Statute, that if the Lord tender a conuenable marriage to the heir female within the ſaid two years, and the heir female refuſeth, then the Lord ſhall hold the Land vntill her age of one and twenty yeares; and further, vntill he hath leuied the value of her marriage. But if the Lord doth not tender a marriage within the two yeares, he ſhall loſe the value of the marriage, and content himſelf with the two years value. 31. Aſſ. p. 26. Lib. 6. fol. 71. L. Darcies caſe.

¶ *Car devant le dit ſtatute, &c. ſicome appiert per le rehearſal & parols de le dit ſtatute.* Nota, The rehearſall or preample of the Statute is a good mean to find out the meaning of the Statute, and as it were a key to open the vnderſtanding thereof. The tender of a marriage to an heir female before the age of fourteen is void, which muſt be vnderſtood where the Lord may hold the land for the ſaid two years, for then the Statute appointeth the time of the tender; but where the Lord cannot haue the two years, he may tender a marriage to the heir female at any time after the age of twelue, and before fourteen, for ſo he might haue done at the Common Law. 35 H. 6. 52. gard. 71. 35 H. 6. 52. gard. 71. Lib. 6. fol. 71. Lo. Darcies caſe. Britton 169.

## *Sect.* 104.

¶ NOta, que le pleine age de male & female ſolonque le common parlance, eſt dit lage de 21. ans. Et lage de diſcretion eſt dit lage de 14. ans, car a tiel age le enf. que eſt marie deins tiel age a un feme, puit agreer

NOte, that the full age of male and female according to common ſpeech, is ſaid the age of 21. yeares. And the age of diſcretion is called the age of 14. years. For at this age, the infant which is married within ſuch age to a wo-

¶ Of full age, which is the age of one and twenty, and of the age of diſcretion, which is the age of 14. somewhat hath been ſpoken before. But now to the point of agreement or diſagreement in this caſe. The time of agreement, or diſagreement, when they marry infra annos nubiles, is for the woman at 12. or after, and for the man, at fourteen, or after, and there need no new marriage, if they ſo agree, but diſagree they cannot 5. Mar. gard. Br. pl. ultim. 39 E. 3. 32. 33. præ. reg. cap. 6. Tr. 24 Eliz. Rot. 842 in banke le Roy Bainters caſe.

not before the said ages, and then they may disagree and marry again to others without any divorce: and if they once after give consent, they can never disagree after. If a man of the age of fourteen marry a woman of the age of ten; at her age of twelve he may as well disagree, as she may, though he were of the age of consent, because in contracts of Matrimony either both must be bound, or equal election of disagrement given to both, and so è converso, if the woman be of the age of consent, and the man under.

a tiel matriage, ou disagreer.

man, may agree or disagree to such marriage.

## Sect. 105.

¶ IT is a maxim in law, Quod Dominus non maritabit minorem in custodia sua nisi semel. And another saith, Si semel legitime nupt' fuer', &c. postmodum non tenebuntur sub custodia dominorum esse. Albeit this marriage is de facto, and not de jure; and though the disagrement dissolveth it ab initio, yet the Lord shall never have the marriage of him.

13 E. 1. gard. 137. Britton, fol. 169. acc.

Glanvil. lib. 7. cap. 12. 27 H. 6. gard 118.

And so if the Gardian marrieth his Ward to a woman, and after the marriage is dissolved by reason of a precontract; yet the Gardian shall never have the marriage of the Ward again.

27 H. 6. gard. 118.

But if one ravisheth a Ward from the Lord, and marrieth him within the age of consent; in that case if the Lord taketh again his Ward, and he at the age of consent disagreeth to the marriage, the Lord shall have the marriage of him, for he never had it before.

27 H. gard, 118.

So likewise, if the Ancestor marrieth his heir apparant infra annos nubiles, and dieth his heire within age, the Ward disagreeth, the gardian shall have the Wardship of him. The same law it is in the same case, if the wife dieth before the age of consent, the Lord shall have the marriage of the heir.

F. N. B. 243.

7 H. 6. 11.

And so note a diversity, when the ward is married by the Ancestor, or by a Ravisher, and when by the Gardian himself. (a) For if the Ancestor marry his heir apparent infra annos nubiles and dieth: In this case, if the marriage be dissolved by disagrement, either of the ward or of his wife, the Gardian shall have the marriage of him. (b) And so it is if a Ravisher marry a Ward infra annos nubiles, and the marriage is dissolved, ut supra, the Gardian shall have the marriage. If the heir male in Ward of the age of ten years be married without the consent of the Lord, he may tender unto the heir infra annos nubiles, a marriage, albeit he be so married; and if he refuse, and agree to the former marriage, the Lord shall have the forfeiture of his marriage, as it hath been holden. But otherwise it is (c) (saith Littleton) where the Gardian himself marrieth the Ward, ut supra. And the reason of the diversity is, because in this case the Gardian had once the marriage of him, but so had not he in either of the other cases, and it is a Maxim in Law, Quod Dominus non maritabit pupillum nisi semel.

(a) 30 E. 1. gard. 156. 12 E. gard. 138. 21 E. 3. 19. 20 E. 3. gard. 31. Temps E. 1. ibidem 128. 35 H. 6. 45. 7 H. 6. 11. Prær. Reg. cap. 6. 13 H. 3. gard. 147. Stanf. præ. 16, 27.
(b) 27 H. 6. gard. 118. F. N. B. 143. m. 19 E. 3. judgement 123. 45 E. 3. 16.
(c) 47 E. 3. tit. action sur le statute 38. and the Books aboveclaid.



ET si la Gardein en Chivalrie marie un foits le garde deins lage de 14. ans, a un feme, & puis sil al age de 14. ans disagree a le mariage, il est dit per aſcuns, que lenfant nest pas tenuz per le Ley destre autrefoits marie per son Gardeine, pur ceo que le Gardeine avoit un foits le mariage de luy, & pur ceo il fuit hors de son garde, quant al garde d son corps. Et quant il avoit un foits le mariage de luy & un foits fuit hors de son garde, il navera plus avant le mariage de luy.

AND if the Gardian in Chivalrie doth once marry the Ward within his age of 14. years to a woman, and if afterward at his age of 14. yeares he disagree to the marriage, it is said by some, that the Infant is not tied by the Law, to be again married by his Gardian, for that the Gardian had once the marriage of him, and because he was once out of his ward, as to the ward of his body. And when he had once the marriage of him, and he was once out of his Wardship, he shall no more have the marriage of him.

It appeareth upon conſideration of all the books aforeſaid, that where the Anceſtor marrieth his heir apparent within the age of conſent, and dieth, the Infant ſtill being within the age of conſent, the Lord may take the Infant (if he will) into his poſſeſſion, in reſpect the Infant may diſagree to the marriage, and if the Infant be detained from him, he ſhall recover him in a Writ of rabiſhment of Ward, and thereupon have the Infant delivered to him. (d) But if the Anceſtor marrieth his heir apparant infra annos nubiles, and dieth, his heir being infra annos nubiles, and after age of conſent the heir agreeth to the marriage; neither the King nor the Lord ſhall have the marriage, for now it is a marriage ab initio, and there need no other marriage.

(d) 7 H. 6. 11. adjudge in the book at large.

## *Sect.* 106.

¶ EN meſme le maner eſt, ſi le Gardein in luy marie, & la feme devie eſteant lenfant deins lage de xiiii. ans, ou xxi.

IN the ſame manner it is if the Gardian marry him & the wife die, the Infant being within the age of 14 years or 21.

¶ This Littleton addeth, becauſe he ſpake in the Caſe next before of a diſagreement by the Infant; here he ſaith, that if the wife die, the Infant being within the age of Conſent.

## *Sect.* 107.

ET que tiel enfant poit diſagreer a tiel marriage, quant il vient al age de xiiii. ans, il eſt prove per les parolr del Statute de Merton, Cap. 6. que iſſint dit.

AND that ſuch Infant may diſagree to ſuch marriage, when he comes to the age of 14 years, it is proved by the words of the Statute of Merton, cap. 6. which ſaith thus:

*De dominis qui maritaverint illos quos habent in cuſtodia ſua, villanis, vel aliis, ſicut burgenſibus ubi diſparagentur, ſi talis hæres fuerit infra* 14. *annos & talis ætatis quod matrimonio conſentire non poſſit, tunc ſi parentes illi conquerantur, dominus amittat cuſtodiam illam uſque ad ætatem hæredis, & omne commodum quod inde receptum fuerit convertatur ad commodum hæredis infra ætatem exiſtentis, ſecundum diſpoſitionem parentum propter dedecus ei impoſitum. Si autem fuerit* 14. ans & ultra, *quod conſentire poſſit, & tali matrimonio conſenſerit, nulla ſequatur pœna.*

¶ *Eſtatut le Merton.* So called becauſe the Parliament was holden at Merton.

¶ *Et que tiel enfant poit diſagreer, &c. il eſt prove, &c.* Note, the time of diſagreement is ſet down by act of Parliament, and ſo obſerved by Littleton, who ſeeks no other proof therein, than by the Law of England.

¶ *Ubi diſparagentur.* Diſparagement, Diſparagatio commeth of the Verb Diſparago, and that of diſpar, and ago.

Now it is neceſſary to be underſtood what diſparagements there be for the which the heir may refuſe.

And of ſuch diſparagements, there be four kinds, The firſt propter vitium animi, as an Idiot, non compos mentis, a Lunatique, &c. The ſecond propter vitium ſanguinis, as firſt a Villein. 2. Burgenſis. 3. The ſonne or daughter of a perſon attainted of treaſon or felony, albeit pardoned, for the bloud is corrupted. 4. A Baſtard. 5. An Alien, or the child of an Alien. Burgenſis is a man of trade, as an Haberdaſher, a Draper,

Bracton lib. 2. fol. 91. Britton fol. 169. Fleta lib. 1. cap. 12. Mirrour cap. . ſect. 17. Rot. Parl. 18 E. 1. fol. 9. The daughter of Nevil married to the ſonne of Tho. of Wey and after his alienader.

Et iſſint eſt prove per meſme le eſtatute que nul diſparagement eſt mes lou celuy que eſt en garde eſt marie deins lage de xiiii. ans.

And ſo it is proved by the ſame Statute, that there is no diſparagement, but where he which is in Ward is married within the age of 14 years.

Draper or the like, (and this agreeth with the Civil Law, Patricii cum plebeiis matrimonia ne contrahant.) Whereof Glanvil speaketh thus, Si vero fuerit filius burgensis, ætatem habere tunc intelligitur, quando discretè sciverit denarios numerare, & pannos ulnare, & alia paterna negotia similiter exercere.

The third, propter vitium corporis, as first de membris, having but one hand, one foot, one eye, &c. Secondly, deformity, as to look a squint, a cripple, halt, lame, decrepit, crooked, &c. Thirdly, Privation, as blind, deaf, dumb, &c. Fourthly, Disease horrible, as leprosy, palsy, dropsy, or such like diseases. Fifthly, great and continual infirmity, as a consumption, and such like. Sixthly, Impotency to have children, in respect either of age past children, or so tender years as there is too great disparity, or for naturall disability or impediment, or such like. Seventhly, Defloured of her virginity.

The fourth kind of disparagement was propter jacturam privilegii, &c. as to marry the heir to a widow whereby he should by reason of the Bigamy have lost the benefit of his Clergy, whereby he might save his life, but now the exception of Bigamy in that case is ousted by the (d) statute. And Littleton saith, that there be many other disparagements which are not specified in the said statute, for those two mentioned are put but for examples. In a word, it must be competens maritagium absque disparagatione.

1 E.6. cap.12.
(d) Vide Sect.109. F.N.B.149.

¶ *Si talis hæres fuerit infra* 14. *annos, & talis ætatis quod matrimonio consentire non possit, &c.* Note, albeit the Ward where he is disparaged may disagree at his age of fourteen years, yet the law doth so abhorr the odious dealing of the Gardian, to whom the custody of the heir is committed, and his horrible profanation of honourable marriage, the onely ligament of mens Inheritances, as it inflicteth a great punishment upon the Lord in this case, albeit the marriage be not perfect, but avoydable by disagreement.

¶ *Tunc si parentes illi conquerantur.* Littleton in the next Section expounds these words in this manner, viz. Si parentes conquerantur, i. Si parentes inter eos lamententur: quæ est tanta adire, quæ si les Cosens de tiel infant ont cause de faire lamentation ou complaint pur le honte fait lour Cosen issint disparage, quel est in manner un hont a eux. Parens est nomen generale ad omne genus cognationis. See more of this in the next Section.

¶ *Dominus amittat custodiam illam usque ad ætatem hæredis, & omne commodum quod inde receptum fuerit convertatur ad commodum hæredis, &c.* Here followeth the penalty.

First, amittat custodiam, that is, the whole benefit of the Wardship. But in this case if the Gardian hath granted the wardship of the Land to another bona fide, and after, the heir is disparaged, the Grantee shall not forfeit his interest: for the statute is (Dominus amittat custodiam.)

Secondly, Et omne commodum quod inde receptum fuerit, convertatur ad commodum hæredis, secundum dispositionem parentem. These words are expounded by Littleton, which needeth no further explanation: Now where Readers upon this Statute have put a case that if a Tenant hath issue a daughter, his wife enseint with a son and dieth, the Lord doth disparage the daughter before the age of twelve years, the son is born, the daughter disagrees, the son dieth, the daughter within the age of fourteen, he shall be in ward again. This case is not warranted by this statute, for this statute extends not to the heirs female.

Vide the second part of the Institutes, Merton cap.5.6. 35 H.6.53.

If the Tenant make a lease to A. for life, the Remainder to B. in fee, the Tenant for life surrenders upon condition; B. dieth, his heir within age; the Lord disparageth the heir, Tenant for life entreth for the condition broken and dieth the heir shall be out of Ward, for that he claimeth as heir to one man. But if after the disparagement, lands descend from another Ancestor to the Ward so disparaged, he shall be in Ward for those lands.

If two Joyntenants be of a Ward, and the one disparageth the heir, both shall lose the Wardship, for the words be & omne commodum, &c.

¶ *Si autem fuerit* 14. *annorum & ultra, &c. nulla sequatur pœna.* By which it appeareth (as Littleton observeth) that there is no disparagement but where the Ward is married within the age of fourteen.

Britton, fol. 169. acc.

## *Sect.* 108.

¶ *L'Estatute de Magna Charta.* Though it be in form of a

¶ Nota que il soloit estre question, coment ceux

Note, it hath been a question, how these words shall be par-

1 H.5.

paroir ſerront entendes, Si parentes conquerantur, &c. * Et il ſemble a aſcũs q̃ conſideront leſtatute de Magna Charta que voit, Quod hæred' maritentur abſq; diſparagatione, &c. Sur quel cel Statute de Merton ſur tiel point eſt foundue, Que nul action poit eſtre pris ſur cel Statute, entant que il ne fuit unques view ne oye, q̃ aſcun action fuit port ſur cel Statute de Merton p̃ cel diſparagement enuers le Gardeine pur ceſt matter avandit, &c. Et ſi aſcun action puiſſoit eſtre priſe ſur tiel matter, il ſerra entendue aſcun foits eſtre miſe en uze. * Et nota que ceux paroir ſerront entendes, Si parentes conquerantur, id eſt, ſi parentes inter eos lamententur, que eſt taunt adire, que ſi les Couſins de tiel Enfant ont cauſe de faire lamentation ou complaint enter eux pur le hont fait a lour Couſin iſſint diſparage, quel eſt en maner un hont a eux, donques puit le prochein Couſine a que underſtood. (*Si parentes conquerantur.*) * And it ſeemeth to ſome who conſidering the Statute of *Magna Charta*, which willeth, *Quod hæredes maritentur abſque diſparagatione, &c.* Upon which, this Statute of *Merton* upon this point is founded, that no action can be brought upon this Statute, inſomuch as it was never ſeene or heard, that any Action was brought upon the Statute of *Merton* for this diſparagement againſt the Gardian for the matter aforeſaid, &c. And if any Action might have beene brought for this matter, it ſhall be intended, that at ſome time it would have beene put in ure. * And note, that theſe words ſhall bee underſtood thus, *Si parentes conquerantur, id eſt, ſi parentes inter eos lamententur*, which is as much to ſay, as if the Couſins of ſuch Infant have cauſe to make lamentation or complaint amongſt themſelves, for the ſhame done to their Couſin ſo diſparaged, which in manner is a ſhame to them; then may the next Couſin to whom

Charter, yet being granted by aſſent and Authority of Parliament, Littleton here ſaith it is a Statute. Vide Lib. 8. the Princes caſe.

This Parliamentary Charter hath divers appellations in law. Here it is calſed Magna Charta, not for the length or largeneſſe of it, (for it is but ſhort in reſpect of the Charters granted of private things to private perſons now adayes being (Elephantinæ Chartæ) but it is called the great Charter; in reſpect of the great weightineſs and weighty greatneſſe of the matter contained in it in few words, being the fountain of all the fundamentall laws of the Realm; and therefore it may truly be ſaid of it, that it is Magnum in parvo. It is in our Books called Charta libertatum, & Communis libertas Angliæ, or Libertates Angliæ. Charta de libertatibus, Magna Charta, &c. And well may the Laws of England be called Libertates, quia liberos faciunt. Magna fuit quondam Magnæ reverentia Chartæ. Bracton 414. & 291. Fleta Lib. 2. cap. 48. & lib. 3. cap. 3. Mirrour, cap. Sect. 18. Britton fol. 177. b.

The Statute of Magna Charta, is but a confirmation or reſtitution of the Common Law, as in the Statute called Confirmatio chartarum, Anno 25 E. 1. it appeareth by the opinion of all the Juſtices; and in 5 H. 3. tit. Mord. 53 Magna Charta is there vouched, for there it appeareth, that King John had granted the like Charter of renobation of the ancient Laws. 25 E. 1. 5 H. 3. Mord. 53. Matth. Paris, 246, 247, 248.

This Statute of Magna Charta hath been confirmed above 30 times, and commanded to be put in execution. By the Statute of 25 E. 1. c. 2. judgements given againſt any points of the Charters of Magna Charta, or Charta de Foreſta are adjudged void. And by the Statute of 42 E. 3. cap. 3. If any Statute be made againſt either of theſe Charters, it ſhall be void. 25 E. 1. cap. 2. 42 E. 3. cap. 1.

¶ *Sur de ſtatute de Magna Charta le ſtatute de Merton eſt foundue ſur*

*ſur tiel point, viz. Quod hæredes maritentur abſque diſparagatione.*

¶ *Foundue.* So as Magna Charta is the foundation of other Acts of Parliament. This act extendeth as well to females as to males.

¶ *Nul action poet eſte priſe ſur cel ſtatute, intant qui il ne unques fuit view ou oye, &c. Et ſi aſcun action puiſſoit eſte priſe ſur ceſt matter il ſerra intend a aſcun foits eſtre miſe in ure.*

Vide Petitiones coram domino rege in Parliamento, fol. 3. 18 E. 1.
39 H. 6. 39. per Aſhton.
6 Eliz. Dier 229.
23 Eliz. Dier.
Nullum breve derrore de judicio in 5. port. quia nullum breve reperitur.
3 E. 3. 50. 11 H. 4. 7. & 38.

lenheritage ne puit diſcender, enter & ouſter le Gardeine en Chivalrie. Et ſil ne voile, un auter couſin del enfant poit ceo faire, & les iſſues & pfits prender al uſe del enfant, & de ceo render accompt al enfant, quant il vient a ſon plein age: ou auterm̃t lenfãt deins age poit enter luy meſme & ouſter le gardein, &c. Sed quære de hoc.

the inheritance cannot deſcend, enter and ouſte the Gardein in Chivalrie. And if he will not, another couſin of the infant may do this, and take the iſſues and profits to the uſe of the infant, and of this to render an account to the Infant when he comes to his full age: or otherwiſe the Infant within age may enter himſelfe, and ouſte the Gardein, &c. *Sed quære de hoc.*

Hereby it appeareth how ſafe it is to be guided by judicial preſidents, the rule being good, Periculoſum exiſtimo quod bonorum virorum non comprobatur exemplo. And as Uſage is a good Interpreter of Laws, ſo non-uſage, where there is no example, is a great intendment, that the Law will not bear it; for ſaith Littleton, If any anciõn might have bẽn grounded upon ſuch matter, it ſhall be intended that ſometime it ſhould have bẽn put in ure. Not that an Act of Parliament by non Uſer can be antiquated or loſe his force, but that it may be expounded or declared how the Act is to be underſtood.

¶ *Si parentes conquerantur.* Of this ſufficient hath bẽn ſaid before.

¶ *Si les Couſins.* Here Littleton expounds Parents to be his Couſins, under which name of Couſins Littleton includeth Uncles and other Couſins, who when the Father is dead, are in loco parentum.

Vide Leſtatute de Marlebrigde, cap. 17.
In cuſtodia parentum.

¶ *Ont cauſe a faire lamentation, &c.* Note, if they have cauſe to make lamentation, it ſufficeth, though they never complain.

¶ *Pur le hont fait a lour couſin.* For when their Couſin is diſparaged in his marriage, it is not only a ſhame and infamy to the heir, but in him to all his bloud and kindred.

¶ *Donques poit le procheine couſin a que le enheritance ne poit diſcender enter & ouſter le Gardein in Chivalry.*

This is worthy the obſervation, for the words of the ſtatute are general, ſecundum diſpoſitionem parentum, and the conſtruction thereof ſhall be according to the reaſon of the common law; for the next couſin to whom the inheritance cannot deſcend, ſhall enter & ouſte the Gardian, and ſhall be in place of a Gardian, as it is in caſe of a Gardian in Socage.

¶ *Et ſil ne voile, un auter couſin del Enfant poet ceo faire.* Still purſuing the reaſon of the common law in caſe of Gardian in Socage.

¶ *Et les iſſues & proffits prender al uſe del enfant, &c.* This is ſo evident, as it needeth no explanation.

¶ *Ou auterment lenfant deins age poit enter luy meſme, & ouſte le gardein.* If none of the Couſins aforeſaid will enter, then the heir himſelf may enter. In all which, the reaſon of the Common Law is purſued. But what if the heir be diſparaged, and the next of kin doth enter, and when the heir cometh to 14 he agreeth to the marriage? yet ſhall not this give any advantage to the Lord, for that he had loſt the Wardſhip before.

*Sect.*

## *Sect.* 109.

¶ Of this ſufficient hath been ſaid before.

¶ Item mults auters divers diſparagements y ſont, que ne ſont ſpecifies en meſme leſtatute. Come ſi l'heire que eſt en gard eſt mary a unque nad forſq; un pee, ou forſq; un maine, ou q; eſt defoyme, decrepite, ou ayant horrible diſeaſe, ou graund & continual infirmitie: Et (ſi ſoit heire male) ſi ſoit marry a feme que eſt paſſe large denfantez. Et mults auters cauſes de diſparagements ſont. Sed de illis quære, car il eſt bon matter dapprender.

Alſo there be many and divers other diſparagements, which are not ſpecified in the ſame Statute. As if the heire which is in Ward be married to one which hath but one foot, or but one hand, or which is deformed, decrepit, or having ſome horrible diſeaſe, or great & continual infirmity. And (if he be an heire male) if he be married to a woman paſt the age of Child-bearing. And there be other cauſes of diſparagement. But inquire of them, for it is a good matter to underſtand.

## *Sect.* 110.

Et des heires males que ſont deins lage de 21. ans apres le mort lour anceſtor mēt marries, en tiel cas le ſr̄ avera le mariage de tiel heire, & avera temps & ſpace de tender a luy convenable mariage ſās diſparagement deins m̄ le temps de 21. ans. Et eſt aſcavoir, q; l'heire ē tiel caſe poit eſlier ſil voit ēe marry ou non, mes ſi le Sr̄ que eſt appel Gardein en Chivalry a tiel heire tēder convenabl' mariage deins lage de 21. ās ſās diſparagemēt, & l'heire ceo refuſe, & ne ſoy marie deyns le dit age,

And of heirs males which be within the age of 21. years after the deceaſe of their Anceſtor & not married, in this caſe the Lord ſhal have the mariage of ſuch heir, and he ſhall have time and ſpace to tender to him covenable marriage without diſparagement within the ſaid time of 21. year. And it is to be underſtood, that the heir in this caſe may chuſe whether he will be married or no, but if the Lord which is called Gardian in Chivalrie tenders to ſuch heire covenable marriage within the age of 21. years without diſpa-

¶ *De Tender a luy convenable marriage, &c.* But it is in the election of the Lord, whether for the ſingle value the Lord will tender a marriage or no, for he ſhall have the ſingle value without any tender. Lib. 6. fol. 70. Lo. Darcies caſe. Vid. Britton, fol. 169.

And of this there needeth no other explication. The value of the marriage of ſuch an heir is according to the valuation by lawfull triall, or as much as another had before offered to give for the ſame without fraud and covin. Merton, cap. 6. 18 E. 3. 18.

¶ *Le heire en tiel caſe poit eſlier ſil voit eſta marrie, ou non, &c.* And ſo on the other ſide, though there be a tender made of a Covenable Marriage without diſparagement, yet the heir may refuſe: for in every marriage there

thers muſt be a free conſent.

¶ *Si tiel heire.* That is, if ſuch an heir to whom a tender hath been made by the Lord, and by whom a refuſall hath been made, if ſuch an heire afterwards marrieth another within age, he ſhall forfeit double the value; but if he before any tender marrieth himſelf within age, he ſhall pay but the ſingle value of the marriage.

Neither the ſingle value, nor the double value ſhall be recovered againſt the heire, but after his full age; but for both theſe the Lord hath a double remedy, viz. an Action as is aforeſaid, or the Lord may retain the Land after full age for his ſatisfaction of both, with this difference, that in the caſe of the ſingle value the taking of the profits ſhall not be accounted parcell of the value, but as a gage or pledge till the heir do ſatisfy him of the ſingle value; but in caſe of the double value, the perception of the profits ſhall be taken in ſatisfaction of the double value; for the ſtatute of Merton which giveth the forfeiture ſaith, Dominus teneat terram, &c. per tantum tempus quod inde percipere poſſit duplicem valorem maritagii: which words (quod inde, &c.) proveth that the taking of the profits ſhall go in ſatisfaction, but in caſe of the ſingle value, until the heir doth ſatisfy the Lord of the ſame.

donques le Gardeine aūra l' value del mariage del tiel heire male, mes ſi tiel heire luy m̄ marie deins lage de 21. ans encoūter la volunt le Gardeine en Chivalrie, donqꝫ le Gardein aūa le double value del maꝝ per force de leſtaꝫ d̄ Merton avantdit come en m̄ leſtaꝫ eſt compriſe pluis a pleine.

ragement, and the heir refuſeth this, and doth not marry himſelfe within the ſaid age, then the Gardein ſhall have the value of the Marriage of ſuch heire male, but if ſuch heire marrieth himſelf within the age of 21. years againſt the will of the Gardein in Chivalry, then the Gardein ſhall have the double value of the Marriage by force of the Statute of *Merton* aforeſaid, as in the ſame Statute is more fully at large compriſed.

Stat. de Merton, cap. 6.
2 E. 2. acc. fur. leſtat. 43.
3 E. 2. ibi. 27.
16 E. 3. b. 14. 18 E. 3. 18.
Temps E. 1. acc. fur. eſtat.
42 E. 3. 21. 27 H. 8. 4.
Stat. de Merton. cap. 7.
25 H. 6. tit. grad. 71. lib. 6. fol. 71. Lord Daleies caſe.

No forfeiture of marriage is given by the ſaid ſtatute of Merton of an heir female, as appeareth by the ſaid Act; neither at the common law could the Lord have holden the land of the heir female after fourteen years for the value.

## *Sect.* 111.

¶ *PEr Caſtle Gard. Wardum Caſtri, ſeu Caſtle-gardum, ſeu Caſtri-gardum.* He that holdeth by Caſtle-gard, holdeth by Knights Service, but not by Eſcuage, for Eſcuage is due when the King maketh a voyage Royall out of this Realm (as hath been ſaid) and the Tenant maketh default, but Caſtle-gard is to be done within the Realme, and without any voyage royal.

Also a certaine Terme is appointed for the Service of the Tenant that holdeth by Eſcuage, but no certain Terme by Law for him that holdeth by Caſtle-gard. Vide in the Title of Grand Serjeanty, Sect. Hereof come

¶ Item divers Tenants teignont de lour Seignors p ſervice de Chivaler & uncore ils ne teignont per Eſcuage, ne paieront Eſcuage, come ceux que teignont de lour Seigniors per Caſtle garde, ceſtaſcavoire, a garder un Tower del Caſtle lour Seignior, ou un huis ou un auter lieu del Caſtle per reaſonable garniſhment quant lour Seigni-

ALſo divers Tenants hold of their Lords by Knights Service, and yet they hold not by Eſcuage, neither ſhall they pay Eſcuage. As they which hold of their Lords by Caſtleward; that is to ſay, to ward a Tower of the Caſtle of their Lord, or a Door or ſome other place of the Caſtle upon reaſonable warning, when their Lords heare that the

Lib. 4. fol. 88. Sir Luttrels caſe Lib. 6. fol. 20. 2. Gregories caſe.
19 R. 2. gard. 195.

ors

ors oyant que enemies voylent venir, ou ſont venus en Engleterre. Et en pluſors autres caſes home poit tener per ſervice de Chivaler, & uncore il ne tient per Eſcuage, ne payera Eſcuage, ſicome ſerra dit en le Tenure per Grand Serjeantie. Mes en touts caſes ou home tient per ſervice de Chivaler, tiel ſervice trait al Seignior garde & mariage.

enemies will come, or are come in England. And in many other Caſes a man may hold by Knights Service, and yet hee holdeth not by Eſcuage, nor ſhall pay Eſcuage, as ſhall be ſaid in the tenure by Grand Serjeantie. But in all Caſes where a man holds by Knights Service, this Service draweth to the Lord Ward and Marriage.

Caſtellani, or Conſtabularii caſtri, for Keepers or Conſtables of a Caſtle. Vide Mag. Chart. cap. 19. 20. W. 1. cap. 7. Bract. lib. 5. fol. 363. Fleta lib. 2. cap. 43.

¶ *A garder un Tower del Caſtle, &c.* A Tower, or a Dore, or a Bridge, or a Sconce, or ſome other certain part of the Caſtle, for the Tenure muſt be certain. And this may be done by the Tenant himſelf or his Deputy. Magna Chart. cap. 20.

¶ *Del Seignior.* For it cannot be of a Caſtle of another.

Lord and Tenant by Caſtle gard, the Lord granteth over his Seigniorie to another, (a) the Caſtle-gard is gone, becauſe the grantee hath not the Caſtle. (b) For the ſame reaſon it is, that if one holdeth of me, as of my Manor of D. by fealty and ſuit of Court, if I grant over the ſervices of this Tenant, the ſuit is gone, becauſe the Grantee hath not the Manor. (c) But if the Caſtle be wholly ruinated, Si Caſtrum ſit penitus dirutum, yet the Tenure remaineth by Knights Service, and it goeth in benefit of the Tenant, as to the garding of the Caſtle until it be re-edified. But ward and marriage belongeth to the Lord in the mean time. For Littleton in the end of this Section putteth it for a generall rule in all caſes; where a man holdeth by Knights Service, it draweth ward and marriage.

(a) Temps E. 2. tit. Aſſ. 399. 31 E. 1. tit. Aſſ. 441.
(b) 17 E. 3. 65. 72. 4 E. 3. 42.
(c) Lib. 4. fol. 88. Luthrels caſe. 3 H. 8. Bendloes, Capels caſe. 4 E. 3. 55.

If the tenant make default in garding of the Caſtle, the Lord may diſtreine for it, and recover ſatisfaction in dammages.

¶ *Per reaſonable garniſhment.* This warning muſt be given by the Lord or ſome other for him, and the tenant need not to ſtir until he have ſuch warning.

¶ *Enemies.* Which is to be underſtood of any manner of enemies whatſoever. And though Littleton ſpeaks of enemies, yet it ſeemeth that to keep a Caſtle in time of inſurrection and rebellion (albeit in propriety of ſpeech Rebels are no enemies) is a Tenure by Knights Service. Vide Hill. 8 E. 1. Midd. Ror. 86.

¶ *Voylunt venir.* For preparation is to be made upon warning, before the Enemy be come indeed into England. This appeareth to be in time of hoſtility and war, or for preparation therefore. But a Tenure to keep a Caſtle in time of peace only is no Knights ſervice.

If the tenant by Caſtle-gard do ſerve the King in his War, he ſhall be diſcharged againſt the Lord, according to the quantity of the time that he was in the Kings hoſt.

Fleta ſpeaketh of an old word called Wardwite, and (ſaith he) ſignificat quie tanciam miſericordiæ, in caſu quo non inventerit quis hominem ad Wardam faciendam in Caſtro. Fleta lib. 1. cap. 42.

## *Sect.* 112.

¶ ET ſi un tenant que tient de ſon Seignior per ſervice de entire fee de Chivaler mourk, ſon heir donqs eſteant de plein age, ſ. de 21. ans,

AND if a Tenant which holdeth of his Lord by the ſervice of a whole Knights fee dieth, his heire then being of full age s. of 21 years, then

¶ *Reliefe; Relevium.* This word is derived from the originall before. Vide Sect. 103.

Note, Relief (a) is no ſervice, but an improvement of the ſervice, or an incident to the ſervice, for the which the Lord may diſtrein, but cannot have an Action of Debt, but

(a) Temps E. 1. relief 13. 41 E. 3. 22. 4 E. 2. avowry 210. 7 H. 6. 11. 22 H. 8. Rot. 528. 3 E. 1. avowry 233.

but his Executors or Adminiſtrators may have an Action of Debt, and cannot diſtrain.

(b) Stat. de 1 E. 2. de militibus, Vide lib. 9. fol. 124. Anth. Lowes caſe.

And it (b) is to be underſtood that Feodum militis, a Knights Fee, conſiſteth of twentie pound land, and he payeth for his Relief, for a whole Knights Fee, the fourth part of his fee, viz. five pound, and ſo according to the Rate.

donque le Seignior avera C. ſ. pur reliefe, & del heire celuy que tient per le moitie dun fee de Chivaler L. ſ. & de celuy que tient per l' quart part de fee dun chivaler 25. ſ. & ſic que pluis, pluis; & que meins, meins.

the Lord ſhall have C. s. for a Relief, and of the heir of him which holds by the moity of a Knights Fee 50. s. and of him which holds by the fourth part of a Knights Fee 25. s. and ſo he which holds more, more; and which leſſe, leſſe.

Baronia, a Barony, or a Barons Fee conſiſteth of thirteen Knights Fees, and the third part of a Knights Fee, which amounteth to four hundred marks per annum, and the Baron for an entire Barony payeth for his Relief an hundred marks, which is the fourth part of the value of his Barony.

Comitatus, an Earldom, or an Earls Fee, conſiſteth of a Barony, and the third part of a Barony, which includeth twenty Knights fees, amounting to four hundred pound land per annum, and he payeth for his Relief for an entire Earldom ¼ fourth part of his Revenue, & ¼ is an hundred pound. All which appeareth by the ſtatute of Magna Charta, ca. 2. made in ¼ ninth year of Henry the third, at which time there was neither Duke, Marquels, nor Viſcount in England, as before is ſaid. But there be Preſidents in the Exchequer, that a Dukedom, conſiſting of two Earldoms, viz. eight hundred pound land by the year, payeth two hundred pound; and a Marquels, conſiſting of two Baronies, viz. eight hundred Marks land per annum, and of an Earldom and a half, payeth two hundred marks for his Relief. What the Viſcount ſhould pay in certain, I have not heard. Before the making of the ſtatute of Magna Charta the King had rationabile relevium of Noblemen, and it was not reduced to any certainty, yet ought it to have been reaſonable and not exceſſive.

Glanvil lib. 9. cap. 4. 6. Bracton, lib. 2. fol. 83. Britton, fol. 178. Ockam 42. F. N. B. 82. 256. Fleta lib. 3. cap. 17. Magna Charta, cap. 2.

I have ſeen the Record of a Charter made in 20 H. 6. to Henry Beauchampe, Earl of Warwick, whereby he was created King of the Iſle of Wight, to him and the heirs males of his body, his relief was incertain, and not limited by the ſtatute of Magna Charta.

Vide Bracton fol. 84. 14 H. 4. in recordo Iongo. 10 H. 7. 19. 20 E. 3. Aſſ. 122, tit. avowery. 126. 18. Aſſ. pl. ultimo. 22 E. 3. 8.

It is to be obſerved that the words of the ſtatute of Magna Charta, be Hæres Comitis de Comitatu integro, & hæres Baronis de Baronia integra, &c. Now, what an entire Earldom, and an entire Barony is, hath been declared before.

It is alſo to be obſerved, that at and before the ſtatute of Magna Charta, all Earldoms and Baronies were derived from the Crown, and were holden of the King in capite, and the King would not ſuffer them to be divided or ſevered. And ſuch entire Earldoms, and entire Baronies are within the Statute; but at this day Earls and Barons are without ſuch Earldoms and Baronies of the Kings gift in chief. For at the creation of an Earl he hath ſometimes an Annuity granted unto him, and ſometime nothing; ſo as ſuch Earls and Barons ſo created, are clearly out of the Statute of Magna Charta, and are to pay ſuch reliefs as other men that hold of the King in capite. For as the heir of a Knight ſhall not pay relief, unleſſe he hath a Knights fee, &c. ſo neither the Earle nor Baron ſhall pay any relief by this Statute, unleſſe he hath an Earldom, &c. or Barony, &c.

16 E. 3. Eſchange 2. 46 E. 3. Forfeiture 18.

¶ *Son heire de pleine age, ſc. de* 21. *ans.* And yet in ſome caſe the heir ſhall pay relief, when he was within age at the time of the death of his Anceſtor. As if a man holdeth lands of the King by Knights Service in capite, and of a common perſon, other lands by Knights Service, and dieth, his heir being within age; the King hath all in ward by his Prerogative, until the full age of the heir. In this caſe the heir ſhall pay relief to the other Lord, for that the King had the Wardſhip of body and lands. And the Lord upon every Diſcent ought to have either Wardſhip or Relief.

24 E. 3. 24. 26 H. 8. 32 H. 8. cap. 2. in fine.

But if there be Lord and Tenant by Knights ſervice and the Tenant dieth, his heir being within age, the Lord waiveth his Wardſhip as he may, and taketh himſelf to his Seigniory; in this caſe the Lord ſhall not have relief at his full age, becauſe he might have had the Wardſhip of the body and land. Lord and Tenant of two Manors by divers Tenures by Knights Service, the Tenant is diſſeiſed of the one and the Diſſeiſor dieth ſeiſed, and the Tenant dieth ſeiſed of the other his heir within age, the Lord ſeiſed the body and lands of that Manor, and after the heir at his full age recovereth the other Manor againſt the heir of the Diſſeiſor, he ſhall pay relief for that Manor, and ſo one Lord of the heir of one tenant ſhall have both Wardſhip during his minority, and Relief at his full age.

1 E. 3. 6. Pl. Com. 229. 33 E. 3. gard. Sathom.

¶ *Son*

¶ *Son heire.* (k) And yet the ſucceſſor of a Biſhop or Abbot may pay relief by preſcription or grant.

If the Tenant infeoffeth his heir apparent by colluſion, and dieth, (l) his heir of full age, it is a queſtion in our Books, whether he ſhall have relief either by the Common Law, or by the Statute of Marlebridge, cap. 6. But now the Statute (m) of 13 Eliz. c. 5. hath cleared that queſtion, and that the Lord ſhall have relief where the conveyance is made to any perſon by colluſion, &c.

(k) 3 E. 3. 13. 76. 8 R. 2. relief 14. 3 H. 4. 2. 2 E. 3. avowry 134.
(l) 39 E. 3. tit. Relief, 24 E. 3. 24 E. 3. Relief, 11. Bracton, lib. 2. 85.
(m) 13 Eliz. cap. 5.

## *Sect.* 113.

This is evident, and needeth no explanation.

¶Item home poſt teñ ſon tre de ſon Sñr per le ſervice de deux fees de Chivaler, & donque lheire eſteant de pleine age al temps de mort ſon anceſtre paiera a ſon Sñr x. l. pur reliefe.

ALſo a man may hold his Land of his Lord by the ſervice of two Knights fees, and then the heir being of full age at the time of the death of his Anceſtor, ſhall pay to his Lord x. pound for reliefe.

## *Sect.* 114.

¶NOta ſi ſoit ail, pier, & fits, & ſa mere morust vivant le pier de le fits & puis laiel que tient ſa terre p Service de Chivaler murust ſeiſi, & ſa terre diſcendiſt al fits la mere, come heire al aiel q̄ eſt deins age: en ceſt cas le Sñr avera le garde de la terre, mes nemy le garde del corps del heire, pur ceo que nul ſerra en gard de ſon corps a aſcun Sñr bivant ſon pier pur ceo que le pier durant ſon vie avera le mariage de ſon heire apparant, & nemy le Sñr, Autrement eſt ou le pier eſt mort vivant la mere, lou le terre tenus en Chi-

NOte, if Grandfather, father, and ſonne, and the mother dieth living the father of the ſonne, and after the grandfather which holds his Land by Knights Service dieth ſeiſed, and his land deſcend to the ſonne of the mother as heir to the grandfather, who is within age: In this caſe, the Lord ſhall have the Wardſhip of the land, but not of the body of the heire, becauſe none ſhall be in Ward of his body to any Lord, living his father, for the father during his life ſhall have the marriage of his heir apparent, and not the Lord. Otherwiſe it is where the father dyeth living the mother,

¶ *Fitz.* yet the father ſhall have the marriage of his Daughter if ſhe be his heir apparent, and Littletons reaſon extendeth to the daughter, for that (ſaith he) the Father ſhall have the Wardſhip of her heire apparent, within which words the daughter is included, ſo long as ſhe continueth heir apparent.

Fleta lib. 1. cap. 5. 16 E. 3. diſſeiſin 6. 31 E. 1. gard. 154. 8 E. 2. treſp. 235. P. N. B. 243. Ambroſia Gorges caſe, lib. 6. fol. 22.

¶ *Le Seignior avera le gard del terre.* Note that albeit in this caſe the Law doth give the cuſtody of the body to the father, and barreth the Lord thereof; yet the Lord ſhall have the Wardſhip of the Land by force of the tenure at the firſt creation thereof. And ſo it is, if the Father marrieth his heir within age, and dieth, yet the Lord ſhall have the Wardſhip of the land.

¶ *Vivant ſon pier.* This doth not extend to any collaterall heir, but only to the ſonne or daughter being heir apparent; for albeit a man ſhall have an Action of treſpaſſe, Quare conſanguineum & hæredem cepit, and albeit the words be Cujus maritagium ad ipſum pertinet; becauſe the well beſtowing of his

9 E. 2. 18 E. 3. 25. 29. 34. 29 E. 3. 37. 31 E. 3. barr. 237.

23 E. 3. Gard. 32.
30 E. 3. 17.
31 H. 655, 12 H. 7. 16.
F. N. B. 141. 31 E. 3.
Br. 357. 9 E. 4. 53.

his heire apparent in marriage is a great eſtabliſhment of his houſe; yet that is to be underſtood as againſt a wrong doer, but not againſt a Gardian in chivalry, and the mother ſhall have the like Writ for taking away of her ſon and heir apparent: and yet the mother ſhall not barr the Lord by Knights ſervice, of his Wardſhip of the body, as Littleton here ſaith, Quitamen ex filia tua naſcitur in poteſtate tua non eſt, ſed patris ejus.

valrie diſcendis al fits de part ſon pier, &c.

where the land holden in Chivalrie deſcends to the ſon on the part of the father, &c.

Vide Flet. lib. 1. cap. 6. Soe W. 2. cap. 35.

¶ *A ſcun Seignior.* Put the caſe there is Lord, & Feme Tenant by Knights Service of a Carue of land, the Feme maketh a Feoffment in Fee upon condition, and taketh the Lord to husband, and habe iſſue a ſon, the wife dieth, the iſſue entreth for the condition broken, the Lord entreth into the land as Gardeine by Knights ſervice, and maketh his Executors, and dieth: in this caſe the Executors ſhall have the Wardſhip of the land during the minority of the heir, but not the Wardſhip of the body; for albeit the Lord ſeemeth to have a double intereſt in the Wardſhip of the body, one as Lord, and another as Father; yet as Father, and not as Lord in judgement of Law, he ſhall have the wardſhip of the body of his ſon and heir apparent, in reſpect of nature, which was before any wardſhip in reſpect of Seigniories by Knights Service began and that Wardſhip by reaſon of nature cannot be waved, and claim made in reſpect of the Seigniory. And the Executors of the father ſhall not have ſuch a Wardſhip which the Teſtator had as father, neither can ſuch a Wardſhip be forfeited by outlawry, becauſe it is due to the father, in reſpect of privity of nature.

33 H. 6. 55. lib. 7. fol. 13. in Calvins caſe. Vid. Flet. lib. 1. c. 12. Sect. cam. Patr. de feodo. &c.

¶ *De ſon heire apparent.* And therefore if the father be attainted of felony, &c. then cannot the ſon or daughter be an heir apparent, becauſe the bloud is corrupted between them, and conſequently in the life of the father, his ſon in that caſe ſhall be in Ward.

A woman ſeiſed of lands in fee, holden by Knights ſervice, taketh husband an Alien, and hath iſſue, and the wife dieth, the iſſue ſhall be in ward, and the father ſhall not have the cuſtody of him, for that in the eye of the law he is not his heir apparent, as Littleton here ſpeaketh.

## Sect. 115.

This Section is an addition to Littleton, and therefore I paſſe it over; and the rather, for that the ſaid Statute of 4 H. 7. is become of no force, for that by the Statute of 27 H. 8. cap. 10, all uſes are transferred into poſſeſſion.

¶ * NOta, ſi home ſoit ſeiſie de Terre que eſt tenus per Service de Chivaler, & fait feoffment en fee a ſon uſe, & moyuſt ſeiſie del uſe, ſon heire deins age, & nul volunt per luy declare, le Seignior avera briefe de droit de gard de corps, & del Terre, ſicome Tenant uſt devie ſeiſie del demeſne. Et ſi le heire ſoit de pleine age al temps de moyant ſon anceſtor, en tiel caſe il payera reliefe, ſicome il fuiſſoit ſeiſie del demeſne. Et ceſt per leſtatut de Anno 4 H. 7. Cap. 17.

NOte, If a man be ſeiſed of land which is holden by Knights ſervice, and maketh a feoffment in fee to his own uſe, & dieth ſeiſed of the uſe, his heir within age, and no Will declared by him, the Lord ſhall have a Writ of Right of the Wardſhip of the body and land, as if the Tenant had died ſeiſed of the demeſne. And if the heir be of full age at the time of the deceaſe of his Anceſtor, in this caſe he ſhall pay reliefe, as if he had been ſeiſed of the demeſne. And this is by the Statute of 4 *H.* 7. *Cap.* 17.

Sect.

## *Sect.* 116.

¶ NOta, il y ad Gardein en droit en Chivalry, & Gardein en fait en Chivalrie. Gardein en droit en Chivalrie est, lou le Seigniour p cause de son Seigniory, est seisie de gard de Terres & del heire, ut supra. Gardein en fait en Chivalrie est, lou en tiel case le Seigniour apres son seisin graunt per fait ou sauns fait le Gard des Terres, ou del heire ou dambideux a un auter. Per force de quel grant le grauntee est en possession, donque est le Grauntee appell Gardein en Fait.

NOte, there is Gardian in right in Chivalrie, and Gardian in Deed in Chivalrie. Gardian in Right in Chivalry is, where the Lord by reason of his Seigniory, is seised of the Wardship of the Lands, and of the Heir, *ut supra*. Gardian in Deed in Chivalry is, where in such case the Lord after his Seisin graunts by Deed, or without Deed, the Wardship of the Lands, or of the Heire, or of both, to another; by force of which Grant, the Grantee is in possession, then is the Grantee called Gardian in Fait, or Gardian in Deed.

¶ HEre Littleton divideth Gardian in Chivalry, into Gardian in Right, and Gardian in Fait. And this is evident, and needeth no explanation.

¶ *Per fait ou sauns fait.* Here Littleton affirmeth, That the Wardship of the body may be granted over without Deed, and herein note a diversity between an original chattell of a thing that properly lyeth in grant, and a Chattel derived out of a Freehold of any thing that lieth in grant. As for example, if a man make a Lease for years of a villein, this cannot be done without deed, neither can the Lesse assigne it over without deed, because it is derived out of a Freehold that lieth in grant: but the Wardship of the body is an original Chattell, during the minority derived out of no Freehold, and therefore as the Law created it without deed, so it may be assigned over without Deed.

12 E.3.tit. Grant. 59. 7 E.3.63.26 E.3.65. 28 E.3.96.14 E.3.Act. sur.Lest. 17.25 E.3.40. 31 E.3.vouch.5. 46 E.3 25. 20 E.4,16. 12 H.4,19. 5 H.7.17.36. 22 E.Dyer 371. 35 H.8.Br.tit. Grant.85.

A corporation aggregate of many, cannot make a Lease for years without Deed, in respect of the quality of the Incorporation, but their lesse may assign it over without Deed.

36 H.8,tit. Grant.B.125. 22 H.6.34.19 H.6.33.

If an Advowson be holden by Knights Service, & the tenant dieth, his heir being within age, the Lord cannot grant the Wardship of the Advowson without Deed, because it is derived out of an Inheritance that lieth in grant, and passeth not by Livery: for Jus præsentandi est incorporale, and so (albeit there be diversity of opinion in our books) is the law taken at this day.

24 E.3.69.70. 5 E.3.58. 43 E.3.15. 5 H.7.36. 14 H.7.16. 15 H.8.8. 48.a Bract. 366.368.246. 43 E.3.1.6.5 H.7.37. 11 H.6.4. 6 H.7. 3. 18 H.8.16 El.Dyer 323.

## CHAP. 5. *Sect.* 117.

## *Socage.*

Mirronr.cap.1. Sect.4.

¶ *Tenure in Socage.* Agriculture or tillage is of great account in law, as being very profitable for the Common-Wealth, wherein the goodnesse of the habit is best knowne by the privation: For by laying of Lands, used in tilth, to pasture, six main inconveniences do daily increase. First, Idlenesse, which is the ground and beginning of all mischiefes. 2. Depopulation, and decay of Towns; For where in some Towns 200 persons were occupied, and lived by their lawfull labors, by converting of Tillage into Pasture; there have been maintained but two or three heardmen: And where men have been accounted sheep of Gods pasture, now become sheepmen of these pastures. 3. Husbandry, which is one of the greatest commodities of the Realm, is decayed. 4. Churches are destroyed, & the service of God neglected by the diminution of Church livings, (as by decay of tithes, &c.) 5. Injury and wrong is done to Patrons and Gods Ministers. And 6. The defence of the Land against forrain enemies is enfeebled and impaired, the bodies of husbandmen being more strong and able, and patient of cold, heat, and hunger, than of any other.

4 H. 7. cap. 39. Lib. 4. Tirriughams case fol. 39. & 4 H. 7. cap. 12.

¶ Enure en socage est, lou le Tenant tient de son seignior son tenement p certein service pur touts maners de services, issint que les services ne sont pas services de chivaler: Sicome lou home tient son terre de son seignior per fealty & pur certeine rent p touts manners de services, ou lou home tient per homage & fealtie & certaine rent pur touts manners de services, ou lou il tient per Homage & Fealty p touts manners de services, car Homage per soy ne fait pas service de Chivaler.

TEnure in Socage, is, where the Tenant holdeth of his Lord the tenancy by certain service for all manner of services, so that the service be not Knights service: As where a man holdeth his Land of his Lord by Fealty and certaine Rent, for all manner of services: or else where a man holdeth his Land by homage, fealty, and certaine Rent, for all manner of services, for homage by it self maketh not Knights service.

(a) 20 E. 3 Admesurement 8. 14. Ass. 24. 24 E. 3. 25.

† Mirrour. Bracton fo. 217. Fleta. lib. 2. cap 41. Regist. orig. 97. Ockam 38. 39. 4 E. 3. t. a. 18 E. 3. tit. action sur estat. 45. Temps E. 1. Avowry 230. 29 E. 3. 169. 17. Cic. lib. 1. offic.

The two consequents that follow of these inconveniences, are, first the displeasure of Almighty God; and secondly, the subversion of the Polity and good government of the Realm, and all this appeareth in our Books. And the Common Law (a) giveth arrable land (which anciently is called Hyde & Gaine) the prehemincncy and precedency before Meadows, pastures, woods, mynes, and all other grounds whatsoever: and † averia carucæ, the beasts of the plough have in some cases more privilege than other cattel have. And amongst the Romans agriculture or tillage was of high estimation, insomuch as the Senators themselves would put their hand to the plough: and it is said, That never prospered tillage better, than when the Senators themselves plowed (such force hath the example of Superiors) whereof three famous Romans in their several kinds spake.

Omnium rerum ex quibus aliquid exquiritur nihil agricultura melius, nihil uberius, nihil dulcius, nihil libero homine dignius.

Virgil. lib. 1. Georg.

O Fortunatos niminum, sua si bona norint
Agricolas, quibus ipsa procul discordibus armis
Fundit humo facilem victum justissima tellus.

Seneca in Epist.

Nullum laborem recusant manus, quæ ab aratro ad arma transferuntur, &c. Fortior autem miles ex confragoso venit, sed ille unctus, & nitidus, in primo pulvere deficit. But now let us peruse our Authors words.

¶ *Socagium*

¶ *Socagium.* Littleton in this chapter Sect. 119. fetcheth this word from the originall. Socagium, idem est quod servitium Socæ, & Soca idem est quod carcu s. un soke ou un carue.

And Bracton agreeth herewith. Dicitur socagium (saith he) à socco, & inde tenentes dicuntur soc manni (b), eo quod deputati sunt tantummodo ad culturam. And Benerth signifieth the service of plough and cart. It is to be observed, that in the Book of (c) Domesday, Land holden by Knights service was called Tainland, and Land holden by Socage, was called Reveland, which appeareth in that it is said there, Hæc terra fuit terra regis Edwardi Taineland, sed postea conversa est in Reveland. And in that Book they that held in Socage were called by several names, as Sochemanni or Sokemanni, which still continueth: sometime † Colebertі, i. qui tenent in liberum socagium per redditum, and sometime they are called Radchenestres, i. liberi homines, qui tamen arabant, herciabant, falcabant, metebant, &c. And here it appeareth how necessary it is, that words be fetched from their originals, and our Author est verus Etymologus doth in this and in many other places in his (d) three Books. And it is to be observed once for all, that the legal termination of (agium) in composition, signifieth service or duty, as homagium, the service of the man, Escuagium, servitium scuti (e): Socagium, servitium socæ: Hidagium, the duty to be paid for a hide or plough-land, and so of cornagium, corsagium, carnagium, cariagium, burgagium, villenagium, and guidagium, (which one describeth thus) quod datur alicui, ut tuto conducatur per loca alterius, and the like.

Bracton lib. 2. fol. 77.
(b) Glanvil lib. 7. ca. 9. & 11. & lib. 9. cap. 4. Fleta lib. 1. cap. 8. & lib. 3. cap. 14. & 16. Britton fol. 164.
(c) Domesday. Herefordsc. Wendeford. Welchesterse.
† Mich. 10 E. 3. Coram rege Wilts in Thesaur.
(d) For Etymologies vide Sect. 95. 154. 164. 204. 234. 267. 268, &c.
(e) Fleta lib. 3. cap. 14. Bracton lib. 2. cap. 16. Britton fol. 164.

¶ *Issint que les services* (f) *ne sont pas services de Chivaler.* And in the next Section he saith, and every tenure, that is not a tenure in Chivalry, is a tenure in Socage, Ex donationibus autem feoda militaria, vel magnam Serjeantiam non continentibus, oritur nobis quoddam nomen generale, quod est Socagium. Here Littleton speaketh of Tenures of common persons; for grand Serjeanty is not Knights service, and yet it is not a tenure in Socage, as shall be said hereafter. Also he meaneth tempozall services, and not Frankalmoigne, as by the examples he put, is manifest, and as in his proper place shall appear more at large. Also here Littleton speaketh of Socage largely taken, and so called ab effectu, that is, all Tenures that have the like effects and incidents belonging to them, as Socage hath, are termed tenures in Socage, albeit originally service of the plough was not reserved: as if originally a Rose, a pair of gilt Spurs, a Rent, and such like were reserved; or that the Tenants in Condemnatos ultrices manus mittant, ut alios suspendio, alios membrorum detruncatione, &c. puniant; these are said to be tenures in Socage ab effectu, for that there shall be like Gardein in Socage, like relief, and such other effects and incidents as a Tenure in Socage hath, and are so termed to distinguish the same from Knights service. May, the worst Tenure that I have read of this kind, is to hold lands to be Ultor sceleratorum condemnatorum, ut alios suspendio, alios membrorum detruncatione, vel aliis modis juxta quantitatem perpetrati sceleris puniat, (that is) to be a Hangman or Executioner. It seemeth in antient times such Officers were not Voluntaries; nor for lucre to be hired, unlesse they were bound thereunto by Tenure. And so note, that some Tenures in Socage are named à causa, and some and the greater part ab effectu.

Fleta ubi supra.
Ockam, cap. quæ per solam consuetudinem, &c.
Ockam, fo. 31. a & b.

¶ *Car homage de soy ne fait service de Chivaler.* But it is a presumption where homage is due, that the land is holden by Knights service, as hath been said.

## *Sect.* 118.

¶ Item hõe poit tenir de son sñr per fealty tm, & tiel tenure est tenure en socage. Car chescun tenure que nest pas tenure in chivalry, est tenure en socage.

Also a man may hold of his Lord by fealty only, and such tenure is tenure in Socage: for every tenure which is not tenure in Chivalry, is a tenure in Socage.

Of this, sufficiently hath been said before.

## *Sect.* 119.

¶ Et il est dit, que la cause pur que tiel tenure est dit & ad le nosme de tenure in Socage,

And it is said, that the reason why such Tenure is called, and hath the name of tenure in Socage,

¶ *Temps de memory.* Time of memory is, when no man alive hath had any proof

Cap. Burgage. Sect. 170.

Mirrour cap. 2. Sect. 18. Vide 9 E. 2. avowry 224. 3 E. 2. accon. fur. lefſ. 24. 10 E. 3. 24. 20 E. 3. 7. 39. Aſſ. p. 3. 20. Aſſ. 1.

proof to the contrary, nor hath any conuſance to the contrary, as ſhall be hereafter ſaid in his proper place. And of neceſſity this change hereafter ſpoken of, muſt be before time of memory, for within time of memory, the ſervices of the plough cannot be changed into money by conſent of the tenant, and the deſire of the Lords, ſ. into an annuall Rent, neither by releaſe or confirmation or other conveyance, ſo long as the ſeigniory remaineth, as ſhall be ſaid in his due place.

Cap. Confirmation. Sect. 539.

¶ *Devoint vener ove lour ſokes.* The plough is named propter excellentiam, but the ſickle, and the ſith, for the reaping in harveſt, & ſuch like, are alſo included. For as Carucata terræ, a plough Land, may contain houſes, milles, paſture, medow, wood, &c. as pertaining to the plough, ſo under the ſervice of the plough all ſervices of tillage or husbandry are included.

4 E. 3. 161. 6 E. 3. 283.

¶ *Uncore le noſme de Socage demiurt.* Although the cauſe whereupon the name of Socage firſt grew, be taken away; yet the name remaines the ſame it hath been, and is uſed to diſtinguiſh this tenure from a tenure by Knights ſervice; Nomina ſi neſcis perit cognitio rerum. Et nomina ſi perdas certè diſtinctio rerum perditur. Therefore the names of things (as Littleton here teacheth) are for avoiding of confuſion diligently to be obſerved.

eſt ceo; Quia ſocagium idem eſt quod ſervitium ſocæ, & ſoca idem eſt quod caruca, ſ. un ſoke ou un carue. Et en ancient temps devant le limitation de temps de memorie grand part de les tenants que tyendront d lour Seigniors per ſocage, devoient bener ove lour ſokes, chescun de les dits tenants pur certein jours per an pur arer & ſemer les demeſnes le Seignior, & pur ceo que tielx overages, fueront fait pur le viver & ſuſtenance de lour Seigniors, ils fueront quits enuers lour Seigniors, d touts maners de ſervices, &c. Et pur ce que tielx ſervices fueront faits ove lour ſokes tiel tenure fuit appel tenure en ſocage. Et puis apres tiels ſervices fueront changes en deners, pur conſent des Tenants & per deſire des Seigniors, ſ. en un annuell rent, &c. Mes uncore le noſme de Socage demurt, & en divers lyeux les Tenants uncore font tiels ſervices ove lour ſokes a lour Seigniors, iſſint que touts maners d tenures q̃ ne ſont pas tenures p ſervice de Chivaley ſont appels tenures e ſocage.

in this, becauſe *Socagium idem eſt, quod ſervitium Socæ, & Soca, idem eſt quod caruca, &c.* A ſoke or a plough. In ancient time before the limitation of time of memory, a great part of the Tenants which held of their Lords by Socage, ought to come with their ploughs, every of the ſaid tenants for certain dayes in the year to plow and ſow the demeſne of the Lord. And for that ſuch works were done for the livelihood and ſuſtenance of their Lord, they were quit againſt their Lord of all manner of ſervices, &c. And becauſe that ſuch ſervices were done with their ploughs, this tenure was called tenure in ſocage. And afterward theſe ſervices were changed into mony by the conſent of the Tenants, and by the deſire of the Lords, *viz.* into an annual rent, &c. But yet the name of Socage remaineth, and in divers places the Tenants yet do ſuch ſervices with their ploughs to their Lords, ſo that all maner of Tenures which are not tenures by Knights Service, are called Tenures in Socage.

## Sect. 120.

¶ ITem ſi home tient ō ſon Seignior per Eſcuage certaine, ſ. ē tiel ſomme quant leſcuage curge, & eſt aſſeſſe per Parliament a griender ſumme ou meinder ſumme, que le tenant paiera a ſon Seignior forſque demy marke pur eſcuage, & nient pluis ne meins, a quel graund ſumme, ou a quel petite ſumme q̄ leſcuage curge, &c. tiel tenure eſt tenure en Socage, & nemy ſervice de chivalrie. Mes lou le ſumme que le tenant paiera pur leſcuage eſt non certaine, ſ. lou il poit eſtre q̄ l' ſumme q̄ le tenant paiera pur leſcuage a ſon Seignior poit eſtre a un foits le greinder & a auter foits le meinder, ſolonque ceo que eſt aſſeſſe, &c. donques tiel tenure eſt tenure per ſervice de Chivaler.

ALſo if a man holdeth of his Lord by eſcuage certain, s. in this manner, when the Eſcuage runneth, and is aſſeſſed by Parliament to a greater or leſſer ſumme, that the Tenant ſhall pay to his Lord but half a Marke for Eſcuage, and no more nor leſſe, to how great a ſumme, or to how little the Eſcuage runneth, &c. Such Tenure is Tenure in Socage, and not Knights Service; but where the ſumme which the Tenant ſhall pay for Eſcuage is uncertaine, s. where it may be that the ſumme that the Tenant ſhall pay for Eſcuage to his Lord, may be at one time more, and at another time leſſe, according as it is aſſeſſed, &c. ſuch tenure is tenure by Knights Service.

¶ *Escuage certein.* Is not in rei veritate ſervitium Scuti, which is to be done by the body of a man, but it is ſervitium Crumenæ, of money, which is to be drawn out of the purſe, and that is in effect a Tenure in Socage, wherein it is to be obſerved, That the ſervice of payment of money is the more baſe, and leſſe profitable for the Commonwealth in this caſe, and hereof ſomewhat hath been ſaid before in the Chapter of Eſcuage, Sect. 98, 99.

If a man hold by Homage, Fealty and Eſcuage, s. by an half penny, when Eſcuage runs at forty ſhillings, this is a tenure in Socage, and no Knights Service, for two cauſes. 15 E. 2. tit. avowry 215. 31 E. 1. Aſſ. 441. 26. Aſſ. 66. 5 E. 3. 6.

Firſt, It is Socage Tenure, becauſe of the certainty, for to the Tenure in Socage, certa ſervitia do eber belong, ſo as the Husbandman may rather live in quiet. 5 E. 1, 128. Vide Rot. Par. 4 E. 3. nu. 19. Claverings caſe excellently reſolved in Parliament. Hill. 3 E. 2. coram Rege Rot. 34. Agnes Browicks caſe.

Secondly, Eſcuage is to be paid at every time when it is aſſeſſed; and here it is not to be paid, but when it amounteth to forty ſhillings.

## Sect. 121.

¶ ITem ſi home tient ſa teñ pur paier certaine rent a ſon ſeignior pur Caſtle-garde, tiel tenure eſt tenure ē Socage: Mes lou l' Tenant doit p

ALſo if a man holdeth his land to pay a certaine rent to his Lord for Caſtle-gard, this Tenure is Tenure in Socage, but where the Tenant ought

¶ HErein the difference ſtandeth thus, If a Rent be paid for Caſtle-gard, it is clear a Socage tenure, as it is agreed in Lutterels caſe according Vide Sect. 88, 89.

Vide lib. 4. fol. 88. in Lutterels case. 19 E. 2. gard. 195. 26 Ass. 66. F. N. B. 83. 256. Lib. 6. fol. 29. Gregories case.

according to Littletons opinion, but if a summe in grosse or other thing be voluntarily paid or given by the Tenant, and voluntarily received by the Lord in lieu of Castle-gard, yet the Tenure by Knights service remaineth. Vide Sect. 88, 89.

iuyn, ou p un auter faire Castle-garde, tiel tenure est tenure per service de chivaler.

by himself or by another to doe Castle-gard, such Tenure is Tenure by Knights service.

## Sect. 122.

¶ It is called Rent service, because it is accompanied with some corporall service, as Fealty at the least, in respect whereof the Lord may distrain for it of common right. See more of this matter in the Chapter of Rents.

¶ Item en touts cases lou l' tenant tient del Seignior a paier a luy alcun certeine Rent, cel Rent, est appelle Rent service.

Also in all cases, where the Tenant holdeth of his Lord to pay unto him any certain Rent, this Rent is called Rent service.

## Sect. 123.

¶ *En tiels Tenures en Socage.* If a man be seised of a Rent charge, Rent seche, Common of pasture, and such like Inheritances, which do not lye in tenure, and dieth his heire within age of 14. years: In this case, the heire may chuse his Gardein, but if he be of such tender yeares as he can make no choice then (if the Father hath made no disposition of the custody of the child) it were most fit, that the next of kin to whom the Inheritance cannot descend should have the custody of him. And whosoever taketh the Rent, as the heire shall charge him in an account. But if he hold any

Vide le statute de 4 & 5. Ph. & Marie, ca. 8.

¶ Item en tiels Tenures en socage sil' ad issue & devie son issue esteant deins lage d 14. ans donques l' procheine amy del heire a q l'heritage ne poit discend avec la gard d la terr & del heir tesq la age del heir de 14. ans, & tiel Gardein est appelle gardein en socage. Car si la terre descendist al heire de pt le pier, donques la mere, ou auter procheine cosen de pt le mere avera la garde. Et si le terr discendist al heire de part la mere, donques le pier ou le procheir amy de part del pier avera le garde de tiels terrs ou tents. Et quant l'heire vient al age de 14. ans compleat, il poit enter & oustre le Gardein en Socage, &

Also in such tenures in Socage if the Tenant have issue and dye, his issue being within the age of 14. years, then the next friend of that heire to whom the inheritance cannot descend shall have the wardship of the land and of the heir untill the age of 14. years, and such Gardeine is called Gardein in Socage. For if the Land descend to the heire of the part of the father, then the mother, or other next Cousin of the part of the mother, shall have the wardship. And if Land descend to the heir of the part of the mother, then the father or next friend of the part of the father shall have the wardship of such Lands or Tenements. And when the heire commeth to

occupier la terre luy meſm̃ ſil voit. Et tiel Gardeine en ſocage ne prendra alcuns iſſues ou profits de tielx terres ou tenements a ſon uſe demeſne, mes tantſolement al uſe & profit del heire, & del ceo il rendra accompt al heire quant pleaſt al heire apres ceo que lheire accompliſh lage de xiiii. ans. Mes tiel Gardein ſur ſon accõpt avera allowance de touts ſes reaſonable coſts & expences en touts choſes, &c. Et ſi tiel Gardein maria lheire deins 14. ans, il accõptera al heire, ou a ſes executors de value del marriage, comẽt que il ne prift riens pur le value del mariage, pur ceo que il ſerra rette ſa folly demeſne, que il luy voiloit marier ſans prender la value del mariage, ſinon que il luy maria a tiel mariage que eſt tant en value come le mariage del heire, &c.

the age of 14. yeares compleat, he may enter and ouſt the Gardian in Socage, and occupy the Land himſelf if he will. And ſuch Gardian in Socage ſhall not take any iſſues or profits of ſuch lands or tenements to his own uſe, but onely to the uſe and profit of the heire, and of this he ſhall render an account to the heire when it pleaſeth the heire, after he accompliſheth the age of 14. yeares. But ſuch Gardian upon his account ſhall have allowance of all his reaſonable coſts and expences in all things, &c. And if ſuch Gardian marry the heire within age of 14. yeares, he ſhall account to the heir or his Executors of the value of the marriage, although that he tooke nothing for the value of the marriage, for it ſhall be accounted his owne folly, that he would marry him without taking the value of the marriage, unleſſe that hee marrieth him to ſuch a marriage that is as much worth in value as the marriage of the heire.

Land in Socage; in that caſe the Gardian in Socage ſhall take into his cuſtody as well the Rent charges, &c. as the land holden in Socage, becauſe he hath the cuſtody of the heir.

¶ *Si le tenant ad iſſue & devie.* The ſame law it is if the tenant hath no iſſue; but a brother or couſin within age of 14 years at the time of his death. (a) Alſo this doth extend as well to iſſue female as to iſſue male. (a) 10 R. 2. Account 134.

¶ *Deins lage de* 14 *ans.* Of this ſufficient hath been ſpoken in the next preceding chapter.

¶ *Donques le procheine Amy del heire a que le inheritance ne poit diſcender.* The next friend of the heir, &c. Here Amy or freind is taken for the next of blood, ſo the effect of it is, that the next of his blood to whom the inheritance cannot diſcend, whereby affinity without blood is excluded. Glanvil. lib. 7. cap. 11. Britton 163. Fleta lib. 1. cap. 9. Stat. de Hibernia, tit. Partition.

¶ *Le Prochein.* The next.

(b) If there be three brethren, and the youngeſt holdeth land in Socage, and hath iſſue, and dieth, his iſſue within age of 14 years, both the Uncles are in equal degree; and yet the eldeſt ſhall be Gardian; becauſe, in equal degree, the Law preferreth him. (b) Vide 30. Aſſ. 47.

(c) And yet if lands holden in Socage be given to a man and to the heirs of his body, and he dieth, his heir within age, the next couſin of the part of the father, albeit ſhe be worthier, ſhall not be preferred before the next couſin of the part of the mother; but ſuch of them as firſt ſeiſeth the heir ſhall have his cuſtody: But if lands be given in Frankmarriage, and the Donees have iſſue and die, their iſſue within age of 14 years, the next of kin of the part of the mother, ſhall have the cuſtody of the body, and not the next of kin of the part of the father, albeit he firſt ſeiſed it, becauſe the mother was the cauſe of the gift. If a man be ſeiſed of lands holden in Socage of the part of his father, and of other Lands holden in Socage of the part of his mother, and dieth, his iſſue being within the age of 14 years. In this caſe ſuch of the next (c) Pl. Com. Carrels caſe. 47 H. 3. Gard. 146.

of

of kin of either ſide as firſt happeth the body of the heir ſhall have him, but the next of blood of the part of the father ſhall enter into the lands of the part of the mother and the next of kin of the part of the mother, ſhall enter into the lands of the part of the father.

d) F.N.B 139.b.Regiſt.

(d) If A. be Gardian in Socage, of the body and lands of B. within the age of fourteen years, A. ſhall be Gardian in Socage per cauſe de Gard. But an Infant within age, that (e) is not in the cuſtody of another, cannot be Gardian in Socage, becauſe no writ of account lieth againſt an Infant. And herewith agreeth Bract. (f) and yieldeth this reaſon, Alium regere non poteſt, qui ſeipſum regere non novit. And Fleta ſaith (h) That minor minorem cuſtodire non debet; alios enim præſumitur malè regere qui ſeipſum regere neſcit: And by like reaſon an Ideot, a man non compos mentis, a Lunatick, a man cœcus & mutus, or ſurdus & mutus, or a Leper removed by a writ de Leproſo amovendo, cannot be Gardian in Socage, but in the caſe of Gard per cauſe de Gard, there lieth an Action of Account againſt A. in the caſe aboveſaid.

e) 7 E.3.46. 16 E.3.ac.52. 21 E.3.8.31 E.3, Enfant.9. 17 E.2.Account 121. 26 E.3.63. 10 H.6.14. F.N.B.118.

f) Bract.lib.2.fo.88.

h) Fleta li.1. ca.10.

¶ *A que le heritage ne poet deſcender.* (i) Nullus hæredipetæ ſuo propinquo vel extraneo periculoſa ſane cuſtodia committatur. Note (k) this word (Poet) may or can. (l) And therefore this doth not onely exclude an immediate diſcent, but all poſſibility of diſcent. As if a man hath iſſue two ſons by ſeveral Venters, and having lands holden in Socage of the nature of Burgh Engliſh, dieth, the younger brother within age of 14. years, (m) the elder brother of the half blood ſhall not have the cuſtody of the land, becauſe by poſſibility the elder may inherit the Land, for if the youngeſt dy without iſſue, and the Land diſcend to an uncle, the elder brother of the half blood may be heir unto him: and herewith do agree our ancient Authors: (n) Hæres Sokmanni ſub cuſtodia capitalium Dominorum non erit, ſed ſub cuſtodia conſanguineorum ſuorum propinquorum, hoc eſt, eorum qui conjuncti ſunt jure ſanguinis, & non jure ſucceſſionis ex parte quorum non deſcendit hæreditas, & regulariter verum eſt, quod nunquam remanebit aliquis in cuſtodia alicujus, de quo haberi poſſit ſuſpicio, quod velit jus clamare in ipſa hæreditate, & unde ſi plures ſint filiæ & hæredes & tenere debeant in Socagio, nulla debet eſſe in cuſtodia alterius. (o) And this is contrary to the Civil Law; for, Leges Civiles impuberum tutelas proximis de eorum ſanguine committunt, ſive agnati fuerunt, ſive cognati, unicuique videlicet, ſecundum gradum & ordinem qui in hæreditate pupilli ſucceſſurus eſt. But this the Law of England ſaith, Eſt quaſi agnum lupo committere ad devorandum.

i) Lib.Rub.ca.70.

k) Glanv. li.7.cap.11.

l) P..Con,Carrels caſe.

m) Lit.li.1,fo.2,3.

n) Bract.li.2.fol. 87: Bri.f.163.b.Flet.L.1.c.10. 28 E.1.Stat.1. Forteſc. cap.40.

o) Fortſc.ub.ſupr. Statut. de Homagio capiendo,temps,E.1.

¶ *Donques le mere.* Note, albeit Land cannot diſcend to the mother from her Sonne, (as hath been ſaid) becauſe inheritance cannot aſcend, yet here it appeareth by Littleton, That ſhe is next of blood, for that none (as it hath been ſaid) can be Gardian in Socage, but the next of blood, and the like is to be ſaid of the Father, as hereafter next appeareth.

¶ *Donques le Pier.* By this it appeareth, that the father in caſe of a tenure in Socage ſhall be Gardian in Socage, and ſhall not have the cuſtody of his eldeſt ſonne, in reſpect of his paternal natural cuſtody, (as he ſhall have in caſe of a tenure by Knights ſervice, as before appeareth) but as Gardian in Socage: and the reaſon of the diverſity is, for that in the caſe of a tenure in Socage, the father muſt by Law be accountable to the ſonne, both for his marriage, and alſo for the profits of his Lands, which he ſhould not be, if he had the cuſtody of his eldeſt ſonne in this caſe as his father, in reſpect of nature, and the Act of Law neither doth any man wrong.

But no Lord or other perſon in reſpect of any tenure by Knights ſervice or otherwiſe, ſhall have the cuſtody of any child that is heir apparant to his father; but the Father only during his life, as hath been ſaid before.

It is to be obſerved, that in the Laws of England, there are three manner of Gardianſhips, viz. by the Common Law, by Statute Law, and by Cuſtom. By the Common Law there are four manner of Gardians, viz. Gardian in Chivalry (whom Littleton hath deſcribed before Section 103, &c.) Gardian by nature, as the Father of the eldeſt ſonne, of whom Littleton hath ſpoken, Sect. 114. Gardian in Socage treated of by Littleton in this Section, and Gardian per cauſe de nurture, all frequent in (a) our Books. By Statute, viz. the Statute in 4 & 5 Phil. & Mariæ, of women children, and that is in two manners, either of the father or mother without aſſignation, or of any other to whom the father ſhall appoint the cuſtody, either by his laſt Will, or by any act in his life time, whereof you ſhall read at large (b) in Ratcliffs caſe in my Reports.

a) 8E.3.43.8 E.4.5.

(b) Lib.3.fo. 57. Ratcliffs caſe.

(c) Laſtly, by cuſtome, as of Orphans by the cuſtome of the City of London, and of other Cities and Boroughs.

c) 32 E.1. gard. 31. 8R.2.gard.166.

¶ *Tantſolement al uſe & profit del heire.* And therefore Gardian in Socage ſhall not forfeit his intereſt by outlawry or attainder of felony or treaſon, becauſe he hath nothing to his own uſe, but to the uſe of the heir.

Alſo

Also if the mother be Gardian in Socage, and taketh husband, and dieth, the husband shall not have this custody by survivour, because the wife had it en auter droit, in the right of the heir. Pl.Com.

A Gardian in Socage shall not(d) present to a benefice in the Right of the heir, because he cannot be accomptable therefore, for that he can make no benefit thereof, for the Law doth abhorr simony or any corrupt contract for benefices, and therefore in that case the heir shall present himself, and Britton speaking of these Gardians said well, Les queux gardeins sont pluis serjeants que Gardeins, (that is) which Gardians are rather servants than Gardians. (d) 8 E.2. præsentment 107. 7 E.3.27 E.3.89. 29 E.3.5. F.N.B.33. 31 E.3. Estoppel, 340. Britton 163, 164. Fleta lib.1.cap.10.

¶ *Il rendra account, &c. apres que lheire ad accompliſhe lage de* 14. *ans.* This point hath been much controverted in our Books, and the causes of the doubts have been, first upon the words of the statute of (e) Merlebridge, ca. 17.2. Upon the original writ of Account against the Gardian in Socage. The words of the statute be Cum ad legitimam ætatem pervenerit sibi respondeat, &c. and legitima ætas, (f) lawful age, is 21. years. Also the writ of Accompt reciteth the said statute, Quare cum de communi consilio regni nostri provisum sit quod custodes terrarum & tenementorum, quæ tenentur in Socagio, hæredibus terrarum & tenementorum illorum cum ad plenam ætatem pervenerint, reddant rationabilem compotum; (g) Whereupon it is gathered that no action of account did lye against the Gardian in Socage at the Common Law, untill the heir be of his lawful age of 21. years. But as to the first legitima ætas (as the statute (h) speaketh) or plena ætas, (as the Writ doth render it) are to be understood secundum subjectam materiam, that is of the heir of Socage land, whose lawful and full age, as to the custody or Gardianship is 14. And as to the recital of the statute: (i) it is evident that an Action of Account did lye against Gardian in Socage at the Common Law. And that the statute was made in affirmance or declaration of the common law, for the statute speaketh only De custodia parentum, that is of a Gardian in Right; but yet an Action of Account lieth against him that occupieth the land as Gardian, albeit he be not of the blood (as hereafter shall be said) And upon consideration had of the said statute and of all the books, it was adjudged in the Court of Common Pleas, Pasch. 16 Eliz. Rot. 436. according to the opinion of Littleton, that the heir after the age of 14. years shall have an action of Account against the Gardian in Socage, when he will at his pleasure, and so is an ancient question well resolved. (e) It is called the stat. of Merlebridge, because the Parliament in 52 H.3. was holden there. (f) 16 E.3.wast.100. 18 E.3.55.77. 29 E.3.5. Vide 31 E.3.Gard.31. F.N.B.118. 6 E.3.28. (g) 16 E.2.Account 120. 17 E.2.ibid.321. (h) 2 E.2.Account. 14 E.3.ibid. 2 Mar.137. Keylwey 131. (i) 18 E.2.Avowry 220. Pasch.16 Eliz.Rot.436. in communi banco.

Britton was of opinion that the statute of Merlebridge, which gave the Capias in Account, extended to Gardian in Socage, for he wrote before the statute of W. 2. cap. 11. But later books have over-ruled in this point, that no Capias lieth against Gardian in Socage, for the statute extendeth to Bailiffs onely; Neither doth the statute of W.2. extend to Gardian in Socage, for it speaketh only De servientibus, balivis, camerariis, & receptoribus. Mirror cap.2.Sect.17. Britton fol.163.b. Fleta lib.2,cap.6. 18 E.2.Avowry 220. 17 E.3.59. Merlbr.ca.23. W.2.cap.11.

¶ *Mes tiel gardein ſur ſon account avera allowance de touts ſes reaſonable coſts & expences en touts choſes.* And this is due to all accountants by the Common Law, and so it is declared by the said statute of Merlebridge, Salvis ipsis custodibus rationabilibus misis suis. The statute of Merlbr. intended by Litt.is,ca.17.

¶ *Allowance.* What other allowance shall the Gardian have? If the Gardian receive the Rents and Profits of the Lands, and be robbed of the same, whether shall he be discharged thereof upon his Account? and it seemeth, that if he be robbed without his default or negligence he shall be discharged thereof. As if a Bailiff of a Manor, or a Receiver, or a Factor of a Merchant, or the like accountant be robbed, he shall be discharged thereof upon his Account, and seeing the Gardian shall be charged as Bailiff after the heirs age of 14. and be discharged upon his account, if he be robbed, Pari ratione, if he be robbed before the age of 14. But otherwise it is of a Carter, for he hath his hire, and thereby implicitly undertaketh the safe delivery of the goods delivered to him, and therefore he shall answer the value of them if he be robbed of them. Note the diversity, and so it was resolved † in the Kings Bench. 41 E.3.3. 22 Ass.41. 22 E.3. Account 111. 29 Ass.28. 3 H.7.4.b. 6 H.7.12. 10 H.7.25. 10 H.6.21. 2 E.4.15. Doct.&Stud.ca.38.f.130. †Hill.38 Eliz. inter Woodliefe & Curties.

So it is if goods be delivered to a man to be safely kept, and after those goods are stollen from him, this shall not excuse him, because by the acceptance he undertook to keep them safely, and therefore he must keep them at his perill.

So it is if goods be delivered to one to be kept; for to be kept, and to be safely kept, is all one in Law; but if the goods be delivered to him to be kept, as he would keep his own, there if they be stollen from him without his default or negligence, he shal be discharged. So if goods be delivered to one as a gage or pledge, and they be stollen, he shall be discharged, because he hath a property in them, and therefore he ought to keep them no otherwise than his own; but if he that gaged them, tendred the money before the stealing, and the other refused to deliver them, then for this default in him he shall be charged. 29 Ass.p. 28.

If A. leave a chest locked with B. to be kept, and taketh away the key with him, and acquainteth 8 E.2.tit. Detinue 59.

quaintcth not B. what is in the Cheſt, and the Cheſt together with the goods of B. are ſtollen away; B. ſhall not be charged therewith, becauſe A did not truſt B. with them as this caſe is. And that which hath been ſaid before of ſtealing, is to be underſtood alſo of other like accidents, as ſhipwrack by ſea, fire by lightning, and other like inevitable accidents. And all theſe caſes were reſolved and adjudged in the Kings bench. And by theſe diverſities are all the bookes concerning this point reconciled.

†Paſch. 43 Eliz. inter Southcote & Bennet in detinue.

Note Reader, it is neceſſary for any that receiveth goods to be kept, to receive them in this ſpecial manner, viz. to be kept as his own, or to keep them at the perill of the owner. But now is Littleton to be further heard.

¶ *Et ſi tiel gardein maria le heire deins* 14. *ans, &c.* For if he marry ẏ heir after 14. he is out of his cuſtody, and no account ſhall be made therefore.

¶ *Il accountera a luy.* He ſhall account for the marriage of the heir viz. for ſo much as any man bona fide had offered for the marriage, or would give in marriage unto him.

¶ *Ou a ſes Executors.* Note that an infant of the age of 14. may make his will (as ſome hereupon have collected) but the meaning of Littleton is, that if after his marriage he accompliſh his age of 18. years at what time he may make his Teſtament, and conſtitute executors for his goods and chattels: and the words are ſo to be underſtood, as may ſtand with Law and reaſon. Note, Executors could not have an Action of account at the common law, in reſpect of the privity of the account, but the ſtatute of W.2. cap.23. hath given the action of account to executors, the ſtatute of 25 E.3.ca.5. to Executors of Executors, and the ſtatute of 31 E.3.ca.11. to Adminiſtrators.

7 E.3.62.
19 E.3. account 56.
38 E.3.7.
31 E.3.tit. Account 57.

¶ *Que il voile ỹl marier ſans prender le value.* So as the Gardian ſhall not account onely for that which he ſhall receive in this caſe, but for that alſo which he might receive.

3 E.3.10.
44 E.3. Account 40.
2 R.2. ibid. 45.
6 R.2. Account 47.

¶ *Si non que il luy marier a tiel mariage que eſt tant value, &c.* This needeth no explanation.

If the heir in Socage be ravished out of the cuſtody of the Gardian, and the Ravisher marrieth the heir, the Gardian ſhall have a Writ of Ravishment of Ward, and recover the value of the marriage, &c. and ſhall account to the heir for the ſame.

Hill. 3 E.2. Coram Rege Rot. 24. Agnes Frowicks caſe. F.N.B. 139. I. & 140. 26 E.3.65. 1 E.3.19.26.

And the Gardian in Socage is bounden by Law, that the heir be well brought up, and that his evidences be ſafely kept.

Trin. 1 H.5. Coram Rege Rot. 1. Midd.

The Grandmother of the ſon and heir of John Bernevil, who held the Manor of Torington in the County of Midd. in Socage, recovered the heir in a Ravishment of Ward againſt Simon Chevin which had married the ſtepmother of the heir, and by the Rule of the Court the Plaintiff pro nutritura hæredis, & pro cuſtodia evidentiarum, inveniet plegios.

## Sect. 124.

¶ *Et ſi aſcun auter home que neſt pas procheine amy, &c.* If a ſtranger entereth into the Lands of the Infant within age of 14. and taketh the profits of the ſame, the Infant may charge him as Gardian in Socage. And this doth well agree with the Writ of Account againſt a Gardian in Socage: for the words be, Idem B. præfato A. rationabilem compotum ſuum de exitibus

19 E.2. Avowry, 221.
39 E.3.16.
41 E.3. Account 35.
49 E.3.10. 18 E.3.77.
28 Aſſ. p.11. Pl. Com. 542
6 E.3.38. F.N.B. 118.

¶ Et ſi aſcun auter home q̃ neſt procheyn amy, occupie les terres ou tenements del heire come gardein in Socage, il ſerra compell' de render accompt al heire, auxi bien ſi cõe il fuiſſoit procheyn amy: car il neſt pas plee pur luy en briefe daccompt adire, que il neſt, procheine amie, &c. mes il reſpondra' quel

AND if any other man, who is not the next friend, occupies the Lands or Tenements of the heir as Gardian in Socage, he ſhall be compelled to yield an account to the heire as well as if he had been next friend, for it is no Plea for him in the Writ of Account to ſay, that he is not the next friend, &c. but he ſhall anſwer

il

il ad occupie les terres ou tenements come gardein en Socage ou nemy. Sed quære, ſi apres ceo que le heire ad accomplith lage de 14. ans, & Gardeine en Socage continualment occupia la terre tanque heire vient a plein age, ſ. 21. ans, ſi le heire a ſon pleine age avera action Dacco̅mpt envers le Gardeine de temps que il occupia apres les dits 14. ans, come envers Gardeine en Socage, ou envers luy come ſon baylife.

whether he hath occupied the Lands or Tenements as Gardian in Socage or no. But *quære*, if after the heire hath accompliſhed the age of 14. years, and the Gardian in Socage continually occupieth the Land untill the heire comes to full age, s. of 21. years, if the heire at his full age ſhall have an action of Account againſt the Gardian, from the time that he occupied after the ſaid 14. years, as gardian in ſocage, or againſt him as his Bailiff.

provenient bus de terris & tenementis ſuis in N. quæ tenentur in Socagio & quorum cuſtodiam idem B. habuit dum præd. A. infra ætatem fuit ut dicitur. And true it is, that in judgement of Law he had the cuſtody of the lands: and he is called Tutor alienus, and the right Gardian in Socage Tutor proprius, & it is no plea for him to deny that he is procheine amy, but he muſt anſwer to the taking of the profit as Littleton here ſaith.

13 E. 3. Account. 77. 22 E. 3. 11. 41 E. 3. Account. 25. 10 H. 7. 7. 4 H. 7. 6. b. 7 H. 7. 9. 2.

¶ *Sed quære, &c.* This Quære came not out of Littletons quiver, for it is evident that after the age of 14. years he ſhall be charged as Bailiff at any time when the heire will, either before his age of 21. years or after.

6 E. 3. 38. 32 E. 3. Account. 63. 7 E. 4. F. N. B. 118.

## *Sect.* 125.

¶ ITem, ſi gardein en chivalry face les Executors & devy, le heire eſtcant deins age, &c. les executors averont le garde durant le nonage, &c. Mes ſi Gardein en Socage face les executors, & devy, le heire eſtcant deins lage d̄ 14. ans, les Executors naveront pas le garde, mes un auter procheine amy, a que le heritage ne poyt my diſcend, avera la garde, &c. Et la cauſe de diverſity eſt, pur ceo que Gardeine en

ALſo, if Gardian in Chivalry makes his executors and die, the heire being within age, &c. the Executors ſhall have the Wardſhip during the nonage, &c. but if the Gardian in Socage make his Executors, and die, the heir being within the age of 14. yeares, his Executors ſhall not have the wardſhip, but another the next friend, to whom the Inheritance cannot deſcend, ſhall have the Wardſhip, &c. And the reaſon of this diverſity is be-

¶ *A Son proper uſe.* A Tenant holdeth land of a Biſhop by Knights ſervice, which Seigniory the Biſhop hath in the Right of his Biſhoprick, the Tenant dieth his heire within age, the Biſhop either before or after ſeiſure dieth, neither the King nor the ſucceſſor of the Biſhop ſhall have the Wardſhip, but his executors. For albeit the Biſhop hath the Seigniory, in auter droit, yet the Wardſhip, being but a Chattell, he hath in his own Right, and a Chattel cannot go in the ſucceſſion of a ſole Corporation, unleſs it be in the caſe of the King.

7 K. 2. bre. 634. 40 E. 3. 14. 2 H. 4. 19. 10 Eliz. Dier 277.

7 H. 4. 51. 44 E. 3. 42.

And yet if a Biſhop have an advowſon, and the Church become void, and the Biſhop dye, neither the Succeſſor nor the Executors ſhall preſent, but the King, becauſe it is but a choſe in Action. And ſo it is in Caſe where the King hath Wardſhip, but that

24 E. 3. 26. 44 E. 3. F. N. B 133. See more of this in the Chapter of Warranty. Sect. 740.

that is a prerogative, that belongeth to the King to provide for the Church being void: for where the tenure by Knights service is of a common person, the Executors of the Tenant shall present where the avoidance fell in the life of the tenant.

chivalrie ad le garde a son proper use, & Gardein en Socage nad le garde a son use, mes al use del heire. Et en cas lou le Gardein en Socage devy devant ascun accompt fait pur luy al heire, de ceo le heire est sans remedie, pur ceo que nul brieve de accompt gist envers les Executors si non pur le Roy solement.

cause the Gardian in Chivalry hath the wardship to his own use, and the Gardian in Socage hath not the wardship to his own use, but to the use of the heire. And in this case, where the Gardian in Socage dieth before any account made by him to the heir, of this the heir it without remedy, for that no Writ of account lieth against the Executors, but for the King onely.

31 E. 3. account. 57.
19 E. 3. ibid, 156.
43 E. 3. 2.
2 H. 4. 3. F. N. B. 117.
19 H. 6. 5. 4 E. 4. 25.
43 E. 3. 31. Lib. 11. fo. 89.

¶ *Le heire est sauns remedie, &c.* For albeit in an action of account against a Gardian in Socage, &c. the Defendant cannot wage his Law; yet in respect of the privity of the matters of account, and the discharge resting in the knowledge of the parties thereunto, an action of account neither lieth against the Executors of the accountant, nor at the Common Law for the Executors of him to whom the account is to be made as is aforesaid, but that is holpen by statute, (†) It hath been attempted in Parliament to give an action of account against the Executors of a Gardian in Socage, but never could be effected.

† Rot. parl. 50. 3. nu. 123.

(a) Pl. Com. 311. Keyleway 131. Lib. 11. fol. 89.

¶ *Si non pur le roy solement.* (a) The reason of this is, because the Kings treasure is the sinews of War, and the honour and safety of the King in time of peace, firmamentum belli, & ornamentum pacis; and therefore the death of the party shall not bar the King of his treasure due unto him upon the account, because it is intended, that the King was busied about the publike, for the good of the Common-wealth, and had not leisure to call his accountant to make his account, and nullum tempus occurrit Regi. Littleton speaketh of the Kings Prerogative but twice in all his Books, viz. here, and Sect. 178. and in both places, as part of the Laws of England. Prærogativa is (b) derived of præ, i, ante, and rogare, that is, to ask or demand before-hand, whereof commeth prærogativa; and is denominated of the most excellent part, because though an Act hath passed both the Houses of the Lords and Commons in Parliament; yet before it be a Law, the Royal assent must be asked, or demanded, and obtained, and this is the proper sense of the word. But legally (†) it extends to all powers, preheminences, and privileges, which the Law giveth to the Crown, whereof Littleton here speaketh of one. Bracton lib. 1. in one place calleth it libertatem, in another Privilegium Regis, (c) Britton (d) (following W. 1.) Droit le Roy. (e) Registrium Regium, and jus Regium Coronæ, &c.

Vide Sect. 178.
Stanf. prær. 2.
(b) Forteſcue. fol. 45.
Rot. Parl. 1 H. 4 nu. 188.
Pl. Com. 236.
Stanf. pl. cor. 162. b.
Stanf. præ. a. b. & 10. b.
(†) Stanf. præ. 5. 10.

(c) Weſtm. 1. cap. 50.
(d) Britton fol. 27.
(e) Regiſt. fol. 61. &c.

## Sect. 126.

¶ *Certeine Rent.* A Tenant holdeth of his Lord certain lands in socage to pay yearly a pair of gilt Spurs, or five shillings in mony at the feast of Easter. In this case the rent is uncertain, and the Tenant may pay which of them he will at the said feast, and likewise the tenant may pay which of them he will for relief; but if he pay it not when he ought, then may the

43 E. 3. barre 294.
9 E. 4. 36.
Bract. lib. 2. fol. 35.
Glanvil. lib. 9. cap. 4.

¶ Item le seignior de que la terre est tenus en Socage apres le mort son Tenant, avera reliefe en tiel forme. Si le tenant tient per fealtie & certain rent, a paier annualment, &c. si les termes de paiment

ALso the Lord of whom the Land is holden in Socage, after the decease of his Tenant, shall have relief in this manner; If the Tenant holdeth by fealty, and certain Rent to pay yearely, &c. if the tearmes of son

ſont a payer per deux termes del an, ou per quater termes ou an le Seignior avera del heire ſon tenant tant come le rent amount que il paya p an. Sicome le tenant tient de ſon ſeignior per fealtie & x. s. de rent, payable a certaine termes del an. donques lheire paiet al Seignior x. s. pur reliefe, outter les x. s. que il paiera pur le rent.

payment bee to pay at two Terms of the year, or at 4. Termes in the year, the Lord ſhall have of the heir his Tenant, as much as the rent amounts unto which he payeth yearly: as if the Tenant holds of his Lord by fealty, and ten ſhillings rent payable at certain Terms of the yeare, then the heire ſhall pay to the Lord ten ſhillings for relief, beſide the ten ſhillings which he payeth for the rent.

Lord diſtraine for which of them he will. But if the Tenure be to attend on his Lord at the feaſt of Chriſtmaſſe, or to pay ten ſhillings, there the Relief muſt be ten ſhillings, becauſe the other cannot be doubled, & ſic de ſimilibus.

¶ *A pair annuelment*. If the tenant holdeth of his Lord by fealty, and to pay every two or three year ten ſhillings; albeit this be no annuall rent, yet ſhall he pay ten ſhillings for Relief, & ſic de ſimilibus.

But it is to be noted, that beſide Relief whereof Littleton here ſpeaketh, there belongeth to a tenure in ſocage of common right, aid, for the making of his eldeſt ſonne a Knight at the age of fifteen years, & to marry his daughter at the age of ſeven years.

Vide Sect. 103. F.N.B. 8. Weſt. 1. cap. 35. 25 E. 3. Stat. 5. cap. 11.

En meſme le manner eſt; ſi home ſoit ſeiſie de certain terre que eſt tenus en Socage, & fait feoffment en fee a ſon uſe & mourt ſeiſie del uſe (ſon heire del age de 14. ans, ou pluis) & nul volunt per luy declare, le Seignior avera reliefe del heire, ſicome avant eſt dit. Et ceſt per le ſtatute de Ann. 19 Hen. 7. Cap. 15.

In the ſame manner it is, if a man be ſeiſed of certain Land which is holden in Socage, and maketh a feoffment in Fee to his own uſe, and dieth ſeiſed of the uſe (his heir of the age of 14. years or more) and no Will by him declared, the Lord ſhall have relief of the heir, as afore is ſaid. And this by the Statute of 19 H. 7. Cap. 15.

This is an addition to Littleton, wherefore I omit it the rather, for the ſtatute of 19 H. 7. is for the cauſe above mentioned become of none effect.

## Sect. 127.

¶ Et en tiel cas apres la mort le Tenant, tiel reliefe eſt due al Seignior maintenant, de quel age que le heire ſoit, pur ceo que tiel Seignior ne poit aver le garde de corps ne de terre

And in this Caſe, after the death of the Tenant, ſuch relief is due to the Lord preſently, of what age ſoever the heir be, becauſe ſuch Lord cannot have the wardſhip of the body, nor of the Land of the Heir.

¶ *Maintenant*, and as Littleton ſaith, he ought not to attend the payment of his Relief according to the dayes of payment of his Rent, but he ought to have his Relief preſently, & for the ſame he may incontinently diſtrain after the death of the Tenant.

16 H. 7. 4. 18 E. 3. 26. p. 18 Bracton lib. 2. f. 85. dabit hæres una vice reditus ſuum unius anni duplicatum. Britton fol. 178. acc. Fleta lib. 1. cap. 8.

And therefore in the caſe aforeſaid, where the Tenant holdeth by the Rent of five ſhillings, or a paire of gilt Spurs,

Spurrs, if the heire be not presently (that is, as presently and as conveniently as he may, all due circumstances considered) after the death of his Ancestour, ready upon the Land to pay Relieſe, the Lord may distrain for which of them he will; and if the Tenant tendred either of them according to the Law, and none for the Lord was ready there to receive it, yet the Lord may distraine for that which was tendred, at his pleasure.

le heire. Et le Seignior en tiel case ne doit attendre a le payment de son reliefe, solonques les termes & jours de payment de rent, mes il doit aver son reliefe maintenant, & pur ceo il poit incontinent distrain apres le mort son tenant, pur reliefe.

And the Lord in such case ought not to attend for the payment of his reliefe, according to the terms and dayes of payment of the rent, but he is to have his reliefe presently, and therefore he may forthwith distrein after the death of his Tenant for reliefe.

45 E.3.19. 35 H.6.52. 20 Eliz. Dyer 361. Stant. prær. 13. B. F.N.B.256,259.

¶ *De quel age que le heire ſoit.* And yet it appeareth in our Bookes, that in this case, the King in case of a Tenure in Socage in chief, shall not have Primer seisin, unless the heir be of the age of 14. years at the death of his Ancestor; for if he be under that age, he is in the gard and custody of his prochein amy.

But otherwise it is in case of a common person, as here it apeareth. And where in some impressions these words be added (issint que il passa lage de 14. ans) those words so added are against the Law, and no part of Littletons words.

## *Sect.* 128.

¶ *VN leb. de pepper ou cumyn.* Here it is to be observed, that the Lord may reserve pepper or any other things that be exotica, forreigne, or the growth of outlandish countreys, or beyond sea, as well as of the growth of England, whereby Navigation (the life of every Iland) is imployed. And where Littleton here putteth his case in the disjunctive, if the Tenant doth hold by fealty, and one pound of Pepper, or a pound of Cummin, he shall pay for Relief a pound of Pepper, or a pound of Cummin over and besides the Rent. But if the Tenant holdeth of his Lord by doing of certain workes dayes in harbest, or to attend at Christmas, or such like, he shall not double the same, for of Corporall Service, or labour, or work of the Tenant, no Relief is due, but where the Tenant holdeth by such yearly Rents or profits, which may be paid or delivered, whereof Littleton hath put his examples; and by them is manifestly proved that corporal service, work, or labour shall not be doubled in this case.

¶ *EN Meſme le Maner eſt lou le tenant tient de ſon Seignior per fealtie, & un li. de Pepper, ou Cummin, & le tenant morust, le seignior avera pur reliefe un lib. de Cummin, ou un lib. de Pepper, ouster le cõmon rent. En Meſme le maner eſt lou tenant tient a payer per un certaine number de Capons, ou de Gallines, ou un paire de Gaunts, ou certaine buſhels de frument, & hmodi.*

IN the same manner it is, where the Tenant holdeth of his Lord by fealtie, and a pound of Pepper or Cummin, and the Tenant dyeth, the Lord shall have for relief a pound of Cummin, or a pound of Pepper, besides the common rent. In the same manner it is, where the Tenant holdeth to pay yearly a number of Capons or Hens, or a pair of Gloves, or certain bushels of corn, or such like.

¶ *Ou certaine buſhels de frument.* Here it appeareth that the Relief of Bushels of corn is to be paid presently, though the Tenant dy in winter before corn be ripe.

Non.

Note, here are examples put of five natueres: 1. Aromatorum exoticorum, of ſpices or drugs of out-landiſh growth. 2. Granorum, of Corn of Engliſh growth. 3. Avium villaticarum, of Powltry, as Capons, Hens, &c. 4. Artificiorum, of handicrafts, as a paire of Globes generally, either of out-landiſh or Engliſh. 5. Aut ſimilium, or ſuch like (that is) of like out-landiſh growth, or of Engliſh growth, or of Powltry, or of Artifices, Out-landiſh or Engliſh, and like herein alſo, that they may be paid or delivered to the Lord, every year, or every ſecond or third year, &c.

## *Sect.* 129.

¶ MEs en aſcun caſe le Seignior doit demurrer a diſtreiner per ſon reliefe jeſque a certaine temps. Sicome le teñ tient de ſon Seignior per un Roſe, ou p un buſhel de Roſes, a paier al feaſt de Nativitie de Saint John Baptiſt, ſi tiel tenant devie en yver, donque le Sñr ne poit diſtr̃ p ſon reliefe tãque al tẽps q̃ les Roſes p le courſe del an poiẽt añ lour creſſer, &c. & ſic de ſimilibus.

But in ſome caſe the Lord ought to ſtay to diſtreine for his relief untill a certain time. As if the Tenant holds of his Lord by a Roſe, or by a buſhell of Roſes to pay at the Feaſt of St. *John* the *Baptiſt*, if ſuch Tenant dieth in Winter, then the Lord cannot diſtreine for his relief untill the time that Roſes by the courſe of the year may have their growth, &c. and ſo of the like.

¶ *Per le courſe del an.* Lex ſpectat naturæ ordinem. The Law reſpecteth the order and courſe of Nature. Lex non cogit ad impoſſibilia, the Law compels no man to impoſſible things. The argument ab impoſſibili is forcible in law, Impoſſibile eſt, quod naturæ rei repugnat. And here it is to be obſerved, that Littleton puts a diverſity between Corn and Roſes; for Corne will laſt, and therefore the Tenant muſt deliver the Corn preſently, before the time of growth, (as before is ſaid,) and ſo of Saffron, and the like; but Roſes, or other flowers, that are fructus fugaces, cannot be kept, and therefore are not to be delivered till the time of growing: neither is the Tenant driven by law artificially to preſerve Roſes, for the Law in theſe caſes reſpecteth Nature, and the courſe of the year, as Littleton here ſaith, Et ars naturam imitatur, & ſic de ſimilibus.

## *Sect.* 130.

¶ ITem ſi aſcun voille demand, pur q̃ home poit tener de ſon Seignior p fealtie tantſolement p touts Manners des ſervices, entant que quant le tenãt ferra fealtie il jurera a ſon Seignior q il ferra a ſon Sñr touts maners des Services dues, & quant il ad

ALſo if any will ask, why a man may hold of his Lord by Fealty only for all manner of Services, inſomuch as when the Tenant ſhall do his Fealty, he ſhall ſwear to his Lord, that he will do to his Lord all manner of Services due, and when he hath done Fealty in

¶ *Quant le tenant ferra fealtie, il jurera a ſon Seignior, &c.* Here it appeareth, that the doing of the fealty is both a performance of his ſervice and of his oath alſo when it is done, for that no other Service is due. And that one oath of fealty is taken of all that hold, & is not to be changed for any novelty or nicity of invention, for Judges anciently & continually have ſuppreſſed innovations, and would in no caſe change ſancient common law.

31 E.3.tit. Gager deliverance 5.
38 E.3.11. 42 Aſſ.p.12.
4 E.3.ca.5.
18 E.3.ca.4.& 6.
4 H.4.ca.2.2 H.4.fo.18.

¶ *Il covient que il doit faire a ſon Seignior aſcun ſervice.* For there can be no tenure without ſome ſervice, becauſe the ſervice maketh the Tenure.

See of this int the Chapter of Fee ſimple, Sect. 4.

¶ *Son eſcheat de la terre.* Eſchaeta is derived of this word Eſchier, quod eſt accidere: For an eſcheat is a caſuall profit, quod accidit Domino ex eventu, & ex inſperato, which happeneth to the Lord by chance, & unlooked for. And of this word Eſchaeta cometh Eſchaetor, an Eſcheator, ſo called, becauſe his office is to inquire of all caſuall profits, and them to ſeiſe into the Kings hands, that the ſame may be anſwered to the King.

See more of this in the Chapter of Warranty, Sect.

Lands may eſcheat to the Lord two manner of wayes: one by attainder, the other without attainder. By attainder in three ſorts: First, Quia ſuſpenſus eſt per collum. Secondly, Quia abjuravit Regnum. Thirdly, Quia, utlegatus eſt: without attainder, as if the Tenant dies without heir.

W.2.cap.33. Flet.li.2.ca. 43. & li.5.ca.34. 32 H.8. cap. 24.

¶ *Ou per caſe auter forfeiture.* As if the land be alienes in Mortmaine, or when Littleton wrote, if the Tenants had erected croſſes upon their houſes or Tenements, in prejudice of the Lords, that the Tenants might claim the priviledge of the hoſpitlers, to defend themſelves againſt their Lords; they had forfeited their Tenancies. But ſince Littleton wrote, the Hoſpitlers are diſſolved, and conſequently that forfeiture is gone.

¶ *Ou profit.* As Reliefe, Aid pur file marrier, Aid pur faire fitz chivaler, and the like.

kait fealtie en tiel caſe nul auter Service eſt due. A ceo il poit eſtre dit, Que lou un Tenant tient ſa Terre de ſon Seignior, il covient que il doit fait a ſon Seignior aſcun Service, car ſi le Tenant ne ſes heires devoynt faire nul manner de Service al Seignior ne a ſes heires, donque per long temps continue il ſerroit hors de memorie & de remembrance, le quel la terr̃ fuit tenus de le ſeignior, ou de ſes heires, ou nemy, & donques pluis toſt & pluis rediment voilont hões dire que la terre neſt pas tenus del Seignior ou de ſes heires, q̃ auterment: Et ſur ceo le Seignior perdra ſon Eſcheat de la terre, ou per caſe auter forfeiture ou profit que il poet aver de le terre. Iſſint il eſt reaſon que le Seignior & ſes heires ont aſcun Service fayt a eur, pur prover & teſtifier que la terre eſt tenus de eur.

this caſe no other ſervice is due. To this it may be ſaid, That where a Tenant holds his land of his Lord, it behoveth that hee ought to do ſome ſervice to his Lord: For if the Tenant nor his heires ought to do no manner of ſervice to his Lord nor his heires, then by long continuance of time it would grow out of memory, whether the Land were holden of the Lord, or of his Heires, or not; and then will men more often and more readily ſay, That the land is not holden of the Lord, nor of his Heirs, than otherwiſe: And hereupon the Lord ſhall loſe his Eſcheat of the Land, or perchance ſome other forfeiture or profit which he might have of the Land. So it is reaſon that the Lord and his Heires have ſome Service done unto them, to prove and teſtifie, That the Land is holden of them.

## *Sect.* 131.

¶ ET pur ceo que Fealty eſt incidēt a touts manners de tenures, ſoyſpris le tenure in Frankalmoign, (ſicome ſerra dit en le tenur̄ d̄ Frankalmoign) & pur ceo que le Seignior ne voiloit al commencement del tenure aver aſcun auter ſervice ſoyſque Fealtie, il eſt reaſon que home poet tener de ſon Seignior per Fealtie tantſolement, & quaunt il ad fait ſon Fealtie, il ad fait touts ſes ſervices.

AND for that Fealty is incident to all manner of Tenures but to the Tenure in Frankalmoigne, (as ſhall bee ſaid in the Tenure of Frankalmoigne) and for that the Lord would not at the beginning of the Tenure have any other ſervice but fealty, it is reaſon that a man may hold of his Lord by Fealty onely, and when hee hath done his Fealty, he hath done all his ſervices.

¶ *Fealtie eſt incident.*

Of Incidents there be two ſorts, viz. ſeparable, and inſeparable.

Seperable, as Rents incident to Reverſions, &c. which may be ſevered; inſeparable, as fealty to a reverſion or tenure which cannot be ſevered: for as all lands and tenements within England are holden of ſome Lord or other, and either mediately or immediately of the King; ſo to every tenure at the leaſt, fealty is an inſeparable incident, ſo long as the Tenure remains, and all other ſervices, except Fealty, are ſeverable. But where the Tenure is by fealty only, there is no relief due, for the cauſe aboveſaid.

## *Sect.* 132.

¶ ITem ſi un home leſſe a un auter p̄ terme d̄ vie certaine terres ou tenemēts ſauns parler de aſcun rent rend̄ a le Leſſor, uncore il ſerra fealtie a le Leſſor, p̄ ceo que il tient de luy. Auxy ſi un leaſe ſoit fait a un hōe pur terme de ans, il eſt dit que le Leſſee ſerra Fealtie a le Leſſor, pur ceo q̄ il tient de luy. Et ceo eſt prove bien p̄ les parols del briefe de Waſt, quaunt le Leſſor ad cauſe de porter briefe d̄ Waſt envers luy, le quel Briefe dira, q̄ le Leſſee tient les Tenements de le Leſſor pur terme de ans,

ALſo if a man letteth to another Lands or Tenements for term of life, without naming any rent to be reſerved to the Leſſor, yet he ſhall do fealty to the Leſſor, becauſe he holdeth of him. Alſo if a Leaſe be made to a man for term of years, it is ſaid, that the Leſſee ſhall do fealty to the Leſſor, becauſe he holdet of him: and this is well proved by the words of the writ of waſt, when the leſſor hath cauſe to bring a writ of waſt againſt him, w^ch writ ſhal ſay, that the Leſſee holds his tenements of the Leſſor for term of years. So the

¶ *SI un home leſſe pur terme de vie ſauns parler de rent, &c. il ſerra fealty, &c.* Vide Sect. 214.

And the reaſon is, Becauſe there is a Tenure; and Fealtie (as hath been ſaid) is incident to all manner of Tenures, & it is to be noted, that the Law for the

the Surety of the Lord, that his Tenant shall be faithful and loyall to him, doth create such a service as the Tenant shall be bound thereunto by oath.

40 E. 3. 34. 9 H. 6. 41. 10 H. 6. 13. 9 E. 4. 1. 21 E. 4. 29. 5 H. 5. 12. 5 H. 7. 11.

¶ *Auxi si lease soit fait pur ans, &c. le Lessee ferra fealty.* For there also is a Tenure between them. And Littletons opinion in this case is holden for good Law at this day.

Vide Sect. 84.

¶ *Et ceo est prove bien per les parols del briefe, &c.* Nota, the original writs are (as it were) the foundations and grounds of the Law, and as it appears here by Littleton, are of great authority for the proof of the Law in particular cases.

¶ *Pur ceo que il nad suer estate.* Therefore tenant at will shall not do Fealty (as hath been said before) because the matter of an Oath must be certain. The rest of this Section needs no explication.

issint le briefe proua un tenure enter eux. Mes celuy que est tenant a volūt solonqz le course del common ley ne ferra fealtie p ceo que il nad ascun suer estak. Mes autrement est de tenant a volunt solonqz l'custome del mannor p̄ ceo que il est oblige pur faire fealtie a son Sñr pur deux causes: Lun est p cause del custome: & lauter est, pur ceo q̄ il prist son estate en tiel forme pur faire a son Sñr fealtie.

Writ proves a tenure between them. But he which is Tenant at will according to the course of the Common-Law, shall not do Fealty, because he hath not any sure estate: but otherwise it is of Tenant at will according to the custome of the Mannor, for that he is bound to do fealty to his Lord for two causes; the one is, by reason of the custome; and the other is, for that he taketh his Estate in such form, to do his Lord fealty.

## CHAP. 6. *Frankalmoigne.* *Sect.*133.

Bract. Lib. 2. cap. 5. & lib. 4. cap. 2. Britton fol. 164, 265. Mirrour cap. 2. Sect. 18. Glanvil. lib. 7. cap. 1. & lib. 12. cap. 3. & 25. Fleta lib. 3. cap. 5.

¶ *UN Abbe, Prior, ou auter home de religion ou de saint Esglise.* It is to be observed, that of Ecclesiastical persons some be regular, and some be secular. They be called regular, because they live under certain rules, and have vowed three things, true obedience, perpetuall chastity, and wilfull poverty. And when a man is professed in any of the orders of Religion, he is said to be home de religion, a man of religion, or religious. Of this sort be all Abbots, Priors, and others of any of the said orders regular. Secular are persons Ecclesiasticall; but because they live not under certain rules of some of the said orders, nor are Notaries

21 H. 7. 39. 29 E. 3. 14.

40 E. 3. 29. 8 H. 6. 23. 7 E. 4. 12. 12 H. 8. 8.

¶ TEnant en Frankalmoigne est lou ū Abbe ou Prior ou un autr̄ home d̄ religion ou d̄ saint Eglise, tiant de son sñr en Frākalmoigne, q̄ est adir̄ en Latin in liberam eleemosynam. Et tiel tenure comenc̄ adeprimes en auncient temps en tiel forme; Quant un home en auncient temps fuit seisie d̄ certain terres ou tenements en son demesne come de fee,

TEnant in Frankmoign, is, where an Abbot or Prior, or another man of Religion, or of holy Church, holdeth of his Lord in Frankalmoigne: that is to say, in Latine, *in liberam Eleemosynam*, that is, in free almes. And such tenure began first in old time, when a man in old time was seised of the Lands or Tenements in his Demesne as of Fee, and of the same; land in-

¶

& de meſmes les terres ou tenements enfeoffa un Abbe & ſon Covent, ou un Prior, &c. a aver & tener a eux & lour ſucceſſors a touts jours en pure & perpetual almoign, ou en Frankalm ou p tiels parols; A ten de le grantor, ou de le feoffor, & de ſes hées en Frankalmoign: en tiels cafes les tenements ſont tenus en Frankalmoigne.

feoffed an Abbot and his Covent, or Prior and his Covent, to have and to hold to them and their ſucceſſours in pure and perpetual Almes, or in Frankalmoigne, or by ſuch words, to hold of the Grantor, or of the Leſſor and his heirs in free alms: In ſuch caſe the Tenements were holden in Frankalmoigne.

they are for diſtinction ſake called Secular, as Biſhops, Deans and Chapters, Archdeacons, Prebends, Parſons, Vicars, and ſuch like. All which Littleton here includeth under theſe general words, de ſaint Egliſe, of holy Church and none of theſe are in law ſaid to be homes de religion, or religious.

Where Littleton ſaith (infeoffa un Abbe & ſon Covent) his meaning is, that the Abbot only is infeoffed, for he is only a perſon capable, & the Covent are dead perſons in law, and have power of aſſent only, & that they thereunto aſſent. But ſince Littleton wrote, all Abbies, Priories, Monaſteries, and other religious houſes of Monks, Canons, Friers, and Nuns, &c. have been diſſolved, and their poſſeſſions given to the Crown.

See the Statutes of 27 H. 8. not printed, but in the abridgment, 31 H. 8. cap. 13. & 32 H. 8. cap. 24. &c. Vide Sect. 530.

The Eccleſiaſtical ſtate of England, as it ſtandeth at this day (which is neceſſary for our Student to know) is divided into two Provinces, or Archbiſhopricks, viz. of Canterbury, and of York. The Archbiſhop of Canterbury is ſtiled, Metropolitanus & Primas totius Angliæ; and the Archbiſhop of York, Primas Angliæ. Each Archbiſhop hath within his Province Suffragan Biſhops of ſeveral Dioceſes. The Archbiſhop of Canterbury hath under him within his Province, of ancient foundations, viz. Rocheſter his Principall Chaplain, London his Dean, Wincheſter his Chancellor, Norwich, Lincoln, Ely, Chicheſter, Salisbury, Exeter, Bathe and Wells, Worceſter, Coventry and Lichfield, Hereford, Landaff, St. David, Bangor, and St. Aſaph, and four founded by King Henry 8. erected out of the ruines of diſſolved Monaſteries, (that is to ſay) Glouceſter, Briſtow, Peterborow, and Oxford. The Archbiſhop of York hath under him four, (viz.) the Biſhop of the County Palatine of Cheſter, newly erected by K. H. 8. and annexed by him to the Archbiſhoprick of York, the County Palatine of Durham, Carlile, and the Iſle of Man annexed to the Province of York by H. 8. but a greater number this Archbiſhop anciently had, which time had taken from him. The extent of every Dioceſe you may elſewhere read, the which for brevity I here omit. All the ſaid Archbiſhopricks and Biſhopricks of England were founded by the Kings of England, to hold by Barony, as hereafter ſhall be ſaid.† And every Archbiſhop and Biſhop hath his Dean and Chapter, whereof more ſhall be ſaid hereafter. The Archbiſhop of Canterbury hath the precedency, next to him the Archbiſhop of York, next to him the Biſhop of London, and next to him the Biſhop of Wincheſter, and then all other Biſhops of both Provinces after their ancientneſs.

Matth. Parker de vitis Archiepiſcoporum. Linwood. Camden Britannia. Vid. Rot. Parliam. anno 26 H. 8. 1 E. 6. 5 E. 6. &c. Weſtminſter alſo was newly erected a Biſhoprick by H. 8. but by Queen Mary it was reſtored to be an Abby, and by Queen Eliz. created a Deanry Collegiate. Cheſter had been anciently a Biſhops Sea, and long ſince tranſlated to Coventry. 33 H. 8. ca. 31. Camden ubi ſupra. 26 H. 8. firſt fruits and tenths. Vid. Sect. 137. † Lib. 3. fo. 73. Dean and Chap. of Norwich caſe. Vide Sect. 134. 201. 31 H. 8. cap. 10.

Every Dioceſe is divided into Archdeaconries, wherein there be 60 and the Archdeacon is called oculus Epiſcopi, and every Archdeaconry is parted into Deanries, and Deanries again into Pariſhes, Towns, and Hamlets. And thus much for the better underſtanding of our Author, and how the ſtate Eccleſiaſtical ſtandeth at this day, ſhall ſuffice.

¶ *Frankalmoigne, que a dire en Latine, in liberam Eleemoſynam.* In Engliſh, in free Alms. There is an Officer in the Kings houſe called Eleemoſynarius, vulgarly called the Kings Almner, (whoſe office and duty is excellently deſcribed in ancient Authors,) viz. Fragmenta diligenter colligere, & diligenter diſtribuere ſingulis diebus egenis: ægrotos, & leproſos, incarceratos, pauperesque viduas, & alios egenos vagoſque in patria commorantes charitativè viſitare; item equos relictos, robas, pecuniam, & alia ad Eleemoſynam largita, recipere, & fideliter diſtribuere; debet etiam Regem ſuper Eleemoſynæ largitione crebris ſummonitionibus ſtimulare, præcipuè diebus Sanctorum, & rogare ne robas ſuas, quæ magni ſunt pretii, hiſtrionibus, blanditoribus, accuſatoribus, ſeu miniſtrallis, ſed ad Eleemoſynæ ſuæ incrementum jubeat.

Vide more hereof, Sect. 180. 528, 648, &c. Fleta. lib. 2. cap. 23.

All Eccleſiaſtical perſons may hold in Frankalmoign, be they ſecular or regular, & no lay perſon can hold in Frankalmoign. This adjective (liber) doth diſtinguiſh many things in law from others. as here libera Eleemoſyna are words appropriated to this caſe, and doth diſtinguiſh it from a Tenure by divine ſervice, liberum tenementum from a Tenure in villenage, or by

Vide Sect. 1. Bract. lib. 4. c. 37, 38. Britton, cap. 32.

by Copyhold or baſe tenure, liberum feodum frank fee from a tenure in ancient Demean; liberum maritagium from other eſtates tail; libera firma, frank ferm, when an eſtate is changed from Knights Servtice to Socage; liberum Socagium, from a tenure by Service in Chivalry. Francus Bancus to diſtinguiſh it from other Dowers, for that it cometh freely without any act of the husbands, or aſſignment of the heir. Libera lex, to diſtinguiſh men, who enjoy it, and whoſe beſt and freeſt birthright it is, from them, that by their offences have loſt it, as men attainted in an attaint, in a conſpiracy upon an Indictment, or in a Premunire, &c. And ſo of libera capella francus plegius, frankpledge, libera chaſea, free chaſe liber burgus, liber aper, liber taurus, and the like. But in a matter (ſome will ſay) of curioſity, this ſhall ſuffice; and yet ſeeing it tends to the better underſtanding (others ſay) it is tolerable.

Britton cap. 66. Bract. Lib.4. F.N.B 150. Bract. Lib.4.fol.288.247. 292. Britton fol. 245. Fleta lib. 5. cap. 11. Fortſecue, c.26.24 E.2.34. 43 E. 3. conſpir 11. 27. Aſſ. 59. Stanf. 175. Vide Sect. 199. Fleta lib. 1. cap.47.

By the ancient Common law of England, a man could not alien ſuch lands as he had by diſcent, without the conſent of his heir; yet he might give a part to God in free Almoigne, or with his daughter in free marriage, or to his ſervant in remuneratione ſervitii. Our old Books deſcribed Frankalmoigne thus, when lands or tenements were beſtowed upon God, (that is) given to ſuch people as are conſecrated to the ſervice of God. In our ancient Books theſe gifts of devocion were called Churchſet, or Churchſeed quaſi ſemen Eccleſiæ; but in a more particular ſenſe it is deſcribed thus, Certam menſuram bladi tritici ſignificat, quam quilibet olim ſanctæ Eccleſiæ die ſancti Martini, tempore tam Britonum quam Anglorum contribuerunt: plures tamen Magnates poſt Romanorum adventum illam contributionem ſecundum veterem legem Moiſi nomine primitiarum dabant, prout in Brevi Regis Knuti ad ſummum Pontificem tranſmiſſo continetur, in quo illam contributionem Churchſed appellant, quaſi ſemen Eccleſiæ.

Glanvil lib,7.ca.1. fo.449 45. acc. Britton cap.66. fol.164. Bract, lib.2. cap. 5.& 10. F. N. B. 211.

¶ *Et tiel tenure.* For albeit neither fealty, nor any other temporall ſervice is due, yet it is a tenure.

Fleta lib. 1. cap. 42.

7 E. 4, 12. 33 H.6.6.7. 39 H. 5, 29.

¶ (a) *En ancient temps.* That is to ſay, before the Statutes of Mortmain, viz. Magna Charta, cap.36. & 7 E.1. de Religioſis, &c. and before the Statute of Quia emptores terrarum; as ſhall be after in his proper place ſaid in this Chapter.

(a) Mortmaine. Britton fol. 32. & 90. Bracton lib. 2. cap. 5. Fleta lib. 3. cap. 5. 11 H. 7. 12.

¶ *Enfeoffe un Abbe & ſon Covent, &c.* Albeit the covent be dead perſons in Law, and the Abbot only capable (as before is ſaid); yet if the feoffment be made to an Abbot and Covent, the feoffment is good, and the ſtate veſteth only in the abbot. And note, a man may infeoffe an Abbot, a Biſhop, a Parſon, &c. or any other ſole body politique by deed, or without Deed, in free Alms, and ſo may a gift in frankmarriage be made without deed alſo: but if lands be given to a Dean and Chapter, or any other Corporation aggregate of many, there the gift muſt be by deed.

39 H. 6. 30. b.

¶ *A aver & tener a eux & a lour ſucceſſors.* For in caſe of an Abbot or Prior and Covent, regularly a Fee ſimple doth not paſs without theſe words (Succeſſors) for the diverſity ſtandeth thus between a Corporation aggregate of many capable perſons, and a ſole Corporation. As if lands be given to a Dean and Chapter, they have a Fee ſimple without theſe words (Succeſſors) for that the body never dies, but if lands be given to a Biſhop, Parſon, or any other ſole Corporation, who after their deceaſes have a ſucceſſion: there without theſe words (Succeſſors) nothing paſſeth unto them but for life. But of Corporations aggregate of many there is a diverſity when the head and body both are capable, as in the caſe of Dean and Chapter, & when one (as hath been ſaid) is only capable, as in caſe of Abbot or Prior and Covent, but yet out of the general rules, the caſe of Frankalmoign is accepted, as hereafter ſhall be ſaid. Alſo Lands muſt be given to a Corporation aggregate of many by deed, but to a ſole Corporation it may be granted without deed.

Vide Littl. in the Chapter of Fee ſimple, Sect.1.2.

39 H. 6. 30.

Bracton lib.2.ca.10. Poteſt donatio fieri in liberam Eleemoſynam Eccleſiis Cathedralibus, Conventualibus, Parochialibus, & viris religioſis.

35 H.6. 56. 7 E. 4. 11. Vide Bract. lib.1. cap. 10.

¶ *En pure & perpetual almoigne.* Here it appeareth that a Tenure in Frankalmoign may be created without this word (libera), for pura implieth as much.

35 H.6. 56. 7 E. 4. 11. Bract. ubi ſupr. 44 E.3.24.

¶ *Ou en Frankalmoigne.* But one of theſe words, either pura, or libera, muſt be uſed, or elſe it is no Tenure in Frankalmoign.

20 H. 6. fol. 36.

¶ *Ou per ceux parolx a tener de le grantor ou feoffor & ſes heires en Frankalmoigne.* Here it appeareth that by theſe words a Fee ſimple paſſeth without theſe words (Succeſſors) albeit it be in caſe of a ſole Corporation. For as in caſe of a gift in Frankmarriage, an Eſtate tail paſſeth to the Donees without words of heirs of their two bodies, as hath been ſaid in the Chapter of Fee tail ſo in caſe of a gift in Frankalmoign (which may be reſembled to a divine marriage) a Fee ſimple paſſeth, as hath been ſaid (though it be in caſe of a ſole Corporation), without this word (Succeſſors.) And beſides Grants in Frankalmoign are ancient Grants, as hath been ſaid, and therefore ſhall be allowed, as the Law was taken, when ſuch Grants were made.

38 E. 3.4.a. 14 H. 6. 12. 10 H. 7. 13. 16 H.7.9. 18 E. 3. Conuſans 39. 32 H.6. 22. 17 E.51. 6 E. 3. 54. &c. Tr. 5 E.3. Rot.4. in Scaccario. The Prior of Dunſtable caſe.

*Sect.*

## *Sect.* 134.

¶ EN meſme le manner eſt, lou terres ou tenements fueront grant en ancient temps a un Deane & Chapter, & a lour ſucceſſors, ou a un Parſon dun Eſglis, & a ſes ſucceſſors, ou a aſcun auter hõe de ſaint Eſglis, & a ſes ſucceſſors en Frankalmoigne ſi il avoit capacity dapprendr̃ tiels grants ou feoffments, &c.

IN the ſame manner it is where Lands or tenements were granted in ancient time to a Deane and Chapter, and to their ſucceſſors, or to a Parſon of a Church and his ſucceſſors, or to any other man of holy Church, and to his ſucceſſors, in Frankalmoigne, if he had capacity to take ſuch grants or feoffments, &c.

¶ *EN Meſme le manner, &c.* Here Littleton having put an example of bodies incorporate aggregate of many, whereof the head is only capable, now putteth examples both of bodies incorporate, aggregate of many (all being capable) and of ſole Corporations of ſecular perſons.

¶ *Deane.* Decanus is derived of the Greek word δεκὰ that ſignifieth Ten, for that he is an Eccleſiaſticall ſecular Governour, and was anciently over ten Prebends, or Canons at the leaſt in a Cathedrall Church, & is head of his Chapter.

¶ *Chapiter.* Capitulum eſt Clericorum congregatio ſub uno Decano in Eccleſia Cathedrali. And Chapters be two fold, viz. the Ancient, and the Latter. And the Latter be alſo of two ſorts, firſt, thoſe which were tranſlated or founded by King Henry the Eighth, in place of Abbots and Covents, or Priors and Covents, which were Chapters whiles they ſtood; and theſe are new Chapters to old Biſhoprickes. Secondly, where the Biſhoprick was newly founded by Henry the Eighth (as Cheſter, Briſtow, &c.) there the Chapters are alſo new. There is a great diverſity between the comings in of the ancient Dean, and of the new: For the ancient come in, in much like ſort as Biſhops do; for they are choſen by the Chapter, by a Conge de iſſier, as Biſhops be, and the King giving his Royal aſſent, they are confirmed by the Biſhop. But they which are either newly tranſlated, or founded, are Donative, and by the Kings Letters Patents are inſtailed; which are matters neceſſary to be known.

¶ *Sil avoit capacitie a prender.* For Eccleſiaſticall perſons have not capacity to take in ſucceſſion, unleſs they be bodies Politick, as Biſhops, Archdeacons, Deans, Parſons, Vicars, &c. or lawfully incorporate by the Kings Letters Patents, or preſcription, as Deans and Chapters Colledges, &c. But a Colledg of religious perſons, Chauntry Prieſts, and ſuch like, that are not lawfully incorporated, but only conſiſt in vulgar reputation, have no capacity to take in ſucceſſion, therefore Littleton added materially (ſil ad capacitie a prender.

## *Sect.* 135.

¶ ET tiels que teignont en frankealmoigne ſont oblige de droit devant Dieu de fair orizons, prairs, meſſ. & auters divine ſervices pur les almes de lour gaantor ou feoff. & pur les almes de lour heires

AND they which hold in Frankalmoigne, are bound of right before God, to make Oriſons, Prayers, Maſſes, and other divine ſervices for the ſoules of their grantor or feoffor, and for the ſoules of their heires

¶ In this Section there appeareth a diviſion of tenures, that is to ſay, ſome be ſpiritual, and ſome be temporal. And of ſpiritual, ſome be incertain, as tenures in Frankalmoigne; and ſome be certain, as Tenures by Divine Service. Again, Divine Service certain, is two-fold, either ſpiritual, as prayers to God; or temporall, as diſtribution of alms to poore people.

¶ *Ob-*

¶ *Oblige de droit.* That is, they are compellable by the Eccleſiaſtical Law to do it, and therefore it is ſaid that they are bound of Right, (for want of Remedy & want of Right is all one) and the Common Law (as here it appeareth) taketh knowledge of the Eccleſiaſtical Law, in ꝯ behalf.

¶ *De faire Oriſons, Prayers, Meſſes, & autres Divine Services.* Since Littleton wrote, the Liturgy or Book of Common Prayer, and of celebrating divine Service is altered: this alteration notwithſtanding, yet the Tenure in Frankalmoign remaineth, & ſuch prayers & divine Service ſhall be ſaid and celebrated, as now is authorized; yea, though ꝯ Tenure be in particular, as Littleton (a) hereafter ſaith, viz. A Chaunter un meſſe, &c. ou a Chaunter un placebo & dirige, yet if the Tenant ſaith the Prayers now authorized, it ſufficeth. And as Littleton (b) hath ſaid before in the caſe of Socage, the changing of one kind of temporal Services into other temporal Services, altereth neither the name nor the effect of the Tenure: ſo the changing of ſpiritual ſervices into other ſpiritual ſervices, altereth neither the name nor effect of the Tenure. And albeit the Tenure in Frankalmoign is now reduced to a certainty contained in the Book of Common Prayer, yet ſeeing the original Tenure was in Frankalmoign, and the change is by general conſent by authority of Parliament, (c) whereunto every man is party, the Tenure remains as it was before.

(a) Vide Sect. 137.

(b) Vide Sect. 119.

(c) 2 E.6.c.1. 5 & 6 E.6. cap. 1. 1 Eliz. cap. 2.

¶ *Ne ferront aſcun fealtie.* Herein Tenant in Frankalmoign differeth from a Tenant in Frankmarriage, for Tenant in Frankmarriage ſhall do fealty, as hath been ſaid in the Chapter of Fée Tail, but Tenant in Frankalmoign ſhall not do any, or any other thing, but devota animarum ſuffragia.

¶ *Tiel divine Service eſt melior pur eux.* And it is alſo ſaid in our Books, (d) Que Frankalmoigne eſt le plus haute Service, and this was confeſſed by the Heathen Poet,

(d) 33 H.6.6. 13 E.1. tit. count de voucher, 118.

fuit hæc ſapientia quondam
Publica privatis ſecernere, ſacra profanis.

And certainly it is, that Nunquam res humanæ proſperè ſuccedunt ubi, negliguntur divinæ.

## *Sect.* 136.

¶ *LE Seigniour ne poet eux diſtreiner pur ceſt non feaſant, &c.*

¶ *Diſtreine.* The

¶ ET ſi tiels que teiguont lour tenements & Frankalmoigne ne voilõt ou failõt ð faire tiel

AND if they which hold their Tenements in Frankalmoign will not or faile to do ſuch Divine ſervice (as di-

divine ſervice (cõe eſt dit) le ſñr ne poit eux diſtrainer q̃ cel non feſant, &c. pur ceo que neſt mis en certaine queux ſervices ils doient faire, mes l'ſñr de ceo poit complaine a lour Ordinary ou Viſitour, luy prayant que il voilloit mitter punishment & correction ꝺ ceo, & aury de provider q̃ tiel negligence ne ſoit pluis a-tãt fait, &c. Et lordinary ou viſit̃ de droit ceo doit faire, &c.

is ſaid) the Lord may not diſtrain them for not doing this, &c. becauſe it is not put in certainty what ſervices they ought to do: but the Lord may cõplain of this to their Ordinary or Viſitor, praying him that hee will lay ſome puniſhment and correction for this, and alſo provide, that ſuch negligẽce be no more done, &c. And the Ordinary or Viſitour of right ought to do this, &c.

word Diſtreſſe, is a French word: in Latine it is called diſtrictio, ſive anguſtia; becauſe the cattel diſtrained are put into a ſtratt, which we call a pound.

¶ *Pur ceo que neſt miſe en certaine queux ſervices ils doient faire.* It is a Maxime in law, that no diſtreſſe can be taken for any ſervices that are not put into certainty, (e) nor can be reduced to any certainty, for, Id certum eſt, quod certum reddi poteſt; for (f) oportet quod certa res deducatur in judicium: and upon the Avowry, Dammages cannot be recovered for that which neither hath certainty, nor can be reduced to any certainty; and yet in ſome caſes there may be a certainty in uncertainty, as a man may hold of his Lord to ſh-r all the ſhẽp depaſturing within the Lords Manor; and this is certain enough, albeit the Lord hath ſometime a greater number, and ſometime a leſſer number there, & yet this incertainty being referred to the Manor which is certain, the Lord may diſtrain for this uncertainty. Et ſic de ſimilibus.

(e) 25 H. 6. 37. Br. tit. offic. 4. 8 E. 3. 3. 66. 20 E. 3. Avowry 15 16.
(f) Bracton fol. 230. & 328.

7 E. 3. 38.

¶ *Poet complainer.* That is, to complain in courſe of Juſtice, according to the Eccleſiaſtical Law.

*A lour ordinary.* Ordinarius, and ſo he is called (g) in the Eccleſiaſticall Law, Quia habet ordinariam jurisdictionem in jure proprio, & non per deputationem: the name we have anciently taken from the Canoniſts, and do apply it only to a Biſhop, or any other that hath ordinary juriſdiction in Cauſes Eccleſiaſtical: In this caſe of Littleton it is to be obſerved, that the Law doth appoint every thing to be done by thoſe, unto whoſe office it properly appertaineth, and forasmuch as it belongeth to the office of the Ordinary in this caſe to ſee Divine Service ſaid, and to compell them to do it by Eccleſiaſticall cenſures, therefore complaint is to be made unto him. Here, and in the next Section it appeareth, that for deciding of controverſies, and for diſtribution of Juſtice within this Realm; there be two diſtinct juriſdictions, the one Eccleſiaſticall, limited to certain ſpirituall and particular caſes (of the one whereof our Author here ſpeaketh) and the Court wherein theſe cauſes are handled, is called Forum Eccleſiaſticum. The other juriſdiction is ſecular and generall, for that it is guided by the common and general Law of the Realm, Quæ pertinet ad coronam & dignitatem regis, & ad regnum in cauſis & placitis rerum temporalium in foro ſeculari. So as in this caſe, put by our Author, the Lord hath remedy for his Divine Service (albeit they iſſue out of temporal lands) in Foro Eccleſiaſtico, by the Eccleſiaſtical Law, otherwiſe the Lord ſhould be without Remedy. Yet the common Law, to the intent that Eccleſiaſticall perſons might the better diſcharge their duty in celebration of Divine Service, and not to be entangled with temporall buſineſs, hath provided, that if any of them be choſen to any temporal office, he may have his writ De clerico infra ſacros ordines conſtituto non eligendo in officium, &c. and thereof be diſcharged.

(g) Mirrour, cap. 5. Sect. Bracton lib. 5. 10. 405, &c. Fleta lib. 2. cap. 50. & 55. & lib. 6. cap. 38. Britton fol. 59. 70. W. 2. cap. 19. 17 E. 2. breve 822. Regiſt. 141. Lindwood, tit. de Conſtit. cap. ex-er. Bract. lib. 5. cap. 2. fol. 400 & 401. and the other Authors aboveſaid.

Regiſt. orig. 187.

¶ *Ou Viſitor.* That is, where the King or any of his Progenitors is Founder of the houſe, there the Ordinary regularly ſhall not viſit them but the Chancellour of England is appointed by the Law to be Viſitor of them, or where a ſpecial viſitor is appointed upon the foundation, the complaint muſt be made to that Viſitor.

27 E. 3. 8, 9. 85. Regiſt. 40. F. N. B. 42. 10 Eliz. Dyer 273. 16 E. 3. breve 660. 21 E. 3. 60. 6 H. 7. 13. 8. Aſſ. 29. Brook tit. Premunire 21.

¶ *De droit doit ceo faire.* De Droit, of Right, (that is to ſay) he ought to do it by the Eccleſiaſtical Law, in the Right of his Office.

And here is implyed a Maxime of the Common Law, that where the Right (as our Author here ſpeaketh) is ſpiritual, and the Remedy therefore only by the Eccleſiaſtical Law, the conuſans thereof doth appertain to the Eccleſiaſtical Court.

Sect.

## *Sect.* 137.

2 E. 3. 27, 28.

¶ *Per certaine Divine ſervice deſtre fait, ſicome a chaunter un meſſe, &c. ou de diſtributer en Almoign, &c.* Here be the two parts abobe mentioned, of Divine Service, and for this Divine Service certain, the Lord hath his remedy, as here it appears by our Author in foro ſeculari: for here it appears, that if the Lord diſtrein for not doing of divine ſervice, which is certain, he ſhall upon his avowry recover dammages at the Common Law, that is, in the Kings temporal Court for the not doing of it. And if iſſue be taken upon the performance of the Divine Service, it ſhall be tried by a Jury of twelve men, becauſe albeit the ſervice be ſpirituall; yet the dammages are temporal, and ſo is the Seigniory alſo.

38 H. 6. 25, 27.

2 E. 6. ca. 13, verſus finem. 13 E. 3. ca. 5. 11 H. 7. c. 8. 1 El. cap. 2. 13 El. cap. 1. 23 E. 1, cap. 1. 1 Ja. c. 11. & 12.

And here is implyed another Maxime of the Law, that where the Common or Statute Law giveth remedy, in Foro ſeculari, (whether the matter be temporall or ſpirituall) the Conuſans of that cauſe belongeth to the Kings temporall Courts only, unleſſe the juriſdiction of the Eccleſiaſticall Court be ſaved or allowed by the ſame Statute, to proceed according to the Eccleſiaſticall Laws.

¶ *Ou de diſtributer en almoign al cent pours homes.* Here note, that the Alms and Relief of poor people being a work of charity, is accounted in Law divine Service; for what herein is done to the Poor, for Gods ſake, is done to God himſelf.

¶ *Poet diſtrein, &c.* Here (&c.) includeth many

¶ MEs ſi un Abbe ou Prior tient de ſon Seignior p certaine Divine Service en certaine deſtr fait, ſicome a chaunter un meſſe cheſchun vend die en le Semaine pur les Almes, ut ſupra, ou cheſcun an a tiel jour a chaunter placebo & dirige, &c. ou de trover un chapleine de chanter meſſe, &c. ou de diſtributer en Almoigne al cēt pours homes cent deniers a tiel jour: en tiel caſe, ſi tiel Divine Service ne ſoit fayt le Seignior poit diſtreyner, &c. pur ceo que le Divine Service eſt miſe en certaine per lour Tenure, que le Abbee ou prior devoit fait. Et en tiel caſe le Seignior avera Fealtie, &c. come il ſemble. Et tiel Tenure nē paſſe dit Tenure en Frankalmoigne, eins eſt dit Tenure per Divine Service, car en Tenure en Frankalmoigne nul mention eſt fait daſcun manner de Service, car nul poet tener en Frankal-

But if an Abbot or Prior holds of his Lord by a certain Divine Service, in certain to be done, as to ſing a Maſſe every Friday in the weeke, for the Soules, *ut ſupra*, or every year at ſuch a day to ſing a *Placebo & dirige*, &c. or to find a Chaplain to ſing a Maſſe, &c. or to diſtribute in almes to an hundred poore men an hundred pence at ſuch a day: In this caſe, if ſuch Divine Service bee not done, the Lord may diſtreine, &c. becauſe the Divine Service is put in certaine by their Tenure, which the Abbot or Prior ought to do. And in this caſe the Lord ſhall have a Fealtie, &c. as it ſeemeth. And ſuch Tenure ſhall not be ſaid to be Tenure in Frankalmoigne, but is called Tenure by Divine Service: For in Tenure in Frankalmoigne, no mention is made of any manner of Service: For none can hold in Frankalmoigne, if there be expreſſed any manner

moign

moign, ſi ſoit expreſſe aſcun manñ dētain ſervice que il doit faire, &c. of certaine Service that he ought to do, &c.

excellent things; as when, where & what may be diſtreined, of all which there is a taſte given in their proper places.

¶ *En tiel caſe le Seignior avera fealtie, &c. come ſemble.* For, as it hath bēn ſaid, Fealty is incident to every Tenure, ſaving the Tenure in Frankalmoign, and where the Lord may diſtrein, there is Fealty due. And Britton calleth this Tenure (by Divine ſervice) Aumone, and not libera Eleemoſyna. And ſaith he, Tenure en aumone eſt terre ou tenement que eſt done a aumone, dount aſcun ſervice eſt retinue al feoffor. Brit. fol. 164.

¶ *&c.* And here (&c.) implieth Diſtreſſe, Eſcheat, and the like.

¶ *Et tiel Tenure neſt paſſe dit Tenure en Frankalmoigne, eins eſt dit tenure per Divine ſervice, &c.* And therefore our old Book, divided Spiritual Service into free Alms, (which was free from any limitation of certainty) and Alms, becauſe the Tenants were bound to certain divine Services. 33 H. 6. fol. 6. Brit. cap. 66.

¶ *Sil ſoit expreſſe aſc in manner de certaine ſervice.* This holdeth where the certainty is reſerved upon the original Grant. If lands were given to hold in libera Eleemoſyna, reddendo a rent, it ſeemeth the reſervation of the Rent to be void, † becauſe it is repugnant, and contrary to the former grant, in libera Eleemoſyna. 13 E. 1. Count. de Vouch. 118. † 13 H. 4. tit. Meſne. 74. 30 E. 3. 30. 19 E. 2. Avowry 224. 32 E. 1. Tail 31. 26. Aſſ. 66. 4 H. 6. 17. Trin. 4 E. 3. F. N. B. 252. 15 E. 3. Corody 4. 11 Aſſ. 22. 50. Aſſ. Pl. 6.

Vide Trin. 4 E. 3. and F. N. B. 231. fol. That an Abbot or Prior that hold in Frankalmoign, ſhall not be charged with a Corody. Alſo, lands holden in Frankalmoign cannot (l) be ancient Demeſne, in reſpect of charges incident thereunto. (l) 32 E. 1. ant. Dem. 39. 8 E. 3. 5.

¶ *Que il doit faire, &c.* Here by (&c.) is underſtood temporal or ſpiritual Service alſo, which he ought to do corporally, or render, or pay.

There were within this Realm of England one hundred and eighteen Monaſteries, founded by the Kings of England, whereof ſuch Abbots and Priors as were founded to hold of the King per Baroniam, and were called to the Parliament by Writ, were Lords of Parliament, and had places and voices there: † And of them there were twenty ſeven Abbots, and two Priors, as by the Rolls of Parliament appears: But ſince our Author wrote, all theſe (as hath bēn ſaid) are diſſolved. King Sephen did found the Abbey of Feverſham in Kent, Et dedit Abbati, & Monachis, & ſucceſſoribus ſuis Manerium de Feverſham in Com. Kanciæ, ſimul cum Hundredo, &c. renendum per Baroniam, &c. Who albeit he held by a Barony; yet becauſe he was never (that I (m) find) called by Writ, he never ſate in Parliament. † For example, Rot. parl. 5 H. 8. & 21 H. 8. &c.

All the Archbiſhops and Biſhops of England have bēn founded by the Kings of England, and do hold of the King by Barony (as before hath bēn ſaid) and have bēn all called by writ to the Court of Parliament, and are Lords of Parliament: As (amongſt many) take one notable Record, (o) Mandatum eſt omnibus Epiſcopis, qui conventuri ſunt apud Glouceſtriam, die Sabbati in craſtin' Sanctæ Katharinæ, firmiter inhibendo quod ſicut Baronias ſuas quas de Rege tenent, diligunt, nullo modo præſumant conſilium tenere de aliquibus quæ ad Coronam Regis pertinent, vel quæ perſonam Regis, vel ſtatum ſuum, vel ſtatum conſilii ſui contingunt; ſciturі pro certo, quod ſi fecerint, Rex inde ſe capiet ad Baronias ſuas. Teſte Rege apud Hereford, 23. Novemb. &c. (m) Canc. paſch. 30 E. 1. cor. rege this foundation is ſo pleaded. (o) Ex Rot. par. de anno 18 H. 3. M. 17.

And the Biſhopricks in Wales were founded by the Princes of Wales; and the Principality of Wales was holden of the King of England as of his Crown: and when the Prince of Wales committed treaſon, rebellion, &c. the Principality was forfeited, and the Patronages of the Biſhops annexed to the Crown of England, ſo as the King is to have Penſions for his Chaplains, and Corodies for his Cadelets, of them, as of Biſhops founded by himſelf. And vide Mich. 10 H. 4. Rot. 60. Wallia coram Rege, that the judgment was given accordingly againſt the Biſhop of Saint Davids in Wales; per Juſticiarios de utroq; Banco & alios de perito concilio Domini Regis. And the Biſhops of Wales are alſo called by Writ to Parliament, and are Lords of Parliament, as Biſhops of England be. 10 H. 4. fol. 6. b.

## *Sect.* 138.

¶ Item ſi ſoit demand, ſi teñ en frankmariage ferra fealtie a le doñ ou a

ALſo if it be demanded, if tenant in frankmarriage ſhall doe fealty to the Do-

¶ *Le quel ſerra inconvenient, &c.* An argument drawn from an inconvenience, is forcible in Law, as hath been obſerved Vid. Sect. 87. 136. 201. 269. 440. 478. 665. 722.

40. Ass. 17.

Littleton fol. 50. b. 42 E.3.5. 28 E.3. 395. 20 H. 6.28.

ved before, and shall be often hereafter. Nihil quod est inconveniens, est licitum. And the law that is the perfection of reason, cannot suffer any thing that is inconvenient.

It is better, saith the Law, to suffer a mischief (that is peculiar to one) than an inconvenience that may prejudice many: See more of this after in this Chapter.

Note, the reason of this diversity, between Frankalmoigne and Frankmarriage, standeth upon a main Maxim of Law, that there is no land, that is not holden by some service spiritual or temporall; and therefore the donee in Frankmarriage shall do fealty, for otherwise he should do to his Lord no service at all; and yet it is Frankmarriage, because the Law createth the service of Fealty for necessity of reason, and avoyding of an inconvenience. But tenant in Frankalmoigne doth spiritual and divine Service, which is within the said Maxim; and therefore the Law will not cohort him to do any temporal service. See the next Section.

¶ *Et encounter reason.* And this is another strong argument in Law, Nihil quod est contra rationem est licitum. For reason is the life of the Law, nay the common Law it self is nothing else but reason, which is to be understood of an artificiall perfection of reason, gotten by long study, observation, and experience, & not of every mans natural reason; for, Nemo nascitur artifex. This legall reason, est summa ratio. And therefore if all the reason that is dispersed into so many several heads were united into one, yet could he not make such a Law as the Law of England is, because by many successions of ages it hath been fined and refined by an infinite number of grave and learned men, and by long experience grown to such a perfection, for the government of this Realm, as the old rule may be justly verified of it, Neminem oportet esse sapientiorem legibus: No man (out of his own private reason) ought to be wiser than the Law, which is the perfection of reason.

ses heires devant le quart degree passe, &c. il semble que oy, Car il nest pas semble quant a cel entēt a tenant en frankalmoigne, pur ceo que tenant en Frankalmoign serra, p cause de sa tenure, divine service pur son Sñr, come devant est dit, & ceo il est charge a faire p la ley del saint esglise, & pur ceo il est excuse & discharge de fealty, mes tenant en frankmarriage ne serra pur son tenure tiel service, & sil ne serra fealty, donqz il ne serra a son Seignior ascun maner de service, ne spiritual ne temporal, le quel serroit inconvenient & encounk reason, que home serra Tenant destate denheritance, a un auter, & uncore ē Sñr averā nul maner de service de luy, & issint il semble que il serra fealty a son Sñr devant le quart degree passe. Et quāt il ad fait fealty, il ad fait touts ses services.

nor or his heirs, before the fourth degree be past, &c. it seemeth that he shall, for he is not like as to this purpose to tenant in frankalmoigne, for tenant in frankalmoigne by reason of his tenure shall do divine service for his Lord (as is said before) and this he is charged to do by the Law of holy Church; and therefore he is excused and discharged of fealty, but tenant in frankmariage shall not do for his tenure such service; and if he doth not fealty, he shall not do any manner of service to his Lord neither spiritual nor temporall, which would be inconvenient, and against reason, that a man shall be tenant of an estate of inheritance to another; and yet the Lord shall have no manner of service of him, and so it seems he shall do fealty to his Lord before the fourth degree be past. And when he hath done fealty, he hath done all services.

## *Sect.* 139.

¶ ET ſi un Abbe tiēt de ſon ſeignior en frankalm. et Labbe et le covent ſouth lour common ſeale alien meſmes les tenements a un ſeculer home en fee ſimple, en ceo cas le ſeculer home ferra fealtie a l' Seignior, pur ceo que il ne poit tener de ſon Sñr en frankalmoigne. Car ſi le Seignior ne doit aver de luy fealtie, donque il avera nul maner d̄ ſervice, que ſerroit inconvenient, ou il eſt Sñr, & le tenement eſt tenus de luy.

AND if an Abbot holdeth of his Lord in frankalmoign, and the Abbot and Covent under their common ſeal alien the ſame Tenements to a ſecular man in fee-ſimple; In this caſe the ſecular man ſhall do fealty to the Lord, becauſe he cannot hold of his Lord in Frankalmoigne: for if the Lord ſhould not have Fealty of him, he ſhould have no manner of ſervice, which ſhould be inconvenient where he is Lord, and the tenements be holden of him.

¶ This caſe is worthy of great obſervation, for hereby it appeareth, that albeit the Alienors held not by fealty nor any other terrene ſervice, but only by ſpiritual ſervices, and thoſe incertain, yet the alienée ſhall hold by the certain ſervice of fealty (and of this opinion is Littleton, agreeable with our books in former Authorities) for the Law createth a new temporall ſervice out of the land to be done by the Alienée, wherewith the Abbot was not formerly charged, for the avoiding of an inconvenience, viz. that the feoffee ſhould do no manner of ſervice, and conſequently that the land ſhould be holden of no man, wherein it is to be remembred that (as hath been ſaid before) all the lands and tenements in England in the hands of any ſubject, are holden of ſome Lord or other, and that every Tenant muſt do ſome kind of ſervice. And that all Lands and Tenements are holden either mediately or immediately of the King, for originally all lands and tenements were derived from the Crown. And it is to be obſerved that when the Law createth any new tenure, it is the loweſt (viz. Tenure in Socage) and with the leaſt ſervice that can be done, and nereſt to ỹ frædom of the former ſervice, as in this caſe a Tenure in Socage by Fealty only, ỹ is created by the Law, which is the loweſt and leaſt ſervice the Law can create, becauſe Fealty is incident to every Tenure except Tenure in Frankalmoign; for if it ſhould create any other ſervice, it muſt create Fealty alſo. And the Law, according to equity and Juſtice, giveth this Fealty to the Lord, of whom the land was before holden in Frankalmoign. And laſtly, the Law ſo abhorreth an inconvenience, as that it createth out of the Land a new ſervice; for avoiding thereof. It appeareth by our books, that a Seignior in Frankalmoign may be granted over, and conſequently the Tenant ſhall hold of the Grantee by Fealty only, and therefore Britton ſaid well, that no ſervice could be demanded of a Tenant in Frankalmoign, tant come les terres remaine en les maines les feoffees.

31 E. 3. Ceſſant 22. 33 H. 6. 67. 21 E. 4. 11. lib. 9. fol. 123. Anth. Lowes caſe.

Lib. 9. fol. 123. in Anth. Lowes caſe.

42 Aſſ. Pl. 6. Britton 164. b.

## *Sect.* 140.

¶ ITem ſi home graunta a cel jour a un Abbe, ou a un Prior terres ou tenements en frankalmoigne, ceux poſt (frankalmoign) ſont

ALſo if a man grant at this day to an Abbot or to a Prior, Lands or Tenements in Frankalmoigne, theſe words (frankalmoign) are voyde, for it is or-

¶ *Ordeine per leſtatute.* Here it appeareth by the authority of Littleton, that this is a ſtatute, and yet the King alone ſpeaketh, viz. Dominus Rex in Parliamento ſuo, &c. ad inſtantiam magnatum Regni ſui conceſſit, providit, & ſtatuit.

But

Vide lib. 8. the Princes caſe.

But becauſe it is Dominus Rex in Parliamento, &c. conceſſit, it is as much in this caſe (being an ancient ſtatute) as Dominus Rex authoritate Parliamenti conceſſit. Secondly, It is (amongſt other acts of Parliament) entred into the Parliament Roll; and therefore ſhall be intended to be ordained by the King, by the conſent of the Lords and Commons in that Parliament aſſembled. Thirdly, It is a generall Law, whereof the Judges may take knowledge; and therefore it is to be determined by them, whether it be a ſtatute or no. Now for the divers forms of Acts of Parliament; you may read them in the Princes caſe, ubi ſupra.

¶ *Appel Quia emptores terrarum.* This ſtatute is called ſo, becauſe the ſtatute beginneth with theſe words, Quia emptores terrarum.

¶ *Nul poet aliener, &c. terres in fee ſimple de tener de luy meſme.*

This is juſtly inferred upon the Statute; but the letter of the Statute is, that Feoffatus teneat terram illam de capitali Domino, &c. So as by the authority of Littleton, he that citeth a Statute, is not bound to recite the very words thereof, ſo long as he miſſeth not of the ſubſtance and neceſſary conſequence thereupon, and yet the ſafer way is, to vouch the words of a Law as they be.

¶ *Graunta per licence meſme les tenements, &c.* Here Littleton ſpeaketh of a licence, or a diſpenſation within the ſaid Statute of Quia emptores terrarum (and mentioneth no other Statute) which may be done by the King and all the Lords immediate and mediate; for it is a rule in Law, Alienatio, licet prohibeatur, conſenſu tamen omnium, in

23 E. 3. tit. releaſe 33. 27 H. 8. F. N. B. 211. 1.

voides, pur ceo que il eſt ordeine per leſtatute que eſt appelle, Quia emptores terrarum (que leſtatut fuit fait Anno 18 Ed. 1.) que nul poit aliener ne graunter terres ou tenements en fee ſimple, a tener de luy meſme. Iſſint ſi hõe ſeiſie de certain tenements quẽr il tient de ſon Seignior per ſervice de chivaler, & a cel jour il, &c. grãta per licẽce meſmes les tenements a un Abbe, &c. en Frankalmoigne, l'abbe tiendra immediatmẽt meſmes l's tenemẽts per ſervice de Chivaler de meſme le ſeignior de q̃ ſon graunter tenoit, & ne tiendra ny de ſon grant en frankalmoign, p cauſe de meſme leſtatut, iſſint que nul poit tener en frankalmoigne, ſi non q̃ ſoit per title de preſcription, ou per force de graunt fait a aſcun d̃ ſes predeceſſors, devant q̃ meſme le ſtatute fuit fait. Mes le roy poit doner terres ou tenements en fee ſimple, a tener en Frankalmoigne, ou per auters ſervices, car il eſt hors de cas del eſtatute.

dained by the Statute which is called, *Quia emptores terarum*, (wch was made *Anno* 18 *E.* 1.) that none may alien nor grant Lands or Tenements in Fee ſimple to hold of himſelf. So that if a man ſeiſed of certain Tenements which he holdeth of his Lord by Knights Service, and at this day he, &c. granteth by licence the ſame Tenements to an Abbot, &c. in Frankalmoign, the Abbot ſhall hold immediately the Tenements by Knights-Service of the ſame Lord of whom his Grantor held, and ſhall not hold of his Grantor in Frankalmoigne, by reaſon of the ſame Statute. So that none can hold in Frankalmoigne, unleſſe it be by title of preſcription, or by force of a grant made to any of his Predeceſſours before the ſame Statute was made: But the King may give Lands or Tenements in Fee ſimple to hold in Frankalmoigne, or by other ſervices, for he is out of the caſe of that Statute.

quo-

quorum favorem prohibita eſt, poteſt fieri, & quilibet poteſt renunciare juri proſe introducto: and the licence of Lords immediate, and mediate, in this caſe ſhall enure to two intents, viz. to a diſpenſation both of the ſtatute of Quia emptores terrarum, and of the ſtatutes of Mortmaine, as Littleton here implieth, becauſe their deds ſhall be taken moſt ſtrongly againſt themſelvs. But it is a ſafe and good policy in the Kings licence to have a Non obſtante alſo of the ſtatutes of Mortmaine, and not onely a Non obſtante of the ſtatute of Quia emptores terrarum. But it appeareth by Littleton (which is a ſecret of Law,) that there needeth not any Non obſtante by the King of the ſtatutes of Mortmaine, for the King ſhall not be intended to be miſconuſant of the Law, and when he licenceth expreſly to Alien to an Abbot, &c. which is in Mortmaine, he needs not make any Non obſtante of the ſtatutes of Mortmaine, for it is apparent to be granted in Mortmaine, and the King is the head of the Law, and therefore Præſumitur Rex habere omnia jura in ſcrinio pectoris ſui, For the maintenance of his grant to be good according to the Law, for which cauſe of purpoſe Littleton maketh no mention of any licence in Mortmaine. Diſpenſatio, eſt mali prohibiti provida relaxatio, utilitate ſeu neceſſitate penſata.

34 Aſſ. pl. 10. 9 E. 4. b. 11. Pl. Com. 502, 503. Grendons caſe. Vide l. 29. 25, 26. 31 & 110. Vide Sect. 686.

Littleton fol. 20. a.

¶ *Labbe tiendra, &c. per ſervice de chivaler.* For although by the death of the Abbot, there is neither Ward, Marriage, nor Relief due, yet he holdeth by Knights ſervice, albeit the Lord cannot have the fruit of it: and if the Abbot with the conſent of the Covent alien the land over to a man and his heirs, there is the Ward, Marriage, & Reliefe reviued. But by preſcription (as it hath been ſaid) the ſucceſſor of an Abbot may pay Relief. An Abbot or Prior, &c. that holdeth lands by Knights ſervice, albeit he ought not in reſpect of his profeſſion, to ſerve in warre in proper perſon, yet muſt he find a ſufficient man, conueniently arrayed for the warre, to ſupply his place. And if he can find none, then muſt he pay Eſcuage, &c. for his profeſſion doth not priviledge him, but that the Kings ſervice in his war muſt be done, that belongeth to his tenure.

8 R. 2. Reliefe 14. 3 H. 4. 2. a. Vide Littl. fol. 29.

Nota (Reader) ſince Littleton wrote, a man might either in his life time, or by his laſt will in writing, (m) give Lands, Tenements, &c. to any ſpiritual body Politick, or Corporate, to be holden of himſelf in Frankalmoign, or by Divine Service, as by the ſtatute of 1. & 2. Phil. & Mariæ (which endured for twenty years) appeareth; which ſtatute, ſince that time, hath been favourably and benignly expounded.

(m) 1. & 2. Ph. & Mar. c 8. Mich. 8 & 9 Eliz. Dyer. fol. 255.

¶ *Iſſint que nul poet tener en Frankalmoign, ſi non que ſoit per title de preſcription, &c.* It is to be underſtood that a man ſeiſed of lands may at this day give the ſame to a Biſhop, Parſon, &c. and their ſucceſſors in Frankalmoign, by the conſent of the King, and the Lords mediate and immediate, of whom the Land is holden; for the rule is, Quilibet poteſt renunciare juri pro ſe introducto.

12 E. 4. 4.

27 H. 8. 2 E. 2. avowry 185.

So if an Eccleſiaſtical Perſon hold lands by fealty and certain Rent, the Lord at this day may confirm (n) his eſtate, to hold to him and to his ſucceſſors in Frankalmoign; for the former Services be extinct, and nothing is reſerved but that he holds of him, and ſo he did before.

(n) 4 E. 3. 21, 22 E. 3. 15. 38 H. 6. 25. Lit. cap. confirmat. 123.

¶ *Mes le Roy poet, &c. car il eſt hors de caſe del ſtatute.*

It is clear that the King is out of the caſe of the ſtatute; for the ſtatute is, Quod feoffatus teneat terram illam, &c. de capitali Domino feodi, &c. and this cannot be intended of the King who is ſuperior to all, and inferiour to none, but where the King is bound by Acts of Parliament, and where not, Vide lib. 11. fo. 66. Magdalen Colledge Caſe.

Lib. 11. fol. 66. Magdalen Colledge caſe.

## *Sect.* 141.

¶ FT nota q̃ nul poit tener terres ou tenements en frankalmoign, forſpriſe del grantor ou de ſes heires. Et pur ceo ſi eſt dit, que ſi ſoit Seignior, meſne & tenant, & le tenant eſt un Abbe que tient

AND note, That none may hold lands or tenements in Frankalmoigne, but of the Grantor, or of his heires. And therefore it is ſaid, that if there be Lord, Meſne, and tenant, and the tenant is an Abbot which

¶ *Forſpriſe del grantor ou de ſes heirs.* The Tenure in Frankalmoigne is an incident to the inheritable blood of the Grantor, and cannot be tranſferred nor forfeited to any other, no more than a Founderſhip of a houſe of Religion, which is intended to be in Frankalmoign, or Homage Anceſtrel, or the writ of Contra formam Feoffamenti, or the writ of Contra

14 E. 3. tit. Meſn. 7. 14 H. 3. tit. diſclaim. b. 33. 35 E. 3. confirm. 8. 27 H. 8. b. Temps E. 3. gar. 90. 45 E. 3. 23. 47 H. 3. gar. 99. 13 H. 4. 5. 2. 14 H. 4. 5. 16 H. 7. 11. 28 Aſſ. 33. 18 E. 3. 18. 22 E. 3. 18. Corody. Brooke 5. 22 H. 6. 50. 4 E. 2. avowry 201. 202. 19 E. 3 ibid. 22. 11 E. 3. ib. 100. 30 H. 6. 7. 33 H. 8. Dyer 51. F. N. B. 16. F. N. B. 211. c.

Contra formam collationis, or any other incident to their inheritable blood. But it is no incident inseparable, for the Lord may release to the Tenant in Frankalmoigne, and then the tenure is extinct, and he shall hold of the Lord Paramount by fealty, as in the case of Littleton, Sect. 139.

15 E.3.confirm.8.

¶ *Ou de ses heires.* Here (or) hath the sense of (and): for a man cannot at this day grant lands in tail, and reserve a Rent to his heirs, and exclude the Grantor himself; for the heir cannot take any thing in the life of the Ancestor, neither can the heir take any thing by descent, when the Ancestor himself is secluded. But if a man had granted lands at the Common Law to hold of his heirs, these words (To hold of his heirs) are void, and he shall hold of the Grantor as he held over, which he should have done, if he had made no reservation at all.

Vide 15 E. 4.

31 E.3.tit Annuity 52. 3 Ass. Pl.8.&c.

And albeit Littleton saith, that no man can hold lands in Frankalmoign, but of the Grantor or his heirs, yet might an Abbot by assent of his Covent, or a Bishop with assent of his Chap. and such like, by license as is aforesaid, have given lands in Frankalmoign, to hold of them and their successors, and as Littleton himself agreeth, the King may give land in Frankalmoigne. In which case, the land shall be holden of him, his heirs and successors.

¶ *Et pur ceo est dit si soit Seignior, mesne, & tenant, & le tenant est un Abbe,* &c: By this it appeareth, that if the Seignior be transferred by Act in Law to a stranger, and thereby the privity is altered, that the tenure in Frankalmoign is changed to a tenure in Socage by fealty, as well as it appeareth before when the Seignior or Tenancy is granted to another; and the Law in this case also createth a new fealty, wherewith the Land was not charged before.

2 E. 4. 46. 7 E.4.12.2.

¶ *Donques le mesnaltie deviendra per escheat al dit Seignior Paramount.* This new Tenure created by Law, shall upon the Escheat drown the Seignior, for always the Seignior neerer to the land, drowns the Seignior that is more remote off, and yet the Lord in this case to whom the Mesnalty is escheated, shall hold by the same services that held before the Escheat.

de son mesne en frãkalmoign, si le mesne devy sans heire, donque le mesnaltie deviendra per escheate al dit Seignior Paramount, & Labbe adonque tient de luy immediate per fealtie tantum, & ferra a luy Fealty, pur ceo que il ne puit tener de luy en Frankalmoigne, &c.

holdeth of his Mesne in Frankalmoigne, if the Mesne dye without heir, the Mesnalty shall come by Escheat to the said Lord Paramount, and the Abbot shall then hold immediately of him by fealty onely, and shall do to him fealty, because he cannot hold of him in Frankalmoigne, &c.

## Sect. 142.

¶ *Home de Religion.* And yet this case extendeth to all Ecclesiasticall persons that hold in Frankalmoign, be they secular or regular, for the mesne ought to acquite all of them, for they be bound (a) to make prayers for their founder, and his heires, and in consideration of those prayers, the founder, &c. is bound to pay to the chief Lord all Rents and Services issuing out of that Land, as it appeareth by that which followeth.

(a) Pl.Com.368.b. in Shoringtons case. 33 H.6.6. 39 H.6.29. 35 E.3. incip 7.

¶ *De luy acquiter.* ET nota q̃ tout tiel hõe de religion tiẽt ses Tenements de son Sñe en frãkalmoign, sou Sñr est tenus p la ley de luy acquiter de chescun manner õ service, que aleñ sur paramount de luy doet aver ou demander de mesmes les tenements, & sil ne

AND note, That where such man of Religion holds his Tenements of his Lord in Frankalmoigne, his Lord is bound by the Law to acquite him of every manner of service which any Lord paramount will have or demand of him for the same Tenements, and if he doth not acquite luy

luy acquita pas, mes ſuffra luy deſtre diſtraine, &c. donqz il avera envers ſon ſeignior un briefe de Meſne, & recovera envers luy ſes dammages & ſes coſtes de ſon ſuit, &c.

him, but ſuffereth him to be diſtrained, &c. hee ſhall have againſt his Lord a Writ of Meſne, and ſhall recover againſt him his damages and coſts of ſuit, &c.

Aquiter is compounded of ad, and the old verb quietare, and ſignifieth in Law (b) to diſcharge, or keep in quiet, and to ſee that the Tenant be ſafely kept from any entries, or other moleſtation for any manner of ſervice, ſuing out of the Land to any Lord, that is above the Meſne. (c) And hereof commeth (d) acquittall, and quietus eſt, (that is) that he is diſcharged; and he that is diſcharged of a felony, &c. by judgment, is ſaid to be acquited of the felony, acquietatus de felonia; and if he be vrawn in queſtion again, he may plead (e) auter foits acquite. And therefore if ſuch a tenant, as Littleton here ſpeaketh of, be diſtrained by any Lord paramount, the Meſne (to keep the Tenant quiet) may put his beaſts in the pound, in ſtead of the beaſts of the Tenant.

(b) Fleta lib. 2. cap. 43. Britton fol. 58. 59. Vide hereafter in this Sect. in brief de Meſne.

(c) Vide ſect. 142. 540.
(d) 8 E. 2. Corone 424. 20 E. 2. Ibid. 232. Stanf. Pl. Corone 105.
(e) 4 E. 3. 35. 17 E. 3. 44. 7 H. 4. 18. 34 H. 6. 47. 13 E. 4. 6. F.N.B. 136. Lib. 9. fol. 110, 111, in Treſhams caſe.

There be three kinds of Acquitals. 1. An acquittall by Deed. 2. An acquittall by preſcription. 3. An acquital by Tenure: And by Tenure four manner of wayes. 1. By oweltie of ſervices, for ſervice acquits ſervice. 2. Tenure in Frankalmoign, whereof Littleton here ſpeaketh. 3. Tenure in Frankmarriage. 4. Tenure by reaſon of Dower.

3 E. 3. 14. 77. 5 E. 3. 11. 4 H. 6. 28. 39 E. 3. 9. 11 H. 4. 52. 12 H. 4. 9. 14 H. 4. 17. F.N.B. 136. b. h. 39 H. 6. 30. 33 H. 6. 7. F.N.B. 135. m. 4 E. 4. 35. 12 H. 4. 9. 27 E. 3. 95. 17 E. 3. 39.

¶ *De cheſcun manner de ſervice.* (f.) And yet not of ſervices only, as Homage, Fealty, Rent works, and other ſervices, but alſo of improvement of ſervices, as if he be diſtreined for relief, Aide pur file marier, aide pur faire fitz chivaler, &c. Alſo for ſuit ſervice to a Hundred, (g) but for ſuit real in reſpect of reſiance within any Hundred, Leet, or Turn, the Meſne ſhall make no acquital, for that is in reſpect of his perſon and reſiancy.

(f) 39 H. 6. 31. a. 9 E. 4. 27. F.N.B. 136. m. 17 E. 2. Meſne 5 E. 3. 49.
† Bracton lib. 2. fol. 84.
(g) 4 E. 3. 42.

¶ *Briefe de meſne.* Breve de medio, a writ of Meſne, ſo called by reaſon of the words of the writ of Meſne, which are Unde idem A. qui medius eſt inter C. & præfatum B. A. who is Meſne between C. that is the Lord paramount, and B. that is the Tenant paravaile. And note, that there be ſix writs in Law that may be maintained, quia timet, before any moleſtation, diſtreſſe, or impleading: as 1. a man may have his writ of Meſne, (whereof Littleton here ſpeaks) before he be diſtreined. 2. A Warrantia cartæ, before he be impleaded. 3. A Monſtraverunt, before any diſtreſſe or vexation. 4. An Audita querela, before any execution ſued. 5. A Curia claudenda, before any default of incloſure. 6. A Ne injuſtè vexes, before any diſtreſſe or moleſtation: and theſe be called Brevia anticipantia, Writs of prevention.

For this writ ſee the Regiſter fol. and F.N.B. fol. 135.
Mirrour cap. 2. Sect. 13. Bract. lib. 2. fol. 84. Britton fol. 58. Flet. lib. 2. cap. 33. Weſt. 2. cap. 9.

¶ *Et recovera vers luy ſes damages.* It is to be known, that there be two ſeveral judgements in a Writs of Meſne, one at the common Law, another by the Statute of W. 2. cap. 9. At the common Law he ſhall have judgement to recover his acquital, and if he be diſtreined or damnified, his damages and coſts: and the proceſſe at the common Law was Summons, Attachment, and Diſtreſſe infinite, in the ſame County where the writ is brought. † The judgment by the ſaid ſtatute of W. 2. is a forejudger of the Meſnalty, and that in two ſeveral caſes, one upon Proceſſe given by the ſaid ſtatute, viz. Summons, Attachment, and Grand diſtreſſe; and if he commeth not, and the writ be returned, he ſhall be forejudged: the other caſe is, where a Tenant recovereth his acquital in a Writ of Meſne; if he be not acquitted afterwards, he ſhall have a Writ of Diſtringas ad acquietandum, againſt the ſame Meſne; and if he commeth not, he ſhall be forejudged by his default of the Meſnalty, and ſo if he commeth, and it be found againſt him by verdict, he ſhall be forejudged: but Forejudger in that caſe is not given againſt his heir, for that the ſtatute ſpeaketh only of the Meſne, and not of his heirs. And the judgement in caſe of forejudgment is, Quod T. (le Meſne) amittat ſervitia de R. (le tenant) de tenementis prædictis, & quod mulier prædicto T. præfat' R. (le ſeignior paramount) modo ſit attendens & reſpondens per eadem ſervitia per quæ T. tenuit. The ſaid ſtatute in caſe of forejudgment, doth not bind a Feme covert, and yet if ſuch a judgment be given againſt a Woman and a Feme, it is not void, but erroneous, and to be reverſed in a Writ of error, and ſo in forejudgment againſt a Tenant in tail ſhall bind the iſſue in tail in an Avowry, untill he reverſe it by error. If two Joyntenants bring a Writ of Meſne, and the one is ſummoned, and ſeverall, the other cannot forejudge the Meſne, for he ought to be attendant to the Lord Paramount, as the Meſne was, and that cannot he be alone. And ſo it is if there be two Joyntenants Meſnes, and in a Writ of Meſne brought againſt them, one maketh default, and the other appears, there can be no Forejudger.

W. 2. cap. 9.
Vide lib. 8. fol. 134. Mary Shepleys caſe.

† Bracton lib. 2. fol 84. Fleta lib. 2. cap. 43.

46 E. 3. 31. 18 E. 2. tit. Meſne F. N. B. 136. 2 H. 4. 7. 17 E. 3. Contra formam Collat. 2. F. N. B. 121.

7 E. 3. 41. tit. Meſne 28. 9 E. 2. ibid. 67. 14 E. 2. ibid. 70. Lib. 9. fol. 73. b. Doct. Huſſeys caſe.

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If the Tenant be disseised, and the Disseisor in a writ of Mesne forejudge the mean, this shall not bind the disseisee. And so if the Mesne be disseised, and a forejudgment is had against the Disseisor, this doth not bind the disseisee; for the words of the said Statute are, Quando tenens sine præjudicio alterius quam medii attornare se potest capitali Domino.

But if the daughter, the sonne being in venter sa mere, be forejudged, it shall bind the sonne that is born afterwards, because he had no right at the time of the forejudgment. And so if the Tenant enter in Religion, and his heir forejudgeth the Mesne, and then the Ancestor is deraigned, he shall be bound causa qua supra. If there be Lord Prior, Mesne, and Tenant, the Mesne cannot be forejudged, because he alone can do nothing to the prejudice or the dilherison of his Church: And the like Law is of a Bishop, Parson, and the like.

16 E. 3. Judgm. 117.

W. 2. cap. 9.

No forejudgment can be, but when there is but one mean between the Lord distreining, and the Tenant, because the Tenant upon the forejudgment cannot be attendant to the Lord distreining in respect there is a mean between them, and so the said Statute provideth for in expresse terms.

Note, the Plaintiff in a writ of Mesne, may chuse either Processe at the Common Law, or upon the said Statute of W. 2. Forejudgment is called Foris judicatio, and he that is forejudged, Foris judicatus. And Bracton hath this writ, Rex Vicecomiti, &c. & non permittas quod A. capitalis Dominus feodi illius, habeat custodiam hæredis, quia in curia nostra foris judicatur de custodia, &c. Fleta calleth it Abjudicationē, and thereupon commeth abjudicatus; for he saith, Post Proclamationem, &c. factam, abjudicetur medius de feodo, & servitio suo.

50 E. 3. 23. F. N. B. 137. Bract. l. 4. 256. b. Brit. f. 58. b. Fleta l. 2. c. 43.

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# Chap. 7. *Homage Auncestrell.* Sect. 143.

*Per title de Prescription en le tenancie en le sanke le tenant, & auxy en le Seignior, en le sanke le Seignior.*

Here Littleton doth not define what Homage Ancestrell is, but putteth an example in one case. For in the 146. Section, it appeareth, that blood is not alwayes necessary on the Lords side. In this example here put, there must be a double prescription, both in the blood of the Lord, and of the Tenant; and therefore I think there is little or no land at all at this day, holden by Homage Auncestrel.

9 H. 3. Vouch. 277. 47 H. 3. Gar. 99. Temps E. 1. Gar. 90. 4 E. 2. Voue. 245. 45 E. 3. 43. 11 H. 4. 50. 4 H. 6. 26.

And hereof it is said, Aucun est le Seignior tenus a son homage, come le homage a son Seignior, forsque solement en reverence. And herewith agreeth Bracton, Est tanta & talis connexio per homagium inter Dominum & tenentem, quod tantum debet Dominus tenenti, quantum tenens Domino, præter solam reverentiam.

Brit. fol. 170. a.

Bract. fol. 78. Glanv. l. 9. c. 4. 536.

*Treit a luy gar.*

TEnure p Homage ancestrel est, lou un Tenant tient sa Terre de son Seignior per homage, & meisme le Tenant & ses Auncesters que heire il est ont tenus meisme le terre del dit Seignior, & de ses Auncestors que heire le Seigniour est, de temps dont memorie ne court, per homage, & ont fait a eur homage. Et ceo est appel Homage auncestrel, per cause de continuance que ad este per title de Prescription en le tenancie en le sanke le Tenaunt, & auxy en le Seignio-

TEnant by homage Auncestrell is, where a Tenant holdeth his land of his lord by homage, and the same Tenant and his Auncestours whose Heire hee is, have holden the same land of the same Lord, and of his Auncestors whose heire the Lord is, time out of memory of man, by Homage, and have done to them Homage. And this is called Homage Auncestrell, by reason of the continuance which hath been by Title of Prescription in the Tenancie in the blood of the Tenant, and also in the Seigniory in

ne

rie en le ſãke le ſeignior. Et tiel Service de Homage anceſtrel trait a luy garrantie, ceſtaſcavoir, que le Seignior que eſt en vie & ad receive le Homage de tiel Tenant, doit garranter ſon Tenant quont il eſt implede de la terre tenus de luy per Homage Anceſtrel.

the blood of the Lord. And ſuch ſervice of Homage Auncestrel draweth to it warranty, that is to ſay, that the Lord which is living, and hath received the Homage of ſuch Tenant, ought to warrant his Tenant when he is impleaded of the land holden of him by Homage Anceſtrell.

*ranty.* hereby appeareth what a reverend reſpect the Law hath to ancient inheritances continued in the blood of the Lord, and of the Tenant: for in this example put, if the continuance hath not been in the blood of both ſides, no warranty belongeth to Homage Auncestrell: but if ancient continuance hath been on both ſides, (n) then ſuch Homage Anceſtrell draweth to it warranty, ſo as ancient continued inheritance on both parties hath more priviledg and account in Law, than inheritances lately or within memory acquired.

Vide Britton ubi ſupra, 14 H.6.25.18 H 6.2.b. Glanvil lib 9.ca.4,5,8& 6. 9 H.3.Voucher 277. 47 H.3. Voucher 270. 271. 43 E.3.3.a.

(n) See the ſecond part of the Inſtitutes upon the 6.chap. of the ſtatute of Bigamies.

If the Lord grant the ſervices of his Tenant by Homage Anceſtrell, the Tenant ſhall not be compelled in a Per quæ ſervitia to attorn, unleſſe the Conuſee will grant in Court to warrant the Land unto him. 18 H.6.2.b. per Newton.

If the Tenant vouch by force of this warranty in Law, it is a good counterplea that the Tenant (or any one of his Anceſtors) receſſit de ſervitio ſuo & fecit ſervitium ſuum A. B. ſine aliqua coactione de ſua propria voluntate. 9 H.3.Voucher 277.

¶ *Et ad receive homage de tiel tenant.* (a) So as before homage received, the Tenant could not abſolutely bind the Lord to warranty, and therefore of ancient time there lay (b) a Writ De homagio capiendo, for the Tenant againſt the Lord to compell him to receive his homage for the benefit of his Warranty. Which Writ you ſhall read in Bracton and (c) Britton, and the Proceſſe, and manner of trial thereupon, and the ſame you ſhall find in 47 H. 3.

(a) 9 H.3. Voucher 277. Temps E.1. Gar.90. 45 E.3.23.
(b) Glanv.lib.9.c.4.5. & lib.1.cap.3. Bracton lib.2,fol.83.
(c) Britton fol. 172,173. 47 H.3. garrantie 99.

## *Sect.* 144.

¶ Et auxy tiel ſervice per Homage auncestrel trait a luy acquitall. ſ. que le Sñr doit acquiter le Tenant envers touts auters Sñrs paramont luy de cheſcun manner de ſervice.

And alſo ſuch ſervice by Homage anceſtrell draweth to it acquitall, s. that the Lord ought to acquit the Tenant againſt all other Lords paramont him of every manner of ſervice.

¶ *Trait a luy acquital.* Of acquitall, ſomewhat hath been ſaid in the Chapters of Frankalmoigne. Sect.142,& 540.

## *Sect.* 145.

¶ Et il eſt dit, q̃ ſi tiel tenant ſoit empled̃ p̃ un Præcipe quod reddat, &c. & il vouche a garrantie ſon ſeignior, q̃ vient eins p̃ proces, & demanda del tenãt que il ad de luy lier a

And it is ſaid, that if ſuch Tenant be impleaded by a *Præcipe quod reddat, &c.* and vouch to warrantie his Lord who commeth in by proceſs, and demands of the Tenant what he hath to bind

¶ *Un Præcipe quod Reddat.* This is underſtood of the Kings writ directed to the Sheriff of the County where the Land lyeth, whereby the Sheriff is authoriſed to command the Tenant of the Land to yield the ſame to the Demandant, and of theſe words of the Writ (Præcipe quod reddat) the Writ is ſo called. Writs of

Regiſt,159.

of Præcipe be of four kinds, Præcipe quod reddat, Præcipe quod faciat, Præcipe quod permittat, & Præcipe quod non permittat, &c. as appeareth by the Regiſter.

¶ *Et il vouche a garrantie*, A Voucher, in Latine vocatio, or advocatio, is a word of Art, made of the Verb voco, and is in (d) the underſtanding of the Common Law, when the Tenant calleth another into the Court that is bound to him to Warrantie, that is, either to defend the right againſt the Demandant, or to yield him other Land, &c. in value: and extendeth to Lands or Tenements of an eſtate of Freehold or inheritance, and not to any Chattel real, perſonal, or mixt, ſaving only in caſe of a Wardſhip granted with warranty (as ſhall be ſaid more at large in the Chap. of Warranties) for in the other caſes concerning chattels, the party, if he hath a warranty, ſhall not vouch, but habe his Action of Covenant, if he hath a Deed, or if it be by Parol, then an action upon his Caſe, or an action of Deceipt, as the caſe ſhall require. Now ſeeing that one Latine, French, or Engliſh word can habe this particular ſignification; therefore the Common Lawyer (that I may ſpeak once for all) is driven, as the profeſſors of other liberall ſciences uſe to do, to uſe ſignificant words framed by art which are called vocabula artis, though they be not proper to any language. He that voucheth is called the Voucher vocans, and he that is vouched is called Vouchee Warrantus. (e) The proceſſe whereby the Vouchée is called, is a Summoneas ad Warrantizandum, whereupon if the Sheriff returneth, that the Vouchee is ſummoned, and he make default, then a (f) Magnum cape ad valentiam is awarded; when if he make default again, then judgment is given againſt the Tenant, and he over to habe in value againſt the Vouchee. If the Vouchée do appear, and after make default, then Parvum cape ad valentiam is awarded, and if he make default again, then judgment as before. But if the Sheriff return, that the Vouchée hath nothing, then after writs of Alias and Pluries, a writ of Sequatur ſub ſuo periculo ſhall be awarded; and if the like return be made, then ſhall the Demandant habe judgment againſt the Tenant, but he ſhall not habe judgment to recover in value, becauſe the Voucher was never warned. And it appeareth that he hath nothing: but in the grand Cape ad valentiam, it appeareth, that he hath aſſets; and his making default after ſummons, is an implied confeſſion of the Warranty. And it is called a Sequatur ſub ſuo periculo, becauſe the Tenant ſhall loſe his land

Mir cap.5. ſect.1. & 5. Brack.li.5.fo,380,381. Brit.c.75,de Gar.Vouch. Fleta lib. 2,3,24,25,26, & c optime. Lamb. Expl. Verb. Advocare.

garranty, & il me coment il & ſes auncestors q̄ heire il eſt, ount tenus ſa terre del vouchee & de ſes auncestors, de temps dont memorie ne curt. Et ſi l'ſeignior que eſt vouche ne avoit reſceive pas homage del tenant ne dalcū de ſes auncestors, le Seignior (ſil voit) poit diſclaimer ē le ſeignioꝛy, & iſſint ouſte le tenāt de ſō garrāty. Mes ſi le Sīr q̄ eſt vouche ad receive homage de le Tenāt ou de alcun de ſes auncestors, donques il ne diſclaimera, mes il eſt oblige p la ley de garrāter le tenāt, & dōqꝛ ſi le tenant perd ſa tre ē default del vouchee, il recovera en value envers la vouchee de terres & tenements que le vouchee avoit al tēps de le voucher, ou unques puis.

him to warranty, & he ſheweth how he & his anceſtors, whoſe heire he is, have holden their Land of the Vouchee and of his Anceſtors time out of minde of man. And if the Lord which is vouched, hath not received homage of the Tenant, nor of any of his anceſtors, the Lord (if he will) may diſclaim in the Seigniory, and ſo ouſte the tenant of his Warrantie: but if the Lord who is vouched, hath received homage of the tenant, or of any of his anceſtors, then he ſhall not diſclaime, but hee is bound by the Law to warrant the Tenant: and then if the Tenant loſeth his Land in default of the Vouchee, he ſhall recover in value againſt the Vouchee of the Lands and Tenements which the Vouchee had at the time of the Voucher, or any time after.

(e) Reg. Jud. for all theſe ſludicial Writs.
(f) V.Vet.N.B. 179. 186. 39 E.3.28. 14 H.6.7. 17 E.3.41. 3 H.4.4. 11 H.4.72. 45 E.3.19. F.N.B. 134,135.

land without any recompence in value, unless he upon that Writ can bring in the voucher to warrant the land unto him: and if at the Sequat' sub suo periculo the Tenant and the Voucher make default, and the Demandant hath judgment against the Tenant, and after brings a Scire fac' to have execution, the Tenant may have a Warrantia carræ, and if he were impleaded by a stranger, he may vouch again: but if he had judgment to recover in value, he shall never have a Warrantia carræ, or vouch again; for by this judgment to recover in value, he hath benefit of the warranty. And you shall find in books a recovery with a single Voucher, and that is, when there is but one Voucher; and with a double Voucher, and that is when the Voucher voucheth over, and so a treble Voucher, &c. Again, you shall find there also a forreign Voucher, and that is when the Tenant being impleaded within a particular jurisdiction (as in London or the like) voucheth one to warranty, and prays that he may be summoned in some other County out of the jurisdiction of that Court: this is called a forreign Voucher, but might more aptly be called a Voucher of a forreigner de forinsecis vocatis ad Warrantizandum. Note, that by the Civil Law every man is bound to warrant the thing that he selleth or conveyeth, albeit there be no express Warranty, but the Common Law bindeth him not, unless there be a Warranty, either in Deed or in Law, for Caveat emptor, as shall be said more at large in the chapter of Warranty in the third book. Glouc. ca. 12. F.N.B. 6. c.

¶ *Le Seignior (sil voet) poet disclaimer* (u) *en le Seigniorie. Disclaimer, disclamare*, is compounded of de and clamo, and signifieth utterly to renounce the Seigniory. (u) Brit. 174.

(a) Note there be divers kinds of Disclaymer, that is to say, a Disclaymer in the tenancy; a Disclaymer in the blood; and a Disclaymer in the Seigniory; whereof Littleton here putteth his case. (a) 47 H. 3. Disclaim. 35. 16 H. 7. 1. 20 E. 2. tit. Nuper ob. 14. F.N.B. 197. & 151. b. 45 E. 3. 19. 21 E. 3. 50 E. 3. 233 &c.

(b) But if the Tenant in Frankalmoign bring a Writ of Mesne against his Lord, the Lord cannot disclaim in the Seigniory, because he cannot hold of any man in Frankalmoign, but of his Donor and his heirs. And so note a diversity between a Tenure in Frankalmoign, wherby Divine Service is maintained, and Homage Auncestrel which respecteth temporal Service. But if the Lord will not disclaim in the Seigniory, in the case of Homage Auncestrel, then albeit he hath not received Homage, he shall warrant the land. (b) 14 H. 3. tit. Disclaim. b. 33.

¶ *Si le Seignior que est vouche ad receive homage, &c. il ne disclaimera*, Therefore it is good for the Tenant, to the intent to oust the Lord of his Disclaymer, in his voucher to alleage, that the Lord hath taken Homage of him, and if he alleage it not, and the Lord offer to disclaim, the Tenant may counterplead the same by acceptance of Homage: and the reason that the Lord cannot disclaim in that case is, for that he hath accepted his humble and reverent acknowledgment to become his man of life and member and terrene honor, and to be faithful and loyal to him for the Tenements which he holds of him, and against the acceptance hereof the Lord cannot disclaim. 47 H. 3. Disclaim. 35. V. Bract. l. 4. 252. b. 164. H. 7. 1. Brit. 175, 176.

¶ *Que il avoit al temps del voucher*. Hereby it appeareth, that the Tenant shall not be driven to recover in value only those lands which the Lord had from that Ancestor which created the Seigniory, for that were in manner impossible, for that the Seigniory must be created before time of memory, and the first creation of the Seigniory did not create the warranty but the continuance of both sides time out of mind created the warranty. And that is the reason that a writ of Annuity shall not (c) lye against the heir by prescription, because it cannot be known, whether he hath any land by descent from the said Ancestor, or first granted the Annuity. And here is a point worthy of observation, that in the case of Homage Ancestrel, (which is a special Warranty in Law) by the authority of Littleton, the lands generally that the Lord hath at the time of the Voucher, shall be liable to execution in value, whether he hath them by descent or purchase. But in the case of an express warranty the heir shall be charged but only for such lands as he hath by descent from the same Ancestor which created the Warranty. (c) 46 E. 3. 5. b. 6. 10 E. 4. 10. b. 19 H. 6. 74. 37 H. 9. 5 H. 7. F.N.B. 152.

Note what privilege this ancient Warranty (created by operation of Law) hath more than the express Warranty. And so you may observe, that in this case, fi mior & potentior est operatio legis quam dispositio hominis. (d) 28 E. 1. Vouch. 291. 9 Ed. 2. War. Car. 20, 19. F.nes 129.

¶ *Al temps de voucher ou unques puis*. This is evident and worthy of diligent observation, viz. that the lands of the Voucher shall be liable to the Warranty, that the Voucher hath at the time of the Voucher; for that the Voucher is in lieu of an action, and in a Warrantia carræ the land which the Defendant hath at the time of the Writ brought, shall be lyable to the Warranty. 29 E. 3. 3. 18 E. 3. 1. 2 H. 4. 10. 23 E. 3. Recon. in valu. 3. 16 Ed. 3. Vouch 85. 19 Edw. 3. Vouch. 224. 22 E. 3. Fitz. Nat. Bre. 134. f.

Upon a Judgment in Debt, the Plaintiff (d) shall not have execution, but only of that land which the Defendant had at the time of the judgment, for that the action was brought in respect of the person, and not in respect of the land. But if an action of Debt be brought against 2 H. 4. 14. 42 E. 3. 1. 42 Ass. 17. 9 E. 2. tit. Execut. 149.

against the heir, and he alieneth, hanging the Writ, yet shall the land which he had at the time of the original purchase be charged, for that the Action was brought against the heir in respect of the land. (c) If a man be Nonsuit, the land onely which he had at the time of the amerciament assessed shall be charged, and not that which he had at the finding of the pledges. For the amerciament is not in respect of the land, of but his want of prosecution, which was a default in his person. But the issues of a Juror shall be levied upon the Feoffee, albeit they were not lost before the Feoffment, because he was returned and sworn in respect of the land. Note the diversity.

(c) 22 Ass. pl. 32.

52 E. 3. Voucher 292.

If a man give lands in fee with warranty, and bind certain lands specially to Warranty, the person of the Feoffor is hereby bound, and not the land, unless he hath it at the time of the Voucher.

## *Sect.* 146.

*SOn Seigniorie est extinct, & le Tenant tiendra de Seignior, prochein Paramount, &c.* Here two things are to be observed: First, that by this disclaimer in the Seigniory, the Seigniory is (f) extinct in the land.

Vide Britton fo. 58. 110.

(f) 45 E. 3. 7. 22 E. 4. 15.

Secondly, That after the Disclaimer the Tenant shall hold of the next Lord Paramount, by the same Services, as the mesne so disclaiming held before.

Vide Sect. 143.

*Si un Abbe ou Prior soit vouch, &c. uncore, &c. Uncore il ne poet disclaimer, &c.* Here it appeareth of the Lords side, that continuance of blood is not necessary, but yet there must be privity of succession time out of mind in one politick body; for if that body be once dissolved, though a new be founded of the same name, and all the possessions be granted to them, yet the Homage Auncestrell is gone. But if a Prior and Covent be translated. Concurrentibus hiis quæ in jure requiruntur to an Abbot and Covent, or to Dean and Chapter, there the Homage Auncestrell remains, for though the name be changed, yet the body was never dissolved, but in effect it remaineth still. If the body Politique were founded within time of memory, there cannot be Homage Auncestrel, for that continuance faileth, and though Ancestor is ever properly applied to a natural body, yet it is called Homage Ancestrel when the tenure is of a body Politique, for that it is Ancestrel of the Tenants side: but on the other side, an Abbot or Prior cannot hold by Homage Ancestrel, for as appeareth by Littletons examples, it must ever be Ancestrel of the Tenants side. And where Littleton putteth his case of an Abbot or Prior, the same Law is of a Bishop, Dean, Archdeacon, Prebend, Parson, Vicar, and the like. Another thing here to be observed is, That an Abbot or Prior cannot disclaim, &c. for regularly it is true, Quod meliorem conditionem Ecclesiæ suæ facere potest Prælatus, deteriorem nequaquam; and again, Ecclesiæ suæ conditionem meliorem facere possunt

14 H. 6. 12. 2 H. 6. 9. 28 Ass. p. 12. 27 Ass. 6. Lib. 3. fo. 73. &c. Dean and Chap. de Norwich case.

*ET est ascavoir, que en chescun cas ou le Seignior poit disclaimer en sõ Seigniorie, p la Ley, & de ceo voit disclaim en Court de Record, son Seigniorie est extinct, & le Tenant tiendra del Seignior procheine Paramont le Seignior que issint disclaime. Mes si un Abbe ou Prior soit vouch per force de Homage Auncestrell, &c. comment que il ne unque prist Homage, &c. uncore il ne poit disclaimer en tiel cas, ne en nul auter cas, car ils ne poient anienter ou divester chose de fee que ad este vestue en lour mesalty.*

AND it is to be understood, That in every case where the Lord may disclaim in his Seigniory by the Law, and of this he will disclaime in a Court of Record, his Seigniory is extinct, and the Tenant shall hold of the Lord next Paramount, to the Lord which so disclaimeth. But if an Abbot or Prior be vouched by force of Homage Auncestrel, &c. albeit that he never took Homage, &c. yet he cãnot disclaim in this case, nor in any other case, for they cannot take away or devest a thing in fee, which hath been vested in their house.

possunt sine consensu, deteriorem non possunt sine consensu. And therefore an Abbot, Prior, Bishop Dean, Archdeacon, Prebend, Parson, Vicar, or any other sole Corporation that is seised in auter droit, cannot disclaim, because as Littleton saith, they alone cannot devest any fee which is vested in their House or Church. For the wisdom of the Law would never trust one sole person with the disposition of the Inheritance of his House or Church. But an Abbot and Prior had their Covent, the Bishop his Chapter, the Parson and Vicar their Patron and Ordinary, and the like of other sole Corporations, without whose assent they could passe away no Inheritance. 40 E. 3. 27. 5 E. 4. 1. 6 E. 3. 51, 52. 13 E. 4. 2. 2. 21 H. 7. 20.

¶ *Ils ne poient anienter ou devester chose de fee, &c.* These generall words have certain exceptions, for in a Quo warranto at the suit of the King against a Bishop, Abbot, or Prior for Franchises and Liberties; if the Bishop, Abbot, or Prior disclaim in them, this should bind their Successors. If an Abbot or Prior had acknowledged the Action in a Writ of Annuity, this should have bound the Successor, because he cannot falsifie it in an higher action, and there must be an end of Suits, Expedit Reipublicæ ut sit finis litium. But if the Abbot levy a fine, or acknowledge the action in a Præcipe quod reddat, the Successor shall be bound pro tempore; but he may have a Writ of Right, and recover the land. 5 E. 3. 51, 52. 38 E. 3. 33. 16 E. 3. tit. Abbot 13. 19 E. 4. tit. Abbot 12. 7 R. 2. Abbot 7. 12 H. 4. 11. 28 H. 6. fol. ultimo. 4 H. 7. 2. 2 H. 4. 6.

¶ *Per force de Homage Ancestrell, &c.* Here (&c.) implyeth or by any other Warranty, (i) as by the reason which our Author here yieldeth, appeareth. 34. Ass. p. 7. 14 E. 4. tit. Abbot. E. 8 E. 3. 28. 12 H. 8. 7.

¶ *Chose de fee.* (k) For if in an action of Debt upon an obligation against an Abbot the Abbot acknowledgeth the Action, and dieth, the Successor shall not avoid Execution though the Obligation was made without the assent of the Covent, for he cannot falsifie the recovery in an higher action: Et res judicata pro veritate accipitur, and this is but a Chattel. And so it is of a Statute or Recognisance, acknowledged by an Abbot or Prior. (i) 12 H. 8. 7. (k) 7 R. 2. tit. Abbot 7. see the Books next above.

## *Sect.* 147.

¶ Item si home q̃ tient son terre p̃ homage ancestrel, alien un auter en fee, le alienee serra Homage a son seignior, mes il ne tient de son Seignior per homage Auncestrell, pur ceo q̃ le tenancie ne fuit cõtinue en le sanke de les auncestors lalienee, ne lalienee navera iames garrãtie ð la terre ð sõ sñr pur ceo que le continuance del tenancie en le tenãt & a son sanke per lalienation est discontinue. Et sic vide, que si le tenãt que tient la terre per homage ãcestrell de son Seig-

ALso if a Man which holds his land by homage Auncestrell, alien to another in fee, the alience shall doe homage to his Lord, but he holdeth not of his Lord by homage ancestrell, because the Tenancie was not continued in the blood of the Ancestors of the alienee, neither shall the alienee have warranty of the Land of his Lord, because the continuance of the tenancy in the Tenant, and to his blood by the alienation is discontinued. And so see, that if the Tenant which holdeth his Land of his Lord

*A Lien a un auter en fee.* For hereby the privity of the estate is altered, and the continuance of it in the blood of the Tenant is dissolved. But if the Tenant maketh a Lease for life, or a gift in tail, this is a continuance of the privity and estate in the Tenant in respect of the reversion that remaineth in him: for the fee, whereof Littleton here speaketh, was not out of him. But if the Tenant maketh a feoffment in fee upon condition, and dieth, his heir performeth the condition, and re-entreth, the Homage Auncestrell is destroyed in respect of the interruption of the continuance of the privity and estate: and this case was put and not denied in the argument (m) of the case between the Lord Cromwell and Andrewes, Mich. 14 & 15 Eliz. which I my self heard and observed. As, if Cesty & use had made a feoffment in fee upon condition, and entred for the condition broken, he should have detained the Land against (m) 1 Mich. 14 & 15 Eliz. 5 H. 7.

gainſt the Feoffees for ever, for that the eſtate and privity was for the time taken out of the Feoffees, and thereby diſſolved for ever. But if the Land were recovered againſt the tenant upon a faint title, and the Tenant recover the ſame again in an action of higher nature, there the Homage Anceſtrell remains, for the right was a ſufficient mean for the continuance: ſo it is if he had reverſed it in a writ of Error. (n) If the alienee be implicaded in Littletons caſe, and vouch the alienor that held by Homage Anceſtrel, albeit he commeth in by ſtation of Law to many purpoſes in privity of his former eſtate: Yet to this purpoſe he cannot come in as Tenant by Homage Anceſtrell, becauſe of the diſcontinuance of the eſtate and privity, and as Littleton ſaith, the Tenancy was not continued in the blood. (o) And Britton ſaith, Et come aſcun nequedent ſoit Vouche per Homage, & le Seigniour tende de averrer que le tenement dount il vouche fuit tranſlate hors del ſanke del primer purchaſer per feoffment ou per aſcun auter tranſlation: en tiel caſe ſoit le tenant charger de voucher ſon feoffor ou ſes heires.

(n) 5 E.3.11.per Cantrel.

(o) Britton fol.170.a.

38 E.3.20. 11 H.4.22. 17 E.3.47. 59. 73, 74. 26 E.3. 56. 18 E. 3. 56. 16 E. 3. Voucher 87. 18 E. 3. 30. 44 E. 3. Littleton fol. 169.

¶ *Coment qui il repriſt eſtate del alienee en fee, &c.* For the cauſe aforeſaid in reſpect of the interruption of the privity and continuance of the eſtate. And herewith agree our Books in Caſes of Warranties in Deed, or Warranties in Law. See more of this in the Chapter of Warranties.

## *Sect.* 148.

¶ *NE ferra homage al Fiz.*

If A. holdeth of B. as of the Manor of Dale, whereof B. is ſeiſed in tail, B. diſcontinueth the eſtate tail, and taketh back an eſtate in Fee ſimple, A. doth homage to B, B. dieth ſeiſed, the iſſue in tail entreth, A. ſhall do homage again to the heir in taile of B, becauſe he is remitted to the eſtate tail; and the eſtate in fee that his father had, in reſpect whereof the homage is done, is baniſhed, and the heir in tail is in of a new eſtate, in reſpect whereof he ought to do a new homage. (p) But regularly it is true, which Littleton ſaith, that when a Tenant hath done once homage to his Lord, he is excuſed for term of his life to make homage to any other heirs of the Lord. But he ſhall do fealty to his ſon, albeit he hath done fealty to the father.

(p) Britton 175, 176.

¶ Item il eſt dit, que ſi home tient ſa terre d̄ ſon Seignior per homage & fealty, & il ad fait homage & fealty a ſon ſeignior, & le ſeignior ad iſſue fits, & deby, & le ſeigniory diſcendiſt a le fits, en ceo cas le Tenant que fiſt homage al pere ne ferra homage al fits, pur ceo que quãt un tenant ad fait un foits homage a ſon ſeignior il eſt excuſe pur terme d̄ ſa vie de faire homage a aſcun auter heire del ſeignior, mes uncore il ferra Fealty al fits & heire le ſeignior, coment que il fiſt fealty a ſon Pere.

ALſo it is ſaid, that if a man holds his Land of his Lord by Homage and Fealty, and he hath done homage and Fealty to his Lord, and the Lord hath iſſue a ſon and dies, and the Signiory deſcendeth to the ſon; in this caſe the Tenant which did homage to the father, ſhall not do homage to the ſon, becauſe that when a Tenant hath once done homage to his Lord, he is excuſed for terme of his life to do homage to any other heir of the Lord; but yet he ſhall do fealty to the ſon and heir of the Lord, although he did fealty to his father.

*Sect.*

## *Sect.* 149.

¶ Item ſi le Sñr apres l'homage a luy fait per ſon tenãt grant le ſervice de ſon tenant per le fait a ũ auter en fee, & le tenant atturna, &c. dõque le Tenant ne ſerra my compel de faire homage, mes il ſerra fealty, com et que il fiſt fealtie devant a le grauntor. Car fealty eſt incidẽt a cheſcũ atturnemẽt del Tenant, quãt le ſeigniory eſt graũt. Mes ſi aſcun home ſoit ſeiſie dun mannor, & un auter home tient de luy la terre come del mannor avãtdit per homage, le quel Tenant ad fait homage a ſon Sñr q̃ eſt ſeiſie del mannor, ſi apres un eſtrange port Præcipe quod reddat envers le Sñr del mannor & recovera le mannor envers luy, & ſuiſt executiõ, en ceſt caſe le tenant ſerra auterfoits homage a celuy q̃ recovera le manor comẽt que il fiſt homage devãt, p̃ ceo que leſſat celuy que receivoit le pr̃mer homage, eſt defeate per l'recovery,

ALſo if the Lord after the homage done unto him by the Tenant, grant the ſervice of his Tenant by Deed to another in fee, and the Tenant atturneth, &c. the Tenant ſhall not be compelled to do homage, but he ſhall do fealty, although he did fealty before to the Grantor. For fealty is incident to every atturnment of the Tenant, when the Seigniory is granted. But if any man be ſeiſed of a mannor, and another holds of him the Land as of the Manor aforeſaid by Homage, which Tenant hath done homage to his Lord who is ſeiſed of the Mannor, if afterwards a ſtranger bringeth a *Præcipe quod reddat* againſt the Lord of the Mannor, and recovereth the Mannor againſt him, and ſues Execution: In this caſe the Tenant ſhall again do homage to him which recovered the Mannor, although he had done homage before, becauſe the eſtate of him which received the firſt homage

¶ *Item ſi le Seignior, &c. grant le ſervice de ſon Tenant per fait, &c.* Note a diverſity, when the Lord alieneth the Seigniory, and when the Tenant alieneth the tenancy; for when the Tenant hath done homage, and the Seigniory is transferred to another either by the act of the party as alienation, or by act in Law as deſcent, yet the Tenant ſhall not iterate homage, as he ſhall do fealty: but when the tenant doth homage, and alieneth the tenancy, there is a new Tenant, which never did homage; and therefore he ought to do homage to the Lord, albeit his Alienor had done it before. And it is to be obſerved, that none ſhall do † homage but the Tenant of the land to the Lords of whom it is holden; and therefore if homage be be due to be done by the Tenant, if the Tenant alieneth the Land to another, the Alienor cannot be compelled to do homage. Britton 176. 13 E.1, tit. Per quæ ſervitia, 22. & tit. Gar. 91. † 8 E. 4, 27. b.

¶ *Attorne, &c.* Here by (&c) is to be underſtood, that albeit he pay his rent, perform his annual ſervices, and do Fealty which is a part of homage, yet homage he ſhall not do.

¶ *Mes ſi aſcun home ſoit ſeiſi dun mannor, &c.* Here it appeareth, that the caſe of the recovery of the Seigniory differeth from the alienation of the Lord, which is his own act, or the deſcent of the ſeigniory to the heir, which is an Act in Law. And the reaſon of this diverſity is, for that by the recovery, the ſtate of him that received the homage, is defeated; for it ſhall not lie in the mouth of the Tenant, to falſifie, or to fruſtrate or defeat the recovery which was againſt his Lord of the Manor, or Seigniory, Vide Sect. 551. 31 E. 3. Avowry 255. 37 H 6. 33. 19 H. 6. 14. 7 H 7. 11. Doct. & Stud. fol. 45. 28 H. 8. Dyer 47.

niory, for that the Tenant had nothing therein, and every man by Law ought to meddle in such cases with that which belongeth unto him, which is worthy of observation concerning falsifying of Recoveries.

Note, that to falsify, in legall understanding is to prove false; that is, to avoid, or, as Littleton here saith, to defeat, in Latine falsare, seu falsificare, (i) falsum facere.

(i) 7 H.8. cap. 4.

But since Littleton wrote, it is recited by Act of Parliament, That whereas divers, &c. have suffered recoveries against them of divers Manors &c. for the performance of their Wills, for the surety of their wives joyntures, &c. and the Recoverors had no remedy to compell the Freeholders and Tenants, &c. to attourn unto them, nor could by order of Law attain to the Rents, Services, &c. that Act doth give the Recoverors power to distrein and avow, whereupon many have thought, that this doth impugne Littletons case of the Recovery. But distinguendum est: Littleton intendeth his case either upon a recovery by title, (for he saith, that the state of the Tenant in the Recovery is defeated) or without any consent upon pretence of Title, which is all one; for the Tenant cannot falsify, and the Lord should avow as one that came in of a former Title. And Littleton hath good authority in Law to warrant (a) his opinion, and the statute of 7 H.8. extendeth to common Recoveries had by consent and agreement, as appeareth by the Act it self, which then was, and yet is a common assurance and conveyance, whereof the Law taketh notice, and whereupon (as appeareth by the Act,) an use might be limited. So as it is apparent, that such Recoverors came in meerly under the state of the Lord, &c. and had no remedy (as the statute saith) to compell the Freeholders and Tenants to attourn, and without attournment, could neither distrein nor avow. Wherefore this statute gave Recoverors remedy to distrein, and a form to avow and justify, which they had not before as it appeareth by the Doctor and Student, who lived at that time: The body of the Act is, That such Recoverors may distrein and make avowry, &c. as those persons against whom the said Recovery is, should have done, &c. if the same Recovery had not been had, and have like remedy, &c.

(a) 29 H.6.22. 37 H.6. 38. 35 H.6.22.

28 H.8. Dyer 41.

If a man had made a Lease for years to begin at Michaelmas, reserving a Rent, & before Michaelmas he had suffered a common recovery, the Recoveror should distrein for the Rent, which the Lessor before the Recovery could not. But if the Recovery had not been had, then he might have distreined, and so it is within the statute: but if a fine had been ledied of a Manor, and before attournment the conusee had suffered a common recovery, the Recoveror should not distrein, &c. because the conusee against whom the Recovery was had, could not.

But this act extended onely to Distresses & Avowries for Rents, Services, and Customs, and gave also a form of a Quare impedit. But upon this statute it was holden, That the Recoveror could not have an action of Debt against the Lessee for years, nor an action of wast against Tenant for life or years, and therefore remedy was provided in these cases, by the statute of 21 H.8.

21 H.8. cap. 15.

## *Sect.* 150.

*Vient a son Seigniour.* The Tenant ought to seek the Lord to do him homage, if the Lord be within England; for this service is personal as well of the Lords side as of the Tenants; for law requi-

Item si un Tenant que doit per son Tenure faire a son Seignior Homage, vient a son Seignior, & dit a

Also if a Tenant which ought by his Tenure to doe his Lord Homage, cometh to his Lord, and saith unto him, Sir, I

luy, Sir, jeo doy a vous faire homage pur les Tenements que jeo teigne de vous, & jeo sue joy prist a vous faire homage pur meismes les Tenements, pur que jeo vous pry, que oy ceo voiles receiver de moy.

ought to doe homage unto you for the Tenements which I hold of you, and I am here ready to doe homage to you for the same tenements, and therefore I pray you, that you would now receive the same from me.

reth order and decency. And therefore Bracton saith, Et sciendum, Quod ille qui homagium suum facere debet, obtentu reverentiæ quam debet Domino suo, adire debet Dominum suum ubicunque inventus fuerit in regno, vel alibi si possit commodè adire, & non tenetur Dominus quærere suum tenentem, & sic debet homagium ei facere. And the same Law it is for Fealty. and the diversity between these services, and the rent is, because that these are personal, and the rent may be paid and received by other; and therefore a tender of the rent upon the land is sufficient.

Bracton fol. 80. a. And Britton fol. 171. agreeth herewith.

## *Sect.* 151.

¶ ET si le Seignior adonques refusa de ceo receiver, donque apres tiel refusal le Seignior ne poet distreiner le Tenãt pur le homage aderere devant que le Seignior requiroit le Tenant de faire a luy homage, &c. Tenant a ceo faire refusa.

AND if the Lord shall then refuse to receive this, then after such refusal, the Lord cannot distreine the Tenant for the homage behind, before the Lord requireth the Tenant to do homage unto him, and the Tenant refuse to do it.

¶ AND the reason hereof is, for that when the Tenant hath done his endeavour and duty to offer his corporal service, and the Lord refuseth the same, or do not accept his service upon his tender thereof, (which is a refusal in Law) then the Law in respect of the Lords fault, requireth, that before the Lord can distrein for it, that he doth require the tenant to do that service; and if he either refuse to do it, or do it not when he is required, it is a refusall in Law.

Vide Bract. fol. 83. Britton 171, 172. 21 E. 3. 24. 21. Ass. p. 73. 20 E. 3. Avowry 223. 45 E. 3. 9. 7 E. 4. 4. 21 E. 4. 17. 20 H. 6. 31.

## *Sect.* 152.

¶ ITem home poit tener sa terre per homage Auncestrel & per Escuage, ou per auter service de Chivaler, auribiẽ sicome il poyt teñ sa tẽ per homage Ancestrel en Socage.

ALSO a man may hold his Land by Homage Auncestrell, and by Escuage, or by other Knights Service, as well as he may hold his land by Homage Auncestrel in Socage.

¶ SO as Homage Auncestrell may belong as well to a tenure by Escuage or Knights service, as to a tenure in socage, or to a tenure in nature of Socage, whereof there hath somewhat been spoken in the chapter of Socage.

# CHAP. 8. *Grand Serjeanty.* *Sect.* 153.

¶ *Enure per grand Serjeanty.* Serjeanty cometh of the French word (Sergeant) i. Satelles, & (a) Serjeantia idem est quod servitium. And it is called Magna Serjeantia, or Serjanteria, † or Magnū servitium, great service, as well in respect of the excellency & greatness of the person to whom it is to be done, (for it is to be done to the King only) as of the honour of the service it self, & so Littleton himself in this section saith, that it is called Magna Serjeantia, or Magnum Servitium, because it is greater and more worthy than Knights Service, for this is revera Servitium Regale, and not Militare onely; Fleta saith, Magna autem serjeantia dici poterit, cum quis ad eundum cum Rege in exercitu cum equo cooperto vel hujusmodi ad patriæ tuitionem fuerit feoffatus.

(a) Glanvil l.b 9.cap.4.
(b) Bracton lib.2. 35. & 84,85.lib.1. cap.10.
† Fleta lib.1. cap. 10. lib. 2.cap.9.in fine. Britton cap. 66. fol. 164,165. Ockam cap. quod non absolvitur.

45 E.3.25.per Finchden, Fleta,ubi supra.

¶ *De nostre Seignior le Roy.* This Tenure hath seven speciall properties. 1. To be holden of the King onely. 2. It must be done when the Tenant is able in proper person. 3. This Service is certain and particular. 4. The Relief due in respect of this Tenure differeth from Knights service. 5. It is to be done within the Realm. 6. It is subject to neither Aid par faire fitz chivaleir, or file marier. And 7. It payeth no Escuage.

Bracton lib.2,84,11 H.4. 34. 10 H.4. Avowry 267. F.N.B.83. 10 H.6.anc. demesne 11.

¶ *Come de porter le banner de nostre Seignior le Roy, ou de amesner son host.* This great Service to the King may (as it appeareth hereby) concern the Warrs and matters mi-

22 H.3.tit.Gard.Stat.de Ward,& relev.28 E.1.

¶ Tenure p graund serjeantie est lou un hõe tient ses terres ou tenemñts d nostre Sñr l'Roy per tiels services que il doit en son propr person faire al Roy, cõe de porter l' banner de nostre Sñr le Roy, ou sa lãce, ou d amesner sõ hoste, ou destre sõ marshal, ou de porter son espee devant luy a son coronement, ou destre s sewer a son coronement, ou son Carver, ou son Butler, ou destre un d ses Chamberlains, de le resceit de son Eschequer, ou de faire auters tiels services, &c. Et la cause que tiel service est appell grand Serjeanty est, p ceo que il est pluis grand & pluis digne service que est le service en le tenure descuage. Car celuy q tient p Escuage nest pas limite per sa tenure de faire ascun pluis special service que ascun auter que tyent p escuage doit faire. Mes celuy que

TEnure by grand Serjeantie is, where a man holds his Lands or Tenements of our Soveraigne Lord the King, by such services as he ought to do in his proper person to the King, as to carry the banner of the King, or his lance, or to lead his army, or to be his Marshall, or to carry his sword before him at his Coronation, or to be his Sewer at his Coronation, or his Carver, or his Butler, or to be one of his Chamberlains, of the receipt of his Exchequer, or to do other like services, &c. And the cause why this service is called grand Serjeanty is, for that it is a greater and more worthy service than the service in the Tenure of Escuage. For he which holdeth by Escuage, is not limited by his Tenure to do any more especial service, than any other which holdeth by Escuage ought to doe: but hee which holdeth by grand

tient

tient p grand Serjeanty doit fair un especial ſervice al Roy, que il que tient per eſcuage ne doit faire.

Serjeanty ought to do ſome ſpeciall ſervice to the King, which he that holds by Eſcuage ought not to do.

litary, for ſome Grand Serjeanties are to be done in the time of warre for the ſafety of the Realm, and ſome in time of peace, for the honour of the Realm.

¶ *Ou deſte ſon Marſhall.*

† If the King giveth lands to a man to hold of him to be his Marſhal of his hoſt, or to be Marſhal of England, or to be Conſtable of England, or to be high Steward of England, † Chamberlain of England, and the like, theſe are grand Serjeanties, and theſe and ſuch like grand Serjeanties are of great and high juriſdiction, and ſome of them concern matters military in time of war, and ſome ſervices of honour in time of peace. And this is to be obſerved, that though there were divers Lords Marſhals of England before the Reign of (z) R. 2. yet King R. 2. created Thomas Mowbery Duke of Norfolk, and firſt Earl Marſhal of England, per nomen comitis Mariſchalli Angliæ.

† Fleta lib. 1. cap. 10. 11 Eliz. Dye 285. Camden Brit. 286, 287. † Ockam cap. Officium conſtabulari.

(z) In rot. patent. de anno. 20 R. 2.

¶ *Ou de porter ſon eſpee, &c. ou deſte ſon ſewer a ſon Coronement, &c.* Theſe and ſuch like grand Serjeanties at the Kings Coronation, are ſervices of honour in time of peace.

¶ *Deſte un de ſes Chamberlaines, &c. ou de faire autiels ſervices.* It is alſo a Tenure by grand Serjeanty to hold (a) by any office to be done in perſon concerning the receipt of the Kings treaſure, Quia theſaurus regis reſpicit regem & regnum; And cenſus regius eſt anima Reip. ſo it is Firmamentum belli, & Ornamentum pacis.

(a) Vide 51 H. 3. ſtatut. 5. 10 H. 3. c. 11. 14 E. 3. c. 14. 26 H. 8. ca. 2. 34. & 35 H. 8. c. 16 E. 4. fol. 1. Pl. Com. 207, 208.

Milites camerarii dicuntur, quia pro camerariis miniſtrant, and concerning their office, this is the effect, as Ockam (b) ſaith, Officiū Camerariorū in recepta conſiſtit in tribus, Scilicet, claves arcarum, &c. bajulant, pecuniam numeratam ponderant, & per centenas libras in forulos mittunt. But diſcontinuance in effect hath worn out their office. And yet they continue their name, and keep the keys of the Treaſury where the Records do lye.

(b) Ockam cap. quid ſit Scaccarium. Gervaſius Tilburienſis in libro nigro ſub cuſtodia camerariorum.

And another ſaith, Camerarius dicitur à camera, quia camera eſt locus in quem theſaurus recolligitur, vel conclave in quo pecunia reſervatur. So as camerarius in legal ſignification eſt cuſtos regii cenſus: and Willielmus de Bello campo comes Warwici (held) officium camerarii in Scaccario.

Rot. clauſ. 6 E. 1. memb. 1.

Or by any office concerning the adminiſtration of Juſtice, quia judicio firmatur ſolium.

Ex lectura Marrowe.

It appeareth by an ancient Record (c) that Varianus de ſancto Petro tenuit de domino rege in capite medietatem ſe. jeantiæ pacis per ſervitium inveniendi decem ſervientes pacis ad cuſtodiendam pacem in Ceſtria.

(c) Ex inquiſitione poſt mortem Variani de ſancto Petro. 4 E. 2. Ceſtr. Vid. 7. Aſſ. 21. 7 E. 3. 57.

See Ockam of the inſtitution and ancient order of the Exchequer, Dier 4 Eliz. 213. the Uſhery of the Exchequer holden by grand Serjeanty.

¶ *Tiels ſervices, &c.* Here by (&c.) is to be underſtood other like ſervices not expreſſed, as partly appeareth by that which hath been ſaid, viz. to be Steward of England, Conſtable of England, Chamberlain of England, and other honourable ſervices, whereof more ſhall be ſaid in this chapter.

¶ *Ou un eſpeciall ſervice al roy.* That is to ſay, that this great ſervice be ſpecially ſet down, for it may conſiſt of divers branches, as to go with the King in his War in the forward, and to return in the rearward. And alſo to pay rent, &c. but yet it muſt be certain and particular.

23 H. 3. gard. 148.

## *Sect.* 154.

¶ Item ſi tenant que tient per Eſcuage morust ſon heire eſtreant de pleine age, ſil tenoit per un fee de chivaler, le heire ne paiera forsqz C. ſ. pur reliefe, come eſt ordeine per l' ſtatute de Magna Charta, cap. 2. Mes ſi celuy que tient de Roy per grand Serjeanty

ALſo if a Tenant which holds by Eſcuage dyeth, his heir being of full age, if hee holdeth by one Knights fee, the heir ſhall pay but a C. s. for relief, as is ordained by the Statute of *Magna Charta*, *c.* 2. But if he which holdeth of the King by grand Serjeanty

Serjeanty

Serjeantie moyuſt, ſon heire eſteant de plein age, le heire paiera al Roy pur reliefe le value de les terres ou Tenements per an (ouſter les charges & repriſes) queux il tient del Roy per grand Serjeantie. Et eſt aſcavoir, que Serjeantia en Latin, idem eſt quod ſervitium, & ſic Magna Serjeantia, idem eſt quod magnum ſervitium.

dieth, his heir being of full age, the heir ſhall pay to the King for relief one years value of the lands or tenements which he holdeth of the King by Grand Serjeanty, over and beſides all charges and repriſes. And it is to be underſtood, that *Serjeantia* in Latine, is the ſame *quod ſervitium*; and ſo *Magna Serjeantia*, is the ſame *quod Magnum Servitium*.

11 H.7.4.7:.b.

*Paiera al Roy pur reliefe le value de ſes terres, &c.* And herewith agreeth 11 H. 4.72.b.

*Serjeantia idem eſt quod ſervitium.* Hereby it appeareth that the explanation of ancient words and the true ſenſe of them are requiſite and to be underſtood per verba notiora.

## *Sect.* 155.

F. N. B. 83. E.

*Tenants per eſcuage doient faire lour ſervice hors del Roialme.*

For he that holdeth by Cornage or Caſtle-gard holdeth by Knights Service and is to do his Service within the Realm, but he holdeth not by eſcuage, and therefore Littleton materially ſaid, Tenant per eſcuage, and not Tenant by Knights ſervice.

Item ceux que teignont per eſcuage doient faire lour ſervice hors de roialme, mes ceux que teignont p grād Serjeantie, pur le greindr part doient faire lour ſervices deins le Roialme.

Alſo they which hold by Eſcuage, ought to do their Service out of the Realm, but they which hold by Grand Serjeanty (for the moſt part) ought to do their ſervices within the Realm.

*Pur le greinder part.* For to bear the Kings Banner, or his Lance, or to lead his Hoſt, and to be his Marſhal, &c. may be as well without the Realm, and therefore Littleton ſaid (for the greateſt part.)

## *Sect.* 156.

4 H.5.cap.7.
22 E.4.cap.8.
Camden in Britannia.

*En l' marches de Scotland.* Marches is either a Saxon word, and ſignifieth, limites, bourdours; or an Engliſh word, viz. Markes. Nota, for that it lyeth neer to Scotland, it is ſaid in the Marches of Scotland, and yet the Land

Item il eſt dit, que en le Marches de Scotland, aſcuns teignont de Roy per Cornage, ceſtaſcavoir, pur ventier un cornu, pur garner homes de pais quant ils oyent que le Scottes, ou auters enemies veignont ou voilent enter en Engleterre, quel ſervice eſt

Alſo it is ſaid, that in the Marches of Scotland ſome hold of the King by Cornage, that is to ſay, to winde a horn to give men of the Country warning when they heare that the Scots or other enemies are come, or will enter into England, which ſervice is grand Serjeanty,

graun

graund Serjeanty. Mes ſi aſcun tenant tient dalcun auter Seignior que de Roy per tiel ſervice de Cornage, ceo neſt pas grand Serjeanty, mes eſt ſervice de Chivaler, & trait a luy garde & marriage, car nul poit tener per grand Serjeanty ſi non de Roy tantſolemẽt.

But if any tenant hold of any other Lord than of the King by ſuch ſervice of Cornage, this is not grand Serjeanty, but it is Knights Service. And it draweth to it Ward and Marriage; for none may hold by grand Serjeanty, but of the King only.

whereof Littleton here ſpeaketh, lieth in England.

¶ *Per Cornage.* Cornagium is derived (as cornuare alſo is) à cornu, and is as much (as before hath been noted) as the ſervice of the Horn. It is alſo called in old Books, Horngeld.

Note, a Tenure by Cornage of a common perſon, is Knights ſervice; of the King it is grand Serjeanty, ſo as the Royal dignity of the perſon of the Lord, maketh the difference of the Tenure in this caſe. And I find, that there were Cornicularii amongſt the Romans; & dicti fuerunt cornicularii, quia cornu faciebant excubias militares; and Magna Serjeantia is appropriated only to this Tenure.

23 H. tit. gard. 148. 8 E. 3. 66. in fine. 16 E. 3. avowry 90. F.N.B. 83.

## *Sect.* 157.

¶ Item home poit veier Anno 1 H. 4. que Cokayne, adonque chiefe Baron deſchequer, vient en le common bank, portant ovesques luy la Copy dun recorde in hæc verba; Talis tenet tantam terram de Domino rege per Serjeantiam, ad inveniendum unum hominem ad guerram ubicunque infra quatuor Maria, &c. Et il demaunda ſil fuit graund Serjeantie ou petit ſerjeantie. Et Hanke, adonques diſoit, que il fuit graunde Serjeantie, pur ceo que il ad ſervice a faire p corps dun home, & ſil ne purra trover nul home a faire l'ſervice pur luy, il meſme doit faire. Quod alii

Alſo a man may ſee in *Anno* 11 *H.* 4. that *Cokayne* then Chiefe Baron of the Exchequer, came into the Common Place, and brought with him the Copy of a Record in theſe words; *Talis tenet tantam terram de Domino Rege per Serjeantiam, ad inveniendum unum hominem ad guerram ubicunque infra quatuor Maria, &c.* And hee demanded if this were Grand Serjeanty, or petit Serjeanty. And *Hank* then ſaid, That it is grand Serjeanty, becauſe hee had a ſervice to do by the body of a man, and if he cannot find a man to do the ſervice for him, he himſelfe ought to do it. *Quod alii Juſticiarii conceſſe-*

¶ *Et ſil ne purra trover nul home a faire le ſervice pur luy, &c.*

Hereby it appeares, That Tenant by Grand Serjeanty, may in ſome Caſes make a Deputy, and therefore the diverſity is, that where the Grand Serjeanty is to be done to the Royal Perſon of the King, or to execute one of thoſe high and great Offices, there his Tenant cannot make a Deputy without the Kings licence, and therefore Littleton hath ſaid before, that ſuch ſervices are to be done in proper perſon. But he that holdeth to ſerve him in his warre within the Realm, or by Cornage, may make a Deputy.

11 H. 4. 72. 24 E. 3. 32. Vide Hill. 8 E. 1. Middle inter Placita de Banco. S.r John Moyſe caſe.

11 H. 4. 72.

(†) Johannes de Archier qui tenet de Domino Rege in capite per Serjeantiam archeriæ, &c. in Comitatu Glouc. hæres in cuſtodia.

(†) Clauſ. 18 H. 3. M. 3.

¶ *Infra quatuor Maria*, That is, within the Kingdom of England, and the Dominions of the ſame Kingdom.

Rot. Eſchcator. 41 H. 3. nu. 23. Stephen Haringdens Caſe.

Now it is good to be ſeen what perſons that hold by Grand Serjeanty may doe and perform that honourable Service in Perſon, and who ought not to be received thereunto

unto, but ought to make a ſufficient Deputy. At the Coronation of (a) King R. 2. John Wiltſhire Citizen of London exhibited his Petition to the high Steward of England in his Court, that where the ſaid John held certain Lands in Hayden in the County of Eſſex, of the King by Grand Serjeanty, viz. to hold a towell when the King ſhould waſh his hands before dinner the day of his Coronation, &c. and prayed that he might be accepted to do this office of Grand Serjeanty, the judgment followeth. Et quia apparet per record. de Scaccario Domini Regis in Curia monſtrat' quod prædicta tenementa tenentur de Domino Rege per ſervitium prædictum, Ideo dictus Johannes admittitur ad ſervitium ſuum hujusmodi faciendum per Edmundum Comitem Cantabrigiæ deputatum ſuum, & ſic idem Comes in jure ipſius Johannis Manutergium tenuit quando Dominus Rex lavabat manus ſuas dicto die Coronationis ſuæ ante prandium.

(a) 1 R. 2. Rot. clauſ. m. 45.

Juſticiarii conceſſerunt. (Cokain), Donque doit le tenant en ceo cas paier reliefe al value del terre per an? Ad quod non fuit reſponſum.

*runt.* Then, ſaith *Cokaine*, Ought the Tenant to pay Reliefe to the value of the Land by the year? *Ad quod non fuit reſponſum.*

By which Record it appeareth that the ſaid John Wiltſhire being of his quality, & having not any dignity, could not do and perform this high and honourable ſervice to the Royal perſon of the King, but did make an honourable Deputy who performed it in his Right, which is worthy of obſervation.

Vide 1 R. 2. memb. 45.

At the ſame Coronation William Furnevall exhibited his Petition in the ſame Court, that where he held the Manor of Farnham, in the County of Buck, with the Hamlet of Cere in the ſame County, by the ſervice to find to the King at his Coronation a globe for his right hand, and to ſupport the Kings right hand the ſame day, while he held in his hand the verge Royal, the judgment followeth. Qua quidem petitione debitè intellecta, & facta publica proclamatione ſi quis clameo ipſius Willielmi in ea parte contradicere vellet, nemineque ei contrariante, conſideratum fuit, quod idem Willielmus aſſumpto per eum primitus ordine militari, ad ſervitium prædictum admitteretur faciendum, & poſtmodo (videlicet) die Martis proximo ante Coronationem prædictam Dominus Rex ipſum Willielmum apud Keningron honorificè præfecit in militem, & ſic idem Willielmus ſervitium ſuum prædictum, dicto die Coronationis juxta conſiderationem prædictam perfecit & in omnibus adimplevit. By which it appeareth that a Knight is of that dignity, that he may perform this high & honourable ſervice in his own perſon; and although this William Furnevall was deſcended of an honourable family, yet before he was created Knight he could not perform it.

And Sir John de Argentine Chivalier performed the ſervice of Grand Serjeanty, to be the Kings Cup-bearer at the ſame Coronation.

(m) Vide 1 R. 2. m. 45.

(m) Anne, which was the wife of Sir John Haſtings Earl of Pembrook, who held the Manor of Aſhley in Norfolk of the King by Grand Serjeanty, viz. to perform the office of the Pantery at his Coronation, was adjudged to make a Deputy, becauſe a woman cannot do it in perſon, and thereupon ſhe deputed Sir Thomas Brount Knight, who performed the ſame in her Right. John, ſon and heir of John Haſtings Earl of Pembrook, exhibited in the ſame Court his Petition, ſhewing that by his tenure he was to carry the great Spurs of Gold before the King at his Coronation, &c. The judgment is, Audita & intellecta billa prædicta, pro eo quod dictus Johannes eſt infra ætatem, & in cuſtodia Domini Regis, quanquam ſufficienter oſtenditur per records, & evidentias, quod ipſe ſervitium prædictum facere deberet. Conſideratum exſtitit, quod eſſet ad voluntatem Regis, quis dictum ſervitium iſta vice in jure ipſius Johannis faceret, & ſuper hoc Dominus Rex aſſignavit Edmundum Comitem Marchiæ ad deferendum dicto die Coronationis prædicta calcaria in jure præfat' hæredis, ſalvo jure alterius cujuſcunque. Et ſic idem Comes Marchiæ Calcaria illa prædicto die Coronationis coram ipſo Domino Rege deferebat,

Vide 1 R. 2. m. 45.

By which it appeareth that the heir before he hath accomplished his age of one and twenty years, cannot perform this great and honourable ſervice, but during his minority, the King ſhall appoint one to perform the ſervice.

## *Sect.* 158.

46 E. 3. 15. a. per Finchden.

HEre Littleton ſaith, that he that holds by Grand Serjeanty, doth hold by Knights

ET nota que touts que teignont de Roy p grand

AND note that all which hold of the King by Grand Ser-

Serjeanty, teignont de Roy per ſervice de Chivalrie, & le Roy p̄ ceo avera garde, mariage, & reliefe, mes le Roy navera de eux Eſcuage, ſils ne teignont de luy per Eſcuage.

Serjanty, hold of the King by Knights ſervice, and the King for this ſhall have Ward, Marriage, and Reliefe, but he ſhall not have of them Eſcuage, unleſſe they hold of him by Eſcuage.

Service which is ſo ſaid of the effects. And therefore Littleton doth adde that the King ſhall have Ward, Marriage, & Relief, which are the effects of Knights ſervice, &c.

Sometimes in ancient Records, Servitium Militare, is called ſervitium Hauberticū, or ſervitium Brigandinum, or ſervitium Loricatum. And a Haubert or Brigandin ſignifieth a coat of male.

## CHAP. 9. *Petit Serjeanty.* Sect. 159.

¶ THenure p petit ſerjeãty eſt lou home tient ſa t̄r de noſtre Sr̄ l'Roy, ō render al Roy annualm̄t ū arke, ou un eſpee, ou un dagger, ou ū cuttel, ou un launce, ou un paire de gãts de ferre, ou un paire de Spours doze, ou un ſete, ou divers ſetes, ou de render auks tiels petit choſes touchants le guerre.

THenure by petit Serjeanty is, where a man holds his Land of our Soveraign Lord the KING, to yeeld to him yearly a Bow, or a Sword, or a Dagger, or a Knife, or a Lance, or a pair of Gloves of Maile, or a paire of gilt Spurs, or an Arrow, or divers Arrowes, or to yeeld ſuch other ſmall things belonging to warre.

*De noſtre Seignior le Roy.* And ſo Littleton concludeth this Chapter, that a man cannot hold by grand Serjeanty, or petit Serjeanty, but of the King, and of the King as of his perſon, and not of any Honour or Manor. And it is to be obſerved, that regularly a tenure of the King as of his perſon is a Tenure in Capite, ſo called κατ' ἐξοχὴν, propter excellentiam, becauſe the head is p̄ principal part of the body; and he that holdeth of any common perſon as of his perſon, he in truth holdeth in Capite; but again, κατ' ἐξοχὴν, it is only in common underſtanding applied to the King, and that Seigniory of a common perſon is called a Tenure in groſs, that is by it ſelf, and not linked or tied to any Manor, &c.

Britton fol. 164. Bracton lib. 2. fol. 35. Fleta lib. 2. cap. 9. Ockam cap. quid de avibus oblatis.

And this Tenure of the King in Capite, is ſaid (a) to be a Tenure of the King as of his Crown, that is, as he is King. (b) And therefore if one holdeth land of a common perſon in groſs as of his perſon, and not of any Manor, &c. and this Seigniory eſcheateth to the King (yea though it be by attainder of treaſon) he holdeth of the perſon of the King, and not in Capite, becauſe the original Tenure was not created by the King. And therefore it is directly ſaid, that a Tenure of the King in Capite, is when the land is not holden of the King as of any Honour, Caſtle, or Manor, &c. But when the Land is holden of the King as of his Crown.

(a) Bracton lib. 2. fol. 87.
(b) 3 E 3. tenures B. 94. 30 H. 8. 43. 28 H. 8. Livery B. 57. 29 H. 8. ibid. 58. 6 H. 8. Dyer 58. Vide Leſtatute de 1 E. 6. cap. 4. F. N. B. 5. K.

Note that an Honour is the moſt noble Seigniory of all others, and originally created by the King but may afterward be granted to others. See for the creation of an Honor, 13 H. 8. cap. 33 H. 8. cap. 37, 38. 37 H. 8. cap. 18.

And it is to be obſerved that a man may hold of the King in Capite, or of his Crown as well in ſcage as by Knights ſervice.

¶ *De render al Roy annualmene un arke, ou un eſpee, &c.* As grand Serjeanty muſt be done by the body of a man, ſo petit Serjeanty hath nothing to do with the body of a man, but to render ſome things touching war, as a Bow, a Sword, a Dagger, a Knife, a Lance, a paire of Gantlets of iron, or ſhafts, and ſuch like.

Magna Charta cap. 27.

It is to be obſerved, that grand Serjeanty or Knights ſervice is not in Law called Liberū Servitium, as Socage is, but per feodum unius militis, &c. but to find the King ſo many ſhips for

Regiſt. fol. 2. F. N. B. fol. 1.

for his paſſage is called liberum ſervitium, and therefore it is ſaid, Per liberum ſervitium, ad inveniendum nobis quinque naves ad tranſitum noſtrum ad mandatum noſtrum. And therefore clearly ſuch a Tenure is neither Grand Serjeanty, nor Knights Service, becauſe nothing is to be done by the body of any man, nor in that caſe, touching war, but Ships to be found. And this is the reaſon that Littleton yieldeth of the examples he doth here put, becauſe that ſuch a Tenant by his Tenure ought not to go, nor to do any thing in his perſon, touching war.

Bract. E, 2. fol. 35. And herewith agreeth Bracton, Ex parvis Serjeantiis quæ non reſpiciunt Regem, nec Patriæ defenſionem, nullum competere debet maritagium nec cuſtodiam, &c.

9 H, 3. Gard. 145. If a man holdeth land of the King, to find an horſe of ſuch a price, and a ſaddle and a bridle by forty dayes, or any other time when the King goeth with his army againſt Wales, this is Petit Serjeanty, and no Grand Serjeanty for the cauſe aforeſaid.

## *Sect.* 160.

¶ *Tiel ſervice neſt forſque Socage, &c.*

But as it hath been ſaid, the dignity of the perſon of the King giveth the name of Petit Serjeanty, which in caſe of a common perſon ſhould be called plain ſocage, ab effectu; for it ſhall have ſuch effects or incidents as belong to Socage, and neither ward nor marriage, &c. for they belong to Knights-ſervice.

9 H, 3. Gard. 145.

Mag. Chart. cap. 28. Vide Stat. de Wardis & Releevis, 28 E, 1. Of this tenure the great Charter in the perſon of the King ſaith thus, Nos non habebimus cuſtodiam hæredis, &c. occaſione alicujus parvæ Serjeantiæ quam tenet de nobis per ſervitium, reddendo nobis cultellos, ſagittas, &c.

¶ Et tiel ſervice ne forſq; Socage en effect, pur ceo que tiel Tenant per ſon Tenure ne doit aler ne faire aſcun choſe en ſon proper perſon, touchãt le guerre, mes de render & payer annualment certain choſes al Roy, ſicõe home doit payer un Rent.

AND ſuch ſervice is but Socage in effect, becauſe that ſuch Tenant by his Tenure ought not to goe nor doe any thing in his proper perſon touching the war, but to render and pay yearly certain things to the King, as man ought to pay a Rent.

## *Sect.* 161.

Vide ſect. 1. ¶ Of this, ſufficient hath beene ſaid before, ſaving that parva Serjeantia is only appropriate to this Tenure.

¶ Et nota que home ne poit tener per graund Serjeanty, ne per petit Serjeanty, ſinon de Roy, &c.

AND note, that a man cannot hold by grand Serjeanty, nor by petit Serjeanty, but of the King, &c.

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## CHAP. 10. *Tenure en Burgage.* *Sect.*162.

Braſton lib. 3, Tract. 2. Britton fol. 164. Mirrour cap. 2. ſect. 18. Lib. 10. fol. 123, 124. The Mayor of Lynns caſe. 40. Aſſ. p. 27. 43 E. 3. 32. 21 E. 4. 53. & 54. 21 H. 7. 15. 2 E. 3. cap. 3. *Burgage*, In Latine Burgagium, is derived of this word Burgus, which is Vicus, Pagus, or Villa, a Towne, and it is called a Burgh, becauſe it ſendeth Burgeſſes to Parliament.

¶ Tenure en Burgage eſt, lou Antient Burgh eſt, ô que l' Roy eſt Seignior, &

TEnure in Burgage is, where an ancient Burrough is, of which the King is Lord

(b) Braſton lib. 3. fol. 124. Fleta lib. 1. cap. 47. Of Burghs, ſome be incorporate, and ſome not; and ſome be walled, and ſome not, (b) Ie

ceur

ceur que ont Tenements deins le Burgh teignont del Roy lour Tenemẽts que chescun Tenant pur son Tenement doit payer al Roy ũ certain Rent per an, &c. Et tiel Tenure nest forsque Tenure en Socage.

and they that have Tenements within the Borrough, hold of the King their Tenements, and every Tenant for his Tenement ought to pay to the King a certain rent by year, &c. and such tenure is but Tenure in Socage.

was in former times taken for those Companies of ten families, which were one anothers pledge; and therefore a pledge in the Saxon tongue a Borhoe, whereof (some take it) that a Burgh came; whereof also commeth Headborough, or Borowhead, Capitalis Plegius, a Chief Pledg, viz. the Chief man of the Borhoe, whom Bracton calleth Firthburgus, and hereof also commeth Burghbote, which as Fleta saith, signifieth Quietanciam reparationis murorum Civitatis aut Burgi.

Every City is a Burgh, but every Burgh is not a City, whereof more shall be said hereafter. And the termination of this word Burgagiũ, (as before hath been noted) signifieth the service whereby the Burgh is holden. And of this word (Burgh) two ancient and noble Families take their names, viz. de Burgo, and de Burgo caro, Burchier.

¶ *De que le Roy est Seignior.* But it may be holden of another, as by that which immediately followeth appeareth. F. N. B. 64. d.

## *Sect.* 163.

¶ ET meine le manner est, lou un auter Seigniour Espirituall ou Temporall, est seignior de tiel Burgh, & ses Tenants de Tenements en tiel Burgh teignont de lour Seignior a payer chescun de eux un annual Rent.

AND the same manner is, where another Lord Spirituall or Temporall is Lord of such a Burrough, and the tenants of the tenements in such a Burrough hold of their Lord, to pay each of them yearly an annual Rent.

¶ This is evident, and needeth no explanation, only this by the way is to be observed, that Bishops being Lords of Parliament, have not been called Lords Spirituall so lately, as some have imagined. 16 R. 2. cap. 5. 1 H. 4. cap. 2. &c.

## *Sect.* 164.

¶ ET est appel tenur̃ ẽ burgage, pur ceo que les tenement deins l' burgh sont tenus del Seignior del Burgh p certaine rent, &c. Et est accordant q̃ les ancient villes appel

AND it is called Tenure in Burgage, for that the tenements within the Burrough be holden of the Lord of the Burrough by certaine rent, &c. And it is to wit that the ancient Townes called Burroughes, be

¶ PER *certaine rent, &c.* By (&c.) here is implyed fealtie, or other service, as to repair the house of the Lord, &c.

¶ *Les ancient villes appel Burghes.*

So as a Burgh is an antient Town holden of the King, or any other Lord which sendeth Burgesses to the Parliament.

And it is to be observed, that Burgh and Bury have all one signification, as Canterbury, Bury Saint Edmond, Sudbury, Salisbury, Banbury, Heytesbury, Malmesbury, Shaftesbury, Teukesbury,

Tewkesbury, and others ſend Burgeſſes to the Parliament, Vide pro Villis, Parochiis & Hamlettis poſtea, Sect. 171.

Burghs ſont les pluis anciēt villsq̄ ſont deins Engleterre, car ceux villes q̄ oꝫe ſont cities, ou counties, en ancient temps fuerout burghes, & appelles burghes, car ō tielr ancient villes, appelles Burghes, veignont les Burgeſſes al Parliamēt, quant le Roy ad ſummon ſon Parliamēt.

the moſt ancient towns that be within England; for the Towns that now be Cities or Counties, in old time were Boroughes, and called Boroughes, for of ſuch old Townes called Boroughs, come the Burgeſſes of the Parliament, to the Parliament, when the King hath ſummoned his Parliament.

¶ *Cities.* Civitas, Whereof cometh the woꝛd City. A City is a Boꝛough incoꝛpoꝛate, which hath, oꝛ hath had a Biſhop: And though the Biſhopꝛick be diſſolved, yet the City remaineth.

Lamb. fol. 125.

In the time of William the Conqueroꝛ it is declared in theſe woꝛds, Item nullum mercatum, vel forum ſit, nec fieri permittatur, niſi in Civitatibus regni noſtri, & in Burgis clauſis & muro vallatis & caſtellis, & locis tutiſſimis, ubi conſuetudines regni noſtri, & jus noſtrum commune, & dignitates coronæ noſtræ, quæ conſtitutæ ſunt à bonis prædeceſſoꝛibus noſtris deperire non poſſunt, nec defraudari, nec violari, ſed omnia rite, & per judicium & juſticiam fieri debent: & ideo caſtella & burgi & civitates ſunt & fundatæ & ædificatæ, ſcilicet ad tuitionem gentium, & populoꝛum regni, & ad defenſionem regni, & idcirco obſervari debent cum omni libertate, & integritate, & ratione. So as by this it appeareth, that Cities were inſtituted foꝛ thꝛee puꝛpoſes: Firſt, Ad conſuetudines regni noſtri, & jus noſtrum commune, & dignitates coronæ noſtræ conſervand'. 2. Ad tuitionem gentium & populoꝛum regni. And thiꝛdly, Ad defenſionem regni. Foꝛ conſeꝛvation of Laws, whereby every man enjoyeth his own in peace: foꝛ tuition and defence of the Kings ſubjects: and foꝛ keeping the Kings peace in time of ſudden uproaꝛs. And laſtly, foꝛ defence of the Realm, againſt outward and inward hoſtility.

Mirroꝛ cap. 2. ſect. 18. Britton fol. 87.

Civitas & Urbs in hoc differunt, quod incolæ dicuntur civitas, urbs veꝛo complectitur ædificia, but with us the one is commonly taken foꝛ the other. Villeins ſont coultivers de fiefe demurrants in villages upland, car de ville eſt dit villeine, & de Buroughs Burgeſſes, & de cite citizens.

Mich. 7 R. 1. Rot. 1. (which was in Anno Dom. 1195.) in an Aſſ. of Darrein preſentment of the Church of St. Peters in Cambridge.

Every Boꝛough incoꝛpoꝛate that had a Biſhop within time of memoꝛy is a City, albeit the Biſhopꝛick be diſſolved, as Weſtminſter had of late a Biſhop, and theꝛefoꝛe it yet remains a City. The Buꝛgh of Cambridge, an ancient City, as it appeareth by a judiciall Recoꝛd (which is to be pꝛeferred befoꝛe all others) where Mos civitatis Cantabrigiæ is found by the oath of 12 men the recognitoꝛs of that aſſize, which (omitting many others) I thought good to mention, in remembꝛance of my lobe and duty Almæ Matri Academiæ Cantabrigiæ.

There be within England two Archbiſhopꝛicks, and 23 other Biſhopꝛicks; theꝛefoꝛe ſo many Cities there be, and Cambridge and Weſtminſter being added, there are in all 27 Cities within this Realm, and may be moꝛe than at this time I can call to memoꝛy.

It is not neceſſary that a City be a County of it ſelf, as Cambridge, Ely, Weſtminſter, &c. are Cities, but are no Counties of themſelves, but are part of the Counties wheꝛe they be.

¶ *Counties.* Oꝛ Shires; the one taken from the French, the other from the Saxon, in Latine Comitatus. Counties are certain circuits oꝛ parts of the Kingdom into the which the whole Realm was divided foꝛ the better gobernment thereof, ſo as there is no land, but it is within ſome County. And every of them is governed by a yeaꝛly Officer which we call a Shiꝛeve. Which name is compounded of theſe two Saxon woꝛds Shire and Reve, (i) Pꝛæpoſitus, oꝛ Pꝛæfectus Comitatus; but hereof moꝛe hereafter in his pꝛoper place ſhall be ſpoken. There be in England 41 Counties, and in Wales twelve.

Lib. 10. fol. 123, 124. Vide Devant ſect. 97.

¶ *Veignont les Burges al Parliament, &c.* Parliament is the higheſt and moſt honourable and abſolute Court of Juſtice of England conſiſting of the King, the Lozds of Parliament, and the Commons. And again, the Lozds are here divided into two ſoꝛts, viz. Spirituall and Tempoꝛall. And Commons are divided into thꝛee parts, viz. into Knights of Shires oꝛ Counties, Citizens out of Cities, and Burgeſſes out of Boꝛoughs. The woꝛds of the Writ to the Sheriff foꝛ the election being, Duos milites gladiis cinctos, magis idoneos, & diſcꝛetos comitatus tui, & de qualibet civitate comitatus tui duos cives, & de quolibet

quolibet Burgo duos Burgenſes de diſcretioribus, & magis ſufficientibus, &c. All which have voyces and ſuffrages in Parliament: You ſhall read in the Parliament Rolls, that (as hath been ſaid) there is Lex, & conſuetudo Parliamenti, quæ quidem lex quærenda eſt ab omnibus, ignorata à multis, & cognita à paucis. Of the members of this Court ſome be by deſcent, as ancient Noblemen; ſome by creation, as Nobles newly created; ſome by ſucceſſion, as Biſhops; ſome by election as Knights, Citizens, and Burgeſſes. Vide ſect. 3.

It is called Parliament, becauſe every member of that Court ſhould ſincerely and diſcreetly parler la mente for the generall good of the Common-wealth. Which name it hath alſo in Scotland, and this name before the Conqueſt was uſed in (a) the time of Edward the Confeſſor, William the Conqueror, &c. It was anciently before the Conqueſt called Michael Sinoth, Michael gemote, Ealſa Witenage mote, that is to ſay, the great Court of Meeting of the King, and of all the wiſe men; ſometime of the King with the Councell of his Biſhops, Nobles, and wiſeſt of the people. This Court the Frenchman calleth Les Eſtates, or Laſſemble des Eſtates. In Germany it is called a Diet: for thoſe other Courts in France & are called Parliaments, they are but ordinary Courts of Juſtice, and (as Paulus Jovius affirmeth) were firſt eſtabliſhed by us. 4 H. 8. cap. 8. (a) Treatiſe de modo tenend. Parliam. 21 E. 3. fol. 60. a. Johannes de Rupicella tempore regis Johannis. Pol. Virgil li. 3. tempore H. 8. W. 1. 3 E. 1. in the title.

The King of England is armed with divers Councels. one whereof is called Commune Concilium, and that is the Court of Parliament, and ſo it is legally called in Writs and judicial proceedings Commune Concilium Regni Angliæ. And another is called (b) Magnum Concilium: this is ſometime applyed to & upper houſe of Parliament, and ſometime out of Parliament time to the Peers of the Realm. Lords of Parliament, who are called Magnum Concilium Regis, for the proof whereof take one (c) Record for many in the fifth year of King H 4. at what time there was an exchange made between the King and the Earl of Northumberland, whereby the King promiſeth to deliver to the Earl lands to the value, &c. Per advice & aſſent des eſtates, de ſon Realme & de ſon Parliament (parenſi que Parliament ſoit devant le feaſt de St. Lucy) ou autrement per advice de ſon graund Councell, & autres Eſtates de ſon Realme, que le Roy ferra aſſembler devant le dit feaſt, in caſe que le Parliament ne ſoit. And herewith agreeth the Act of Parliament in 37 E. 3. cap. 18. where it is ſaid, before the Chancellour, Treaſurer, and great Counceil. Thirdly, (as every man knoweth) the King hath a Privy Councel for matters of State, (as for example) (d) Henricus de bello monte Baro de magno & de privato Concilio Regis juratus: and many others before and after. The fourth Councel of & King are his Judges of the Law for Law matters, and this appeareth frequently in our (e) Books, and muſt be intended: when it is ſpoken generally by the Councel, it is to be underſtood Secundum ſubjectam materiam; for example, if it be legall then by the Kings Councell of the Law, viz. his Judges. (b) Bracton lib. 1. cap. 2. Regiſt. 280. (c) 27 Aug. 5 H. 4. (d) In Dorſ. Clauſ. 16 E. 2. M. 5. (e) 43. Aſſ. 15. 27 H. 6. 5. 1 R. 3. 11. Regiſt. 191. 122. 22. 4 E. 3. 2. 39 E. 3. 35. 3. Aſſ. 15. 19 E. 3. Judgement 174. W... cap. 1. Leſtat. de Templ. 1. 16 R. 2. ſtat. de præmunire. See the ſame publiſhed by Mr. Lambert.

Now for the antiquity of this high Court of Parliament, whereof Littleton here ſpeaketh; It appeareth that divers Parliaments have been holden long before and until the time of & Conqueror, which be in Print, and many more appearing in ancient Records and Manuſcripts (f) Le Roy Alfred aſſembler' les Counties, &c. & ordeina per uſage perpetual que deux foitz per an ou pluis ſovent put miſter in temps de peace ſe aſſemblerent a Lones a Parliamenter ſur le guidament del people de Dieu, & coment ſoy garderont de percher, viverónt en quier, & receiveront droit per uſages & ſanits judgements per ceſte eſtate ſe fierent pluſors ordinances per pluſors Roys jeſque a temps le Roy que ore eſt. que ſoit le Roy E. 1. The concluſion of that great Parliament holden by King Athelſtan at Grately is very remarkable, wherein I have ſeen in theſe words: All this was enacted in that great Synod or Councell at Grately, whereat was the Archbiſhop Wolfchelme, with all the Noblemen and wiſe men which King Athelſtan called together. (f) Mirror cap. 1. ſect. 2. Vide ſtatutes de 4 E. 3. cap. 14. & 36 E. 3. cap. 10.

There have been in the time of, and ſince the Conqueſt, in the reigns of H. 1. King Stephen, H. 2. R. 1. King John, H. 3. &c. 280. Seſſions of Parliament, and at every Seſſion divers Acts of Parliament made, no ſmall number whereof are not in Print. Mirr. ca. 2. ſect. 4. 7. 10. 14. cap. 4. defaults, & cap. de Homicide cap. 1. ſect. 13. cap. 4. de Poins. Ockam quid cum ven. Matth. Pariſ. 212, 213.

The jurisdiction of this Court is ſo tranſcendent, that it maketh, inlargeth, diminiſheth, abrogateth, repealeth and reviveth Laws, Statutes, Acts, and Ordinances concerning matters Eccleſiaſtical, Capital, Criminal, Common, Civill, Martiall, Maritime, and the reſt. None can begin, continue or diſſolve the Parliament but by the Kings authority. Of which Court it is ſaid, (a) Que il eſt de treſgrand honor & juſtice, de que nul doit imaginer choſe diſhonorable. (b) Habet Rex Curiam ſuam in Conciliis ſuo in Parliamentis ſuis, præſentibus Prælatis, Comitibus, Baronibus, Proceribus, & aliis viris peritis, ubi terminatæ ſunt dubitationes judiciorum, & novis in juriis emerſis nova conſtituuntur remedia, & unicuiq, juſtitia prout meruerit retribuetur ibidem. But this properly doth belong to the Juriſdiction of Courts, and therefore this little taſte hereof ſhall ſuffice. (a) Pl. Com. 391. b. Doct. and Stud. cap. 55. fol. 164. (b) Fleta lib. 2. cap. 2. Forteſcue de laudibus legum Angliæ. Bracton lib. 1. cap. 2.

## *Sect.* 165.

¶ *Cuſtomes & uſages.* Conſuetudo, is one of the main triangles of the Laws of England, thoſe Laws being divided into Common Law, Statute Law, and Cuſtome. Of which it is ſaid, (†) Bract.lib.1. ca.3.f.2. † that Conſuetudo quandoque pro lege ſervatur, in partibus ubi fuerit more utentium approbata, & vicem Legis obtinet; longævi enim temporis uſus & conſuetudinis non eſt vilis authoritas. (c) Idem lib.2.fol.52. Longa poſſeſſio (ſicut jus) parit jus poſſidendi, & tollit actionem vero domino.

Of every Cuſtome there be two eſſential parts, Time and Uſage, Time out of minde, (as ſhall be ſaid hereafter) and continuall and peaceable uſage without lawfull interruption.

¶ ITem p̃ le greinder part tiels burghes ont divers cuſtomes & uſages que nont pas auters villes. Car aſcuns burghes ont tiel cuſtome, q̃ ſi home ad iſſue pluſors fits & moyſt le puiſne fits enheritet touts les tenements que fuer̃ a ſon pere deins m̃ le burgh come heire a ſon pere per force de cuſtome. Et tiel cuſtome eſt appel Burgh Engliſh.

ALſo for the greater part, ſuch Boroughes have divers cuſtomes and uſages, which be not had in other Towns; for ſome Boroughes have ſuch a cuſtome, that if a man have iſſue many ſons and dyeth, the youngeſt ſon ſhall inherit all the Tenements which were his fathers within the ſame Borough as heire unto his father, by force of the cuſtom, the which is called Borough Engliſh.

¶ *Que nont pas auters villes.* It is neceſſary to be known what cuſtomes may be alledged in an upland town which is neither City nor Borough. † In an upland town which is neither in City nor Borough, ſuch a cuſtome to deviſe lands cannot be alledged. Neither in an upland town can there be a cuſtome of Borough Engliſh or Gabelkind; but theſe are cuſtomes which may be in Cities or Boroughs. (d) Alſo if lands be within a Manor, Fée, or Seigniory, the ſame by the cuſtome of the Manor, Fée, or Seigniory, may be deviſable or of the nature of Gabelkind, or Borough Engliſh. † But an upland town may alledge a cuſtome to have a way to their Church, or to make By-lawes for the reparations of the Church, the well-ordering of the Commons, and ſuch like things. And it is to be obſerved that in ſpecial caſes a cuſtome may be (e) alledged within a Hamlet, a Town, a Burg, a City, a Manor, an Honour, an Hundred, and a County: but a cuſtom cannot be alledged generally within the Kingdom of England, for that is the Common Law.

(†) 44 E.3.33. 40 Aſſ.4. 27. 41.21 E.4.54.43 E.3. 32.

(d) 21 E. 4. 53. 54.

(†) 21 E.4.54.15 E.4. 29.11 H.7.14. 44 E.3.18. 1 H.7.40.

(e) Bracton lib.4.271. 24 E.1.detinue 60. 17 E. 2.detinue 58.3 E.3.det. 156.30 E.3.25. 39 E.3.6. 9,10.31 E.3. render 6. 17 E.3.27.21 E.4.28.22 E.4.8.7 E.3.51.30 Ed.3. 23.34 H.8. Dier 54. F. N.B.122.5 E.3.treſp.13. Vide Glanvil.li.7. c.3.9.

¶ *Le puiſne fits inheritera.* And yet by ſome cuſtomes the youngeſt brother ſhall inherit; for, Conſuetduo loci eſt obſervanda.

¶ *Touts les terres ou tenements.* Either in Fée-ſimple, Fée-taile, or any other inheritance. If lands of the nature of Borough Engliſh be letten to a man and his heirs during the life of I.S. and the Leſſée dyeth, the youngeſt ſon ſhall enjoy it.

¶ *Borough Engliſh.* So called, becauſe this cuſtome was firſt (as ſome hold) in England.

## *Sect.* 166.

¶ AND this is called Franke banke, Francus bancus. Conſuetudo eſt in partibus illis, quod uxores maritorum defunctorum habeant francum bancum ſuum de terris Sockmannorum tenent' nomine dotis. Bract.lib.4. tract.6.cap. 13. F.N.B.150.6.Pl. Com. 413.

¶ ITem, en aſcun burghes per le cuſtome feme avera pur ſa dower touts les tenements q̃ fueront a ſa baron, &c.

ALſo in ſome Boroughs by cuſtom the wife ſhall have for her dower all the Tenements which were her husbands.

¶ *Que*

¶ *Que fueront a ſa baron, &c.* Here is implyed by (&c.) that in ſome places, wife ſhall have the moiety of the lands of her husband ſo long as ſhe lives unmarried, as in Gavelkind. And of lands in Gavelkind a man ſhall be Tenant by the Curteſy without having of any iſſue. In ſome places the widow ſhall have the whole, or half, Dum ſola & caſta vixerit, and the like. (l) F. N. B. 150. 19 E. 3. aide 129.

## *Sect.* 167.

¶ ITem, en aſcuns burghes per le cuſtome hõe poit deviſer per ſon teſtament ſes terres & tenements que il ad en fee ſimple deins meſme le burgh al tẽps de ſ̃ mozant, & per force de tiel deviſe, celuy a que tiel deviſe eſt fait, apres le mozt le deviſor poit ẽtre en les tenemẽts iſſint a luy deviſes, a aver & tener a luy ſolonque la fozm & effect del deviſe, ſans aſcun liverie de ſeiſin deſtre fait a luy, &c.

ALſo in ſome Boroughs by the cuſtome a man may deviſe by his Teſtament his Lands and Tenements which he hath in Fee ſimple within the ſame Borough at the time of his death, and by force of ſuch Deviſe, hee to whom ſuch Deviſe is made after the death of the Deviſor, may enter into the Tenements ſo to him deviſed, to have and to hold to him after the forme and effect of the deviſe, without any livery of Seiſin thereof to be made to him, &c.

¶ *Deviſer.* This is a French word, & ſignifieth ſermocinari, to ſpeak, for teſtamentũ eſt teſtatio mentis, & index animi ſermo. So as a deviſer per ſon teſtament, is to ſpeak by his Teſtament what his mind is to have done after his deceaſe.

¶ *Per ſon teſtament.* Teſtamentum eſt (m) duplex, 1. In ſcriptis. 2. Nuncupativum, ſeu ſine ſcriptis. And in ſome Cities and Boroughes lands may (n) paſs as Chattels by Will nuncupative or parol without writing. Revera (o) terminatũ eſt quod poteſt legari ut catallum tam hæreditas quã perquiſitum per Barones London, & Burgenſes Oxon. Ideo verum eſt quod in Burgis non jacet aſſiſa mortis anteceſſoris. But in Law moſt commonly, Ultima voluntas in ſcriptis, is uſed where Lands or Tenements are deviſed, and Teſtamentum when it concerneth Chattels. (m) Vide ſect. 586. (n) Britton fol. 164. 212. b. (o) Bracton l. 4. fol. 272. Fleta lib. 5. cap. 5. & l. 2. cap. 56.

¶ *Ses terres ou tenements.* And by the ſame cuſtom he may deviſe a Rent out of the ſame Lands and Tenements. 4 E. 3. 53. 7 H. 6. 1. 14 H. 8 5. 22. Aſſ. 78. Abbr. Aſſ. 118. b. 4 E. 2. mordanc. 39. 49 E. 3. 17. F. N. B. 196. 21 H. 6. 38. 2. 7 E. 2. tit. mordanc.

¶ *Que il ad en Fee ſimple.* For lands in tail are not deviſable by Will, and therefore he in this place neceſſarily added (que il ad en Fee ſimple) and purpoſely omitted the ſame in the clauſe concerning Borough Engliſh, becauſe there an eſtate tail is included.

¶ *Poet entrer.* Note, the cuſtom of a City or Borough concerning the deviſe of lands is, Quod liceat unicuiq; civi ſive burgenſi, &c. ejuſdem civitatis ſive burgi tenementa ſua in eadem civitate ſive burgo in teſtamento ſuo in ultima voluntate ſua, tanquam catalla ſua legare cuicunque voluerit, &c. (p) Now if a man deviſeth either by ſpecial name or generally, goods or chattels real or perſonal, and dieth, the Deviſee cannot take them without the aſſent of the Executors. But when a man is ſeiſed of lands in fee, and deviſeth the ſame in fee in tail, for life, or for years, the Deviſee ſhall enter; for in that caſe the Executors have no medling therewith. And in the caſe of a deviſe by Will of lands, whereof the Deviſor is ſeiſed in fee; the freehold or intereſt in Law is in (q) the Deviſee before he doth enter, and in that caſe nothing (r) (having regard to the ſtate or intereſt deviſed) deſcendeth to the heir. But if the heir of the Deviſor entreth and holdeth the Deviſee out, he may either enter as Littleton here ſaith, or have his writ called Ex gravi querela, and this writ (without any particular uſage) is incident to the cuſtome to deviſe, for otherwiſe if a deſcent were caſt before the Deviſee did enter, the Deviſee ſhould have no remedy. After an actual poſſeſſion this Writ lieth not, for then the Deviſee may have his ordinary remedy by the Common Law. F. N. B. 199. Regiſt. in ex gravi Querela. (p) 2 H. 6. 16. 27 H. 6. 8. 2 E. 4. 13. 21 E. 4. 21. 4 H. 7. 16. (q) 3 Mar. Br. tit. deviſ. 49. (r) Regiſt. fol. 244. 39. Aſſ. pl. 6. 3 E. 3. deviſe 12. 29. Aſſ. 31. 34 E. 3. tit. Formedon Pl. poſtr. 30 H. 8. deviſe 28. F. N. B. 198. 199, &c. Britton fol. 212. b.

And well ſaid Littleton, that Lands and Tenements were deviſable in Burghes by cuſtome, for that (f) at the Common Law no Lands or Tenements were deviſable by any laſt Will and Teſtament, nor ought to be transferred from one to another, but by ſolemn livery of ſeiſin, matter of record, or ſufficient writing. but as Littleton here ſaith, that by certain private cuſtoms in ſome Burghes they are deviſable. But now ſince Littleton wrote, by the Statutes of 32 and 34 H.8. Lands and Tenements are generally deviſable by the laſt Will in writing of the Tenant in Fee ſimple, whereby the ancient (t) Common Law is altered, whereupon many difficult queſtions, and moſt commonly diſherſion of heirs (when the Deviſors are pinched by the meſſengers of death) do ariſe and happen. But (u) theſe Statutes take not away the cuſtome to deviſe, whereof Littleton ſpeaketh: for though lands deviſable by the cuſtome be holden by Knights ſervice, yet may the owner deviſe the whole land by force of the cuſtome, and that ſhall ſtand good againſt the heir for the whole. But the deviſe of lands holden by Knights Service, by force of the ſtatutes, is utterly void for a third, and the ſame ſhall deſcend to the heir. If he hath any lands holden by Knights Service in Capite, and lands in Socage, he can deviſe but two parts of the whole; but if he hold lands by Knights Service of the King, and not in Capite, or of a mean Lord, and hath alſo lands in Socage, he may deviſe two parts of his land holden by Knights Service, and all his Socage lands. If he holds any land of the King in Capite, and by act executed in his life time, he conveyeth any part of his lands to the uſe of his wife, or of his children, or payment of his debts, though it be with power of revocation; he can deviſe by his Will (x) no more, but to make up the land ſo conveyed two parts of the whole. And if the land ſo conveyed amount to two parts or more, then he can deviſe nothing by his Will. But if he hath land only that is holden in Socage, then he may deviſe by his Will all his Socage lands; ſo as it is apparent that the benefit of the Lords was more carefully provided for, than the good of the heir. But if a man holding ſome land of the King by Knights Service in Capite, convey two parts of his land to the uſe of his wife for life; now (as hath been ſaid) he can deviſe no part of the reſidue, but yet he may by his Will deviſe the reverſion of the two parts ſo conveyed to his wife: for the intention of the Act is to give power to diſpoſe two parts intirely.

If the Deviſor leave a full third part of the land immediately to deſcend in fee ſimple or in tail, he may deviſe the other two parts in fee ſimple; if a third part be not left, it ſhall be made up according to the Act. But hereditaments that are not of any yearly value, as bona & catalla felonum & fugitivorum, waifts, eſtrays, and the like, can neither be left to deſcend for any part of the third part, or deviſed as part of the two parts. But yet if ſuch Franchiſes of uncertain value be holden of the King in Capite, they ſhall reſtrain the deviſe of all his lands, and make it void for a third part. So it is if a man hath a reverſion expectant upon an eſtate tail, dry and fruitleſſe, holden of the King by Knights Service in Capite; yet that ſhall reſtrain him to deviſe but two parts of his lands only. And where the ſtatute ſpeaks of a remainder, it is to be intended only of ſuch a remainder, as may draw Ward & Marriage by the Common Law. As if a reverſion upon a ſtate for life be granted to one for life, the remainder in fee, during the life of the grantee for life, it is not within the ſtatute: but if he dieth, this is ſuch a remainder, as is within the ſtatute, although it be dry and fruitleſs. If a gift in tail or a leaſe for life be made, & remainder in fee, this remainder in fee is not within the ſtatute. But if a man hath lands holden by Knights Service in Capite in poſſeſſion, reverſion, or remainder, and alſo ſeiſed of Socage land, and deviſe by his Will all his lands, & after he ſelleth away the Capite land, or that land is recovered from him, the Will is good for the whole Socage land. The values both of the third part, and the two parts of the lands, ſhall be taken as they happen to be at the time of the death of the Deviſor, for then his Will takes effect.

He that holds by Knights Service in chief, deviſeth by his Will a Rent, Common, or other profit as ſhall amount to the value of two parts out of all his lands, this rent iſſueth only out of the two parts, and the third part is free of it. And if he hath lands holden by Knights ſervice, and not in Capite, he may charge two parts of the Knight-Service-land as is aforeſaid, and all his Socage land, &c. And if he hath only Socage land, he may by his Will charge it at his pleaſure, ſo as the Kings and Lords third part is free, and the heirs two parts charged, and this is only by force of the ſtatute of 34 H.8.

If a man make a feoffment in fee of his lands holden by Knights ſervice to the uſe of ſuch perſon and perſons, and of ſuch eſtate and eſtates, &c. as he ſhall appoint by his Will, in this Caſe by operation of Law, the uſe and ſtate veſts in the feoffor, and he is ſeiſed of a qualified fee. In this caſe if the Feoffor limit eſtates by his will, by force, and according to his power, there the uſes and eſtates growing out of the feoffment are good for the whole, and the laſt will is but directory. But in y^e caſe if the Feoffor had deviſed the land (as owner thereof) without any reference to the feoffment, and power thereby given then taking effect by the will, it is void for a third part. But if he had formerly conveyed two parts to the uſe of his wife, &c. and after deviſed the reſidue by his will without any reference to his power by the feoffment,

(f) 27 H. 8. cap. 10. Britton fo. 212, 78. b. 164. Vide before in this ſect. 32 H. 8. ca. 2. 34 H. 8 ca. 5.

(t) Vide lib. 3. fo. 25, &c. in Butler & Bakers caſe. Lib. 6. fol. 10. & 76. Lib. 8. fol. 84, 85. Lib. 9. 133. Lib. 10. 82, 83, 84. Lib. 11. fol. 24. Lib. 1. fol. 25. a.

(u) Dyer 4 & 5 Ph. & Mar. 155. an 6. Eliz. Dalſon Patch 20. Eliz. between Barber & his wife, wife plaintiff, and William Long Defendant, in a Writ of partition. Bendloes adjudged.

(x) Lib 6. fol. 17, 18. Sir Edw. Cleres caſe. Lib. 3. fol. 34. b. Butler & Bakers caſe.

Lib. 10. fol. 80, 81. Leon. Loveys caſe.

Leon. Loveys caſe, and Butler and Bakers caſe. ubi ſupra.

Leon. Loveys caſe. ubi ſupra. fol. 81.

Lib. 8. fol. 84, 85. Sir Richard Pexals caſe. Lib. 3. fol. 33. Butler and Barkers caſe.

Lib. 6. fol. 17. 18. in Sir Edw. Cleres caſe.

feoffment, yet this Will shall enure to declare the use upon the feoffment, because he had no power as owner of the land to devise any part of it. But if the feoffment had bin made to the use of his last Will, although he deviseth the land with reference to the feoffment, yet it taketh effect only by the Will and not by the feoffment. All which and many other points of intricate and abstruse learning you shall more largely read in my Reports.

¶ *Sauns ascun liverie de seisin destre fait a luy, &c.* For in his life time Livery of seisin could not be made, because his Will is ambulatory till his death, and no estate passeth during his life, neither can Livery be made after his decease. for then it cometh too late. 40. Ass. 38.

Here (&c.) implyeth that the devise is good without any Attournment of any Lessé or Tenant.

## *Sect.* 168.

¶ Nota coment q home ne poet granter ne doner les tenements a sa feme, durant le coverture, pur ceo que sa feme & luy ne sont forsq; un person en Ley, uncore p tiel custome il poit deviser per testament les tenements a sa feme, a aver & tener a luy en Fee simple, ou en Fee taile, p̄ terme de vie, ou pur terme des ans, pur ceo que tiel devise ne p̄nt effect forsq; apres la mort le Devisor; car touts devises ne p̄eignont effect forsq; apres la mort le devisor. Et si home fait a divers temp; divers testaments, & divers devises, &c. uncore le darrein devise & volūt fait p luy estoiera, & lautres sōt voides.

ALso though a man may not grant nor give his Tenements to his Wife during the coverture, for that his Wife and hee be but one person in the Law, yet by such custome hee may devise by his Testament his tenements to his Wife, to have and to hold to her in Fee simple, or in Fee taile, or for term of life, or years; for that such Devise taketh no effect, but after the death of the Devisor. And if a man at divers times make divers Testaments: and divers devises, &c. yet the last Devise and Will made by him, shall stand and the other are void.

¶ *Home ne poet granter ne doner ses tenements a sa feme, &c.* This opinion is (a) clear, for by no conveyance at the Common Law a man could, during the coverture, either in possession, reversion, or remainder, limit an estate to his wife. But a man may by his deed covenant with others to stand seised to the use of his wife, or make a feoffment or other Conveyance to the use of his wife, and now the state is executed to such uses by the statute (b) of 27 H. 8. for an use is but a trust and confidence which by such a mean might be limited by the husband to the wife. But a man cannot covenant with his wife to stand seised to her use, because he cannot covenant with her for the reason that Litleton here yeelds. (a) 4 H. 7. (b) 27 H. 8. cap. 10.

¶ *Durant le coverture.* That is, during the continuance of the marriage. For to cover in English, is Tegere in Latine, and is so called, for that the wife is sub potestate viri, and she is disabled to contract with any without the consent of the husband. (c) Omnia quæ sunt uxoris sunt ipsius viri, non habet uxor potestatem suiſed vir. (c) Bracton lib. 2. cap. 15.

¶ *Un person en Ley.* Vir & uxor sunt quasi unica persona, quia caro una, & sanguis unus, res licet sit propria uxoris, vir tamen ejus custos, cum sit caput mulieris. Idem, l. 5. tract. 5. cap. 25.

If Cestey que use had devised that his wife should sell his land, and made her Executrix, and died, & she took another husband, she might sell the land to her husband, for she did it in auter droit, and her husband should be in by the Devisor. 10 H. 7. 20.

¶ *Per testament.* Testamentum is (as is said before) Testatio mentis, and is favourably

rably to be expounded according to the meaning of the Teſtator. In contractibus benigna, in teſtamentis benignior, in reſtitutionibus benigniſſima interpretatio facienda eſt.

(d) 4 E.3 tit. Deviſe 23.
(e) 44 Aſſ.p.16. 44 E.3.33. 18 E.3.8.
(f) Britton 264.

¶ *A ſon feme.* And Littleton himſelf yieldeth the reaſon (d) becauſe the deviſe doth not take effect till after the deceaſe of the Deviſor. And in ſome (e) places the cuſtom is general, that he may deviſe any lands, &c. In ſome (f) places lands only which the Deviſor purchaſed. In ſome places he may deviſe any eſtate. In ſome places for life only, &c.

But albeit the laſt Will doth not take effect, untill after his deceaſe, yet if a Feme Covert be ſeiſed of lands in fee, ſhe cannot deviſe the ſame to her husband, becauſe at the making of her Will ſhe had no power, being ſub poteſtate viri, to deviſe the ſame, and the Law intendeth it ſhould be done by coertion of her husband.

2 H.5.8. 2 R.3.22.

¶ *Divers teſtaments.* For Voluntas Teſtatoris eſt ambulatoria uſque ad mortem (as hath bẽn ſaid before) and the later Will doth countermand the firſt. And it is truly ſaid, that the firſt grant, and the laſt Will is of greateſt force.

¶ *Divers deviſes, &c.* Here by (&c.) is to be underſtood aſwell deviſes of Chatels reall or perſonall, as of freehold and inheritance. Alſo that in one Will where there be divers devices of one thing, the laſt deviſe taketh place. Cum duo inter ſe pugnantia reperiuntur in teſtamento, ultimum ratum eſt.

## *Sect. 169.*

¶ *Queſes Executors poient aliener ou vender ſes tenements.* And that which in Littleton's time a man might do by Cuſtome in ſome particular places, he may now do by the ſtatutes of 32 & 34 H.8. generally.

32 H.8. cap.2.
34 H.8. cap.5.

¶ *Les Executors apres le mort lour teſtator poient vender.* Here it appeareth, that the Executors having but a power, as Littleton putteth the caſe, to ſell, they muſt all joyn in the ſale. Then put the caſe that one dies, it is regularly true, that being but a bare authority, the ſurvivors cannot ſell. But if a man deviſeth his land to A. for term of life, and that after his deceaſe, his lands ſhall be ſold by his Executors generally, (as Littleton here putteth his caſe) and make three or four Executors, and during the life of A. one of the Executors dieth, and then A. dieth, the other two or three Executors may ſell, becauſe the land could not be ſold before, and the plurall number of his Executors remaine. But if they had bẽn named by their names, as by I.S. I.N. I.D. and I.G. his Executors,

49 E.3.16. 29 Aſſ.17. 39 Aſſ.17. 9 H.6.24. 15 H.7. 12, 21. 14 H.8.6. 30 H.8. tit. Deviſe Br.31. 2 Eliz. Dyer 177.

¶ Item p tiel cuſtome home poit diſpiſer per ſon teſtament que ſes Executors poient aliener & vender ſes tenemẽts que il ad en Fee ſimple, p̃ certaine ſumm̃ de money a diſtributer p̃ ſon alme. En ceſt cas, coment que le deviſor devie ſeiſie de les tenements, & les tenements diſcẽdont a ſon heire, uncore les executors apres le mort lour teſtator, poyent vender les tents iſſint a eur deviſes, & ouſte le hr̃, & ent fait̃ feoffm̃t, alienation, & eſtate p fait, ou cãs fait a eur a q̃r l' vend eſt fait. Et iſſint pois veier icy ũ cas ou hõe poit faire loial eſtat, & uncore il navoit riẽs en

Alſo by ſuch cuſtome a man may deviſe by his Teſtament, that his Executors may alien and ſell the Tenements that he hath in Fee ſimple, for a certain ſum, to diſtribute for his Soul: In this caſe though the deviſor dye ſeiſed of the tenements and the tenements deſcend unto his heire, yet the Executors after the death of the Teſtator may ſell the tenements ſo deviſed them, and put out the heir, and thereof make a feoffment, alienation, and eſtate by Deed, or without Deed to them to whom the ſale is made. And ſo may ye here ſee a caſe where a Man may make a lawfull eſtate,

les

les Tenements al temps del eſtate fait. Et le cauſa eſt, pur ceo que la cuſtome & uſage ad eſte tiel. Quia conſuetudo ex certa cauſa rationabili uſitata privat Communem Legem.

and yet he hath nought in the tenements at the time of the eſtate made: and the cauſe is, for that the cuſtome and uſage is ſuch. *For a cuſtome uſed upon a certain reaſonable cauſe depriveth the Common Law.*

then in that caſe the ſervivors could not ſell the ſame, becauſe the words of the Teſtator could not be ſatisfied: and I my ſelf knew this caſe adjudged †: A ſpecial verdict was found, that A. was ſeiſed of certain lands in Fee, and deviſed the ſame in tail, and if the Donee dyed without iſſue, that his ſaid land ſhould be ſold by his ſons in law, he in truth having five ſons in law, one of his ſons in law dyed in the life of the Donee, and after the Donee dyed without iſſue, and then the four of the ſons in law ſold the land, and it was adjudged that the ſale was good, becauſe they were named generally by his ſons in law, and the Lands could not be ſold by them all. And the words of the Will, in a benigne interpretation, are ſatisfied in the plural number, albeit they had but a bare authority: but if they had been particularly named, it had been otherwiſe. But if a man deviſeth lands to his Executors to be ſold, and maketh two Executors, and the one dyeth, yet the ſurvivor may ſell the land, becauſe as the ſtate, ſo the truſt ſhall ſurvive; and ſo note the diverſity between a bare truſt, and truſt coupled with an intereſt. In both thoſe caſes the Executors may (a) ſell part of the land at one time, and part at another, as they may find purchaſers.

† Hill. 26 El. inter Vincent & Lee, in the Kings Bench.

39. Aſſ. p. 17. 4 Eliz. Dier 210. 23 Eliz. Dier 371. Paſch. 32 Eliz. fRo. 1307. in Communi Banco, and ſo reſolved in Vincents caſe.

(a) Lib. 1. fol. 173. in Digges caſe.

In Littletons caſe, admit that one Executor had refuſed to ſell (then as the Law ſtood when Littleton wrote) it was clear, that the others could not ſell; but now by the Statute (b) of 21 H. 8. it is provided, that where lands are willed to be ſold by Executors, that though part of them refuſe, yet the reſidue may ſell. And albeit the letter of the Law extendeth only where Executors have a power to ſell; yet being a beneficial Law, it is by conſtruction extended where lands are deviſed to Executors to be ſold. Yet in neither of thoſe caſes, albeit one refuſe, can the other make ſale to him that refuſed, becauſe he is party and privy to ꝯ laſt Will, ꝯ remains Executor ſtill. Mine advice to them that make ſuch deviſes by wills, is, to make it as certain as they can, as that the ſale be made by his Executors, or the Survivors or Survivor of them; if his meaning be ſo, or by ſuch or ſo many of them as take upon them the probate of his Will, or the like. And it is better to give them an authority then an eſtate, unleſſe his meaning be, they ſhould take the profits of his lands in the mean time, and then it is neceſſary, that he deviſeth, that the mean profits till the ſale ſhall be aſſets in their hands, for otherwiſe they ſhall not be ſo. But hereof thus much ſhall ſuffice.

(b) 21 H. 8. cap. 4.

Tr. 27 H. 8. in the Common Pleas, Serjeant Bendloes reports.

¶ *Et en faire feoffment.* For albeit the Executors in this caſe have no eſtate or intereſt in the land, but only a bare and naked power; yet this feoffment amounteth to an alienation, to veſt the land in the Feoffee, as it appeareth here, and the Feoffee ſhall be in by the Deviſor.

49 E. 3. 16. 38. Aſſ. 3. 39. Aſſ. 17. 13 E. 3. deviſe 3. 14 H. 8. 10. 15 H. 7. 12. b.

¶ *Per fait ou ſauns fait.* And therefore if by the cuſtome a man deviſeth that a Reverſion, or any other thing that lyeth in grant ſhall be ſold by the Executors; they may ſell the ſame without Deed, for the Words ſhall be in by the Deviſor, and not by the Executors, as hath been ſaid.

19 H. 6.

¶ *Conſuetudo ex certa cauſa rationabili uſitata privat communem legem.* Quia conſuetudo contra rationem introducta potius uſurpatio quam conſuetudo appellari debet. Conſuetudo præſcripta & legitima vincit legem.

¶ *Privat communem legem.* For no cuſtom or preſcription can take away the force of an Act of Parliament, and therefore Littleton materially ſpeaketh here of the Common Law.

4 E. 4. 4. 11 H. 4. 7. 39 H. 6 39. 7 H. 6. 1. 2. 9 H. 6. 56. 8 H. 7. 4. 8 Eliz. Dier 247.

## *Sect.* 170.

¶ Et note q̄ nul cuſtome eſt allowable, meſque tiel cuſtome q̄ ad eſte uſe

And note, that no cuſtome is to be allowed, but ſuch cuſtome as hath bin uſed

¶ *Preſcription.* Preſcription is a title taking his ſubſtance of uſe and time allowed by the Law; Præſcriptio eſt titulus, ex uſu & tempore ſubſtantiam capiens

capiens ab authoritate Legis. In the Common Law a preſcription which is perſonal, is for the moſt part applied to perſons, being made in the name of a certain perſon, and of his Anceſtors, or thoſe whoſe eſtate he hath, or in bodies politique or corporate, & their Predeceſſors; for as a naturall body is ſaid to have Anceſtors, ſo a body politique or corporate is ſaid to have Predeceſſors. And a cuſtome which is local is alleaged in no perſon, but laid within ſome Mannor or other place. As taking one example for many, J.S. ſeiſed of the mannor of D. in fee preſcribeth thus: That J.S. his Anceſtors, and all thoſe whoſe eſtate he hath in the ſaid Mannor, have time out of mind of man had and uſed to have Common of paſture, &c. in ſuch a place, &c. being the land of ſome other, &c. as pertaining to the ſaid Mannor. This properly we call a Preſcription. A cuſtom is in this manner: A Copyholder of the Mannor of D. doth plead, that within the ſame Mannor, there is and hath been ſuch a cuſtome time out of mind of man uſed, that all the Copyholders of the ſaid Mannor have had and uſed to have Common of paſture, &c. in ſuch a waſt of the Lord, parcell of the ſaid Mannor, &c. where the perſon either doth or can preſcribe, but alleageth the cuſtome within the Mannor. But both to Cuſtomes and Preſcriptions, theſe two things are incident inſeparable, viz. Poſſeſſion, or Uſage, and Time. Poſſeſſion muſt have three qualities, it muſt be long, continual, and peaceable. Longa, continua, & pacifica: For it is ſaid, Transferuntur dominia ſine titulo & traditione, per uſucaptionem, ſ. per longam, continuam, & pacificam poſſeſſionem. Longa, i. per ſpatium temporis per legem definitum, of which hereafter ſhall be ſpoken, Continuam dico ita quod non ſit legitime interrupta.

12 E.4.1,2. Mariæ. Br. Preſcr. 100. 6 E. 6. Dyer 71. 14 E.3. Bar. 277. 43 E. 3. 32. 7 H.6. 26. 12 H.6. 14 16 E.2. tit. Preſcr. 53. 45. Aſſ. 8. 40. Aſſ. 27. 41. 21 E.4. 53, 54.

Brac. fol. 51, 52.

per title de preſcription. ſ. ỏ temps dont memorie ne curt. Mes divers Opinions ont eſte ỏ temps dont memorie, &c. & ỏ title p preſcription, q̃ eſt tout un en Ley. Car aſcuns ont dit que temps de memorie ſerra dit de temps de limitation en un briefe de droit, ſcilicet de temps le Roy R. le i. puis le conqueſt, come eſt done per l'ſtatute de Weſtminſter 1. pur ceo que le briefe de droit eſt le pluis haut briefe en ſa nature que poit eſtre, & per tiel briefe home poit recover ſon droit de la poſſeſſion ſon Auncеſtors de pluis auncient temps que home purroit per aſcun briefe per le ley, &c. Et entant que il eſt done p le dit eſtatute que en briefe de droit nul ſoit oye a demander de le ſeiſin ſon Auncеſtors de pluis longe temps q̃ de temps le Roy R. avantdit, iſſint ceo en prove q̃ continuance de poſſeſſion, ou auters cuſtomes, & uſages uſes puit le dit temps, eſt le title de preſcriptiõ, &c. & hoc certum eſt. Et auters

by title of preſcription, that is to ſay, from time out of minde. But divers opinions have been of time out of minde, &c. and of title of preſcription, which is all one in the Law. For ſome have ſaid, That time of minde ſhould be ſaid from time of limitation in a Writ of right, that is to ſay, from the time of King *Richard* the firſt after the Conqueſt, and is given by the Statute of Weſtminſter the firſt, for that a Writ of Right is the moſt higheſt Writ in his nature that may be. And by ſuch a writ a man may recover his right of the poſſeſſion of his Anceſtors, of the moſt ancient time that any man may by any writ by the Law, &c. And in ſo much that it is given by the ſaid Eſtatute, that in a Writ of right none ſhall be heard to demand of the Seiſin of his Anceſtors of longer time, than of the time of King *Richard* aforeſaid; therefore this is proved, that continuance of poſſeſſion, or other cuſtomes & uſages uſed after the ſame time is the title of

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ont dit, q̄ bien & verity eſt que ſeiſin & continuance puis le dit limitatiō eſt un title ō preſcription, come eſt avantdit, & per cauſe avātdit. Mes ils ont dit, que il y aury un auter title ō preſcription, q̄ fuit a la common ley devant aſcū eſtatute de limitatiō de briefe, &c. & ceo fuit lou un cuſtome, ou un uſage, ou auter choſe ad eſte uſe de temps dont memory des homes ne curt a le contrarie. Et ils ont dit, que il eſt prove p le pleder, lou hōe voit pleder un title de preſcription ō cuſtome il dirra q̄ tiel cuſtom ad eſte uſe, de tempore cujus contrariū memoria hominum non exiſtit, & t̄ eſt aut āt a dire quāt tiel matter eſt pleď, q̄ nul home adonq̄ en vie ad oye aſcun proofe al' contrary, ne avoit aſcun conuſās al' cōtrary. Et entant que tiel title de preſcriptiō fuit a le common ley, & nient ouſte p aſcun eſtatute, ergo il demurt come il fuit a le common ley, & le pluis toſt, entant que la dit limitation de briefe ō droit eſt de cy long tempz paſſe, Ideo of preſcription, and this is certain. And others have ſaid, that well and truth it is, that ſeiſin and continuance after the limitation, &c. is a title of preſcription, as is aforeſaid, and by the cauſe aforeſaid. But they have ſaid that there is alſo another title of preſcription that was at the Common Law, before any eſtatute of limitation of writs, &c. And that it was where a cuſtom or uſage, or other thing hath been uſed, for time whereof mind of man runneth not to the contrary. And they have ſaid, that this is proved by the pleading: wher a man will plead a title of preſcription of cuſtome, he ſhall ſay that ſuch cuſtome hath been uſed from time whereof the memory of men runneth not to the contrary, that is as much to ſay, when ſuch a matter is pleaded, that no man then alive hath heard any proof of the contrary, nor hath no knowledge to the contrary, and inſomuch that ſuch title of preſcription was at the cōmon law, & not put out by an eſtatute, *Ergo*, it abideth as it was at the cōmon law, and the rather inſomuch that the ſaid limitatiō of a writ of right, is of ſo long time paſſed, *Ideo quære de hoc.* And

Pacificam dico, quia ſi contentioſa fuerit, idem erit quod prius, ſi contentio fuerit juſta. Ut ſi verus Dominus ſtatim cum intruſor vel diſſeiſor ingreſſus fuerit ſeiſinam, nitatur tales viribus repellere, & expellere, licet id quod inceperit perducere non poſſit ad effectum, dum tamen cum defecerit diligens ſit ad impetrandum & proſequendum. Longus uſus nec per vim, nec clam, nec precario, &c. Idem fol. 222, b. 13 E. 4. 6.

**If a man preſcribeth to have a rent, and likewiſe to take a Diſtreſſe for the ſame, it cannot be avoided by pleading, that the rent hath been alwayes paid by coherſion, albeit it began by wrong.**

¶ *Un title de preſcription.* **Seeing that preſcription maketh a title, it is to be ſeen, firſt to what things a man may make a title by preſcription without charter. And ſecondly, how it may be loſt by interruption.**

**For the firſt, as to ſuch Franchiſes and Liberties as cannot be ſeiſed or forfeited, before the cauſe of forfeiture appear of Record, no man can make a Title by preſcription, becauſe that preſcription being but an uſage in pais, it cannot † extend to ſuch things as cannot be ſeiſed, nor had without matter of Record: as to the goods and Chattels of Traitors, Felons, Felons of themſelves, Fugitives, of thoſe that be put in Exigent, Deodands, Conuſance of Pleas, to make a Corporation, to have a Sanctuary, to make a Corporation,** 21 H. 6. Preſcrip. 141 21 E. 4. 6. 1. l. 7. 23. 9 H. 7. 11. 20. 7 H. 6. 45. 6 E. 3. 32. 42. 45 E. 3. 2. 2 E. 4. 26.

(†) Fleta lib. 1. cap. 25. Brit. f. 6. & 15. 44 Aſſ. p. 8. 49 E. 3. 3. Stamf. Pl. Co. 21. 51. Lib. 5. fol. 109, 110. Lib. 9. fol. 29.

ner, &c. to make Conſervatoꝛs of the peace, &c.

de hoc quære. Et pluſoꝛs auters cuſtomes & uſages ont tiels ancient burges.

many other cuſtomes and uſages have ſuch ancient Boroughs.

(c) But to Treaſure Trove, Waifs, Eſtrais, Wreck of ſea, to hold Pleas, Courts of Leets, Hundꝛeds, &c. Infange thief, Outfange thief, to have a Park, Warren, Royall fiſhes, as Whales, Sturgeons, &c. Faires, Marꝛets, Frankfoldage, the keping of a Goal, Toll, a Coꝛpoꝛation by preſcription, and the like, a man may make a Title by uſage & preſcription only without any matter of Recoꝛd, (†) Vide Sect. 310. where a man ſhall make a Title to lands by preſcription.

(c) 12 E. 3 Coron, 241. 9 H. 7. 11. 20. 18 H. 6. preſcrip. 45. 11 H. 4. 10. 21 H. 7. 33. 9 E. 4. 12. 9 E. 3. 15. 46 E. 3. 16. 11 H. 6. 25. F. N. B. 91. I H. 7. 24. Stant. Pl. Cor. 38. 44 E. 3. 4. 22 E. 4. 43. 44. 3 E. 3. Brook preſcrip. 57. 44 Aſſ. Pl. (†) 8 rl. 6. 16.

But it is to be obſerved (f) ỵ although a man cannot as is aforeſaid preſcribe in the ſaid Franchiſe to habe Bona & catalla proditorum, ſelonum, &c. yet may they and the like be had obliquely oꝛ by a mean by preſcription; foꝛ a County Palatine may be claimed by preſcription, and by reaſon thereof to habe Bona & catalla proditorum, ſelonum, &c.

(f) 12 E. 4. 16. 32 H. 6. 25. 12 Eliz. Dier 288. 20.

As to the ſecond, by what means a Title by preſcription oꝛ cuſtome, may be loſt by interruption; It is to be known ỵ the Title being once gained by preſcription oꝛ cuſtome, cannot be loſt by interruption of the poſſeſſion foꝛ 10. oꝛ 20. years, but by interruption in the Right, as if a man habe had a Rent oꝛ Common by preſcription, unity of poſſeſſion of as high and perdurable eſtate is an interruption in the right.

11 E. 3. tit. iſſue 40.

In a Writ of Meſne the Plaintiff made his Title by preſcription. ỵ the Defendant and his Anceſtoꝛs had acquited the Plaintiff and his Anceſtoꝛs, and ỵ Terre-tenant time out of mind, &c. the Defendant took iſſue, ỵ the Defendant and his Anceſtoꝛs had not acquited the Plaintiff and his Anceſtoꝛs and ỵ Terre-tenant, and the Jury gabe a ſpeciall verdict, ỵ the Grandfather of the Plaintiff was infeoffed by one Agnes, and that Agnes and her Anceſtoꝛs were acquited by the Anceſtoꝛs of the Defendant time out of mind beſoꝛe that time, ſince which time no acquitall had been, and it was adjudged and affirmed in a Writ of Errour, ỵ the Plaintiff ſhould recoꝛer his Acquitall, foꝛ ỵ there was once a Title by preſcription veſted, which cannot be taken away by a wꝛongfull Ceſſer to acquite of late time; and albeit the verdict had found againſt the letter of the iſſue, yet foꝛ ỵ the ſubſtance of the Iſſue was found, viz. a ſufficient Title by preſcription, it was adjudged both by the Court of Common Pleas, and in the Writ of Erroꝛ by the Court of Kings Bench foꝛ the Plaintiff, which is wꝛothy of obſervation.

15 E. 3. tit. judgment 133. 14 E. 3. ibid. 155.

So a Modus decimandi was alledged (†) by preſcription time out of mind foꝛ Tithes of Lambs, and thereupon iſſue joyned, and the Jury found ỵ beſoꝛe 20 years then laſt paſt there was ſuch a preſcription, and that foꝛ theſe 20 years, he had paid Tithe Lamb in ſpecie and it was objected, firſt, That the iſſue was found againſt the Plaintiff, foꝛ ỵ the preſcription was general foꝛ all the time of preſcription, and 20 years fail thereof. 2. That the party by payment of Tithes in Specie had waibed the preſcription oꝛ cuſtome. But it was adjudged foꝛ the Plaintiff in the pꝛohibition; foꝛ albeit the Modus decimandi had not been paid foꝛ the ſpace of 20 years, yet the preſcription being found, the ſubſtance of the iſſue is found foꝛ the Plaintiff. And if a man hath a Common by preſcription, and taketh a leaſe of the land foꝛ 20 years, whereby the Common is ſuſpended, after the years ended, he may claim the Common generally by preſcription; foꝛ that the ſuſpenſion was but to the poſſeſſion, and not to ỵ right, and ỵ inheritance of the Common did alwayes remain; and when a preſcription oꝛ cuſtom doth make a Title of inheritance (as Littleton ſpeaketh) the party cannot alter oꝛ waibe the ſame in pais.

(†) Mich. 43 & 44 Eliz. in a pꝛohibition between Nowell pl. & Hicks Vicar of Edmunton defendant in the Kings Bench.

¶ *Temps dont memory, &c. & de title per preſcription que eſt tout un en Ley.* So as the time preſcribed oꝛ defined by Law is, time, whereof there is no memoꝛy of man to the contrary. (e) Omnis querela, & omnis actio injuriarum limitata intra certa tempora.

(e) Bracton fol. 314.

¶ *Temps de limitation.* Limitation, as it is taken in Law, is a certain time preſcribed by Statute, within the which the Demandant in the action muſt pꝛove himſelf oꝛ ſome of his Anceſtoꝛs to be ſeiſed.

*En briefe de droit.* In (f) ancient time the limitation in a Writ of Right was from the time of H. 1. whereof it was ſaid, à tempore Regis Henrici ſenioris. After that by the Statute of (g) Merton the limitation was from the time of H. 2. and by the Statute (h) of W. 1. the limitation was from the time of R. 1. And this is that limitation that Littleton here ſpeaketh of: Whereof in the Mirroꝛ in pꝛoof of the Law it is thus ſaid, (i) Abuſion eſt de counter cy longo temps dount nul ne poet teſtmoigner de vien & de oyer que ne dure my generalment ouſter 49 ans.

(f) Regiſt. 158. Bracton fol. 373. 5 Aſſ. p. 2. 34 H. 6. 40. (g) Stat. de Mert. 20 H. 3. cap. 8. (h) Weſt. 1. an. 3 E. 1. c. 38. Vide W. 2. 13 E. 1. c. 46. (i) Mirroꝛ cap. 5. ſect. 1.

Time

Time of limitation is two-fold, First, in Writs, and ſo is by divers Acts of Parliament. Secondly, To make a title to any Inheritance, and that (as Littleton here ſaith) is by the Common Law.

Glanv. l. 13. 13. ca. 3. & 34. Mirror, cap. 5. ſect. 4. Flet. l. 2 c. 38. & l. 4. ca. 5. Britton fol. 79. 82. Bracton lib. 2. fol. 52. & f. 179, 255, 373.

Limitation of times in Writs are prohibed by the ſaid ſtatute of Merton, and after by the ſaid ſtatute of W. 1. which Littleton here citeth, and which was in force when he wrote, but is ſince altered by a profitable and neceſſary ſtatute (k) made Anno 32 H. 8. and by that Act, the former limitation of time in a Writ of Right is changed and reduced to threeſcore years next before the Teſt of the Writ, and ſo of other actions, as by the ſtatute at large appeareth. But it is to be obſerved, that this Act of 32 H. 8. extendeth (l) not to a Formedon in the Diſcender, nor to the Services of Eſcuage, Homage, and Fealty, for a man may live above the time limited by the Act: neither doth it extend to any other ſervice, which by common poſſibility may not happen or become due within ſixty years; as to ſober the hall of the Lord, or to attend on his Lord when he goeth to warre, or the like; nor where the ſeiſin is not traverſable or iſſuable, neither doth it extend to a Rent created by Deed, nor to a Rent reſerved upon any particular eſtate, for (m) in the one caſe the Deed is the Title, and in the other the reſervation; nor to any Writ of Right of Advowſon, Quare impedit, or Aſſiſe of Darreine preſentment (for there was a Parſon of one of my Churches that had been Incumbent there above fifty years, and dyed but lately) or any Writ of Right of Ward, or Baviſhment of Ward, &c. but they are left as they were before the ſtatute of 32 H. 8. But hereof thus much for the better underſtanding of Littleton ſhall ſuffice.

(k) 32 H. 8. cap. 2. See the ſecond part of the Inſtitutes, Merton c. 8.

(l) Mich. 16. & 11 Eliz. Dyer 278. Fitz-williams caſe.

Lib. 4. 10. & 11. Bevils caſe.

(m) Lib. 3. fol. 65. Sir Wil. Folters caſe.

¶ *De temps le Roy R.* 1. And that was intended from the firſt day of his Reign, for (from the time) being indefinitely, doth include the whole time of his Reign, which is to be obſerved.

1 Mar. parliam. 2. cap. 5. Vide 17 E. 3. 11. Pl. Com. 371. b.

Vide 34 H. 6. 36.

¶ *Briefe de droit.* Breve de recto, a Writ of Right ſo called, for that the words in the Writ of Right are, Quod ſine dilatione plenum rectum teneas.

¶ *Title de preſcription al Common Ley, &c. de temps dont memorie des homes ne curge al contrarie.* Docere oportet longum tempus, & longum uſum illum, viz. qui excedit memoriam hominum; tale enim tempus ſufficit pro jure.

Bract. lib. 4. fol. 230. Fleta lib. 4. cap. 24.

¶ *Aſcun proofe al contrarie.* For if there be any ſufficient proof of Record or writing to the contrary, albeit it exceed the memory, or proper knowledg of any man living, ye is it within the memory of man: for memory or knowledg is twofold. First, by knowledg by proof, as by Record or ſufficient matter of writting. Secondly, by his own proper knowledg. A Record or ſufficient matter in writting are good memorials, for Litera ſcripta manet. And therefore it is ſaid, when we will by any Record or writing commit the memory of any thing to poſterity, it is ſaid tradere memoriæ. And this is the reaſon that regularly a man cannot preſcribe or alleage a Cuſtom againſt a ſtatute, becauſe that is matter of Record, and is the higheſt proof and matter of Record in law. But yet a man may preſcribe againſt an Act of Parliament, when his Preſcription or Cuſtom is ſaved or preſerved by another Act of Parliament.

28 Aſſ. 25. 38 Aſſ. 18. 45 E. 3. 25. 5 H. 7. 10. 8 H. 7. 7. 11 H. 7. 21. Dyer 23 Eliz. 373.

There is alſo a diverſity between an Act of Parliament in the negative and in the affirmative, for an affirmative Act doth not take away a cuſtom, as the ſtatutes of Wills of 32 & 34 H. 8. do not take away a Cuſtom to deviſe Lands, as it hath been often adjudged. Moreover, there is a diverſity between ſtatutes that be in the negative; for if a ſtatute in the negative be declarative of the ancient Law, that is in affirmance of the common law, there as well as a man may preſcribe or alleage a Cuſtom againſt the common law, ſo a man may do againſt ſuch a ſtatute, for, as our Author ſaith, Conſuetudo &c. privat communem legem. As the ſtatute of Magna Charta provideth, that no Leet ſhall be holden but twice in the year, yet a man may preſcribe to hold it oftner, and at other times, for that the ſtatute (n) was but in affirmance of the Common law.

Magna Charta cap. 35.

(n) 6 H. 7. 2. 8 H. 4. 34. 12 H. 7. 18. 31 H. 6. Leet. 11. 18 H. 6. 13.

So the ſtatute (o) of 34 E. 1. provideth that none ſhall cut down any trees of his own within a Foreſt without the view of the Foreſter: but inaſmuch as this Act is in affirmance of the Common law, a man may preſcribe to cut down woods within a Foreſt without the view of the Foreſter. And ſo was it adjudged in 16 Eliz. in the Exchequer by Sir Edward Sanders, Chief Baron, and other the Barons of the Exchequer, as Sir John Popham Chief Juſtice of the Kings Bench reported to me.

(o) 34 E. 1. tit. Foreſt. Raſt. 1 E. 3. cap. 2.

In the Eire of the Foreſt of Pickering, before Willoughby, Hungerford and Hanbury, Juſtices Itinerants there, Anno 8 E. 3. I read (p) a claim made by Henry de Percy, Lord of the Manor of Semor within the ſaid Foreſt, the Foreſters, Verderours, and Regarders found his claim to be true, viz. Quod prædictus Henricus de Percy, & omnes anteceſſores ſui tenentes

(p) Itin. Pickering ann. 8 E. 3. Rot. 38.

manerium prædictum à tempore quo non extat memoria et ſine interruptione aliquali tenuerunt prædictum manerium cum pertinentiis extra regardum Foreſtæ, & habuerunt Wordwardum pro tantem arcum & ſagittas, ad præſentandum præſentanda de venatione tanta, &c. & habuerunt in boſcis ſuis de Semere forgeas, & mineras, & amputarunt, dederunt, & vendiderunt boſcum ſuum infra manerium prædictum ſine viſu foreſtariorum pro voluntate ſua, & fugarunt & ceperunt Vulpes, Lepores, Capreolos, &c. ſicut idem Henricus Percy ſuperius clamat. Which claim by preſcription, and found as is aforeſaid, the Juſtices doubted onely of two points. The firſt, foraſmuch as the ſaid Mannor was within the limits of the Forreſt, it ſhould not onely be Contra aſſiſam Foreſtæ, for his Woodward to bear Bow and Arrows, where by Law he ought to bear but an Hatchet and no Bow nor Arrows within the Forreſt, but alſo de facili cedere poſſit in deſtructionem ferarum, &c. and therefore doubted whether it might be claimed by preſcription. Their ſecond doubt was concerning fugationem, & captionem Capreolorum in boſcis ſuis prædictis, eo quod eſt beſtia venationis Foreſtæ, & tranſgreſſores inde convicti finem facerent ut pro tranſgreſſione venationis, and for that difficulty the claim was adjourned into the Kings Bench. But of the other parts of the Preſcription no doubt at all was made: and the like had been allowed by the ſame Eire, as in the caſe of Thomas Lord Wake of Lydell, and of Gilbert of Acton, in the ſame Eire, Rot. 37 and of others.

¶ *Il eſt prove per le pleader.* Note, one of the beſt arguments or proofs in Law is drawn from the right entries or courſe of pleading; for the Law it ſelf ſpeaketh by good pleading, and therefore Littleton here ſaith, It is proved by the pleading &c. as if pleading were ipſius legis viva vox.

¶ *Entant que tiel title per preſcription fuit al common ley, &c.* Note, all the preſcriptions that were limited from a certain time, were by Act of Parliament, as from the time of H. 1. which was the firſt time of limitation ſet down by any Act of Parliament, and ſo from the Reign of R. 1. &c. But this preſcription of time out of memory of man was (as Littleton here ſaith) at the Common Law, and limited to no time. Alſo here is implyed a maxime of the Law, viz. That whatſoever was at the Common Law, and is not ouſted or taken away by any ſtatute, remaineth ſtill.

¶ *Common Ley.* The Law of England is divided, as hath been ſaid before, into three parts; the Common Law, which is the moſt general and ancient Law of the Realm; of part whereof Littleton wrote; 2. Statutes or Acts of Parliament; and 3. particular Cuſtomes (whereof Littleton alſo maketh ſome mention): I ſay particular, for if it be the generall Cuſtome of the Realm, it is part of the Common Law.

The common law hath no controller in any part of it, but the high Court of Parliament, and if it be not abrogated or altered by Parliament, it remains ſtill; as Littleton here ſaith, The Common Law appeareth in the Statute of Magna Charta and other ancient ſtatutes (which for the moſt part are affirmations of the Common Law) in the Originall Writs, in judicial Records, and in our books of terms and years. Acts of Parliament appear in the Rolls of Parliament, & for the moſt part are in print. Particular cuſtomes are to be proved,

## *Sect.* 171.

¶ *Ville.* Villa, quaſi vehilla quod in eam convehantur fructus. And it is called Vicus, becauſe it is prope viam. Villa eſt ex pluribus manſionibus vicinata & collecta ex pluribus vicinis. If a Town be decayed ſo as no houſes remain, yet it is a Town in Law. And ſo if a Borough be decayed, yet ſhall it ſend Burgeſſes to the Parliament, as old Salisbury and others do. It cannot be a Town in Law, unleſs it hath, or in time paſt hath had, a Church and celebration of Divine Service, Sacraments, and Burials: What alteration hath been made in Towns, hear what a great Lawyer ſaith, In Anglia Villula tam parva inveniri non poterit, in qua non eſt Miles, Armiger, vel Paterfamilias, &c. magnis ditatus poſſeſſionibus; nec non liberi tenentes allii valeſti plurimis ſuis patrimoniis ſufficientes, &c. And it appeareth by Littleton, that a Town is the Genus, and a Borough is the Species, for he ſaith that every Borough is a Town, but every Town is not a Borough. Et ſub appellatione Villarum continentur Burgi & Civitates.

¶ Item, cheſcun Burgh eſt un ville, mes nemy e converſo. Plus ſerra dit de cuſtome en le Tenure de villenage.

ALſo every Borough is a Town, but not *e converſo*. More ſhall be ſaid of cuſtome in the tenure of villenage.

Vid. Linwood verbo vicus. Bract. lib. 5. fol. 434. & lib. 4. fol. 211. Forteſcue cap. 29. 7 E. 6. fines levie de terre, Br. 9. 1.

34 E. 1. Quare imp. 187.

Forteſcue cap. 29.

Forteſcue cap. 24.

Berewica, or Berewit in Domeſday ſignifieth a Town. Hæ Berewicæ pertinent ad Berchley. (Et ſic recitat plus quam viginti villas.) Domeſday, Glouc.

There be in England and Wales eight thouſand eight hundred and three Towns, or thereabout.

See more De villis, parochiis, & hamletciis, in the ancient Authors of the Law, and plentifully in our other Books. But let us now hear what Littleton ſaith. Bract. ubi ſupra Flet. l. 4. c. 15. & lib. 6. cap. 49. Brit. fol. 124. & 274. &c.

## CHAP. 11. *Villenage.* *Sect.* 172.

¶ TEnure en villenage eſt plus properment quant un villein tient de ſon Sñr, a que il eſt villeine, certaine terres ou tenements ſolonꝫ le cuſtome del manoꝛ, ou autrement a la volunt ſon ſeignioꝛ, & de faire a ſon Seignioꝛ villein ſervice: Come de porter & de carier le fime le Sñr hoꝛs del City ou del Manoꝛ ſon Seignioꝛ jeſques a le terr ſon Seignioꝛ, en giſant ceo ſur le terre, & hujuſmodi. Et aſcuns franke homes teignont lour tenements ſolonꝫ le cuſtome del certaine manoꝛs per tiels ſervices. Et lour tenure aury eſt appel Tenure en Villenage, & uncoꝛe ils ne ſont pas villeines: Car mil fre tenus in Villenage, ou villeine terre, ne aſcun cuſtome ſurdant de la fre, ne unques ſerra

TEnure in villenage is moſt properly, when a Villeine holdeth of his Lord, to whom he is a Villeine, certaine lands or tenements according to the Cuſtome of the Mannor, or otherwiſe at the will of his Lord, and to doe to his Lord villeine-ſervice: As to carry and recarry the dung of his Lord out of the City, or out of his Lords Mannor, unto the Land of his Lord, and to ſpread the ſame upon the Land, and ſuch like. And ſome free men hold their Tenements according to the cuſtome of certain Mannors by ſuch ſervices. And their Tenure alſo is called Tenure in villenage, and yet they are not villeines. For no land holden in villenage, or villein land, nor any cuſtome ariſing out of the land, ſhall ever make a free man villeine; but, a

¶ *Tenure en villenage.* Villeine is from the french word Villaine, and that à villa, quia villæ adſcriptus eſt: for they which are now called Villani, of ancient times were called Adſcriptitii; and in the common law he is called Nativus, quia pro majore parte natus eſt ſervus, and this is he which the Civilians call ſervus. (a) Theyn in the Saxon tongue is Liber, and Then, ſervus. Theme (ſometimes written Theame corruptly) is an old Saxon word, & ſignifieth Poteſtatem habendi in nativos ſive villanos cum eorum ſequelis, terris, bonis, & catallis. But Teame ſometime corruptly written Theame, is of another ſignification; for it is alſo an old Saxon word, (b) & ſignifieth where a man cannot produce his warrant of that which he bought according to his Voucher. Lib. Rub. 76, & 77. Glanvil. l. 5. ca. 1, & 2, &c. Vide Bract. li. 1. ca. 6. &c. Britt. fol. 77. & 67. 82. 97. 98. 125, 126. 147. Flet. l. 1. c. 3. Flet. l. 2. c. 44. Idem l. 4. cap. 11. & 12. Mir. ca. 2. ſect. 18. Ockam. (a) Flet. li. 1. cap. 24. (b) Vide Lamb. inter Legee Sancti Edw. fol. 132. nu. 25.

¶ *Villenage.* Villenagium (as in like caſes hath been ſaid when the termination is in age,) is the ſervice of a bondman. And yet a free man may do the ſervice of him that is bound. And therefore a Tenure in Villenage is two-fold, one where the perſon of the Tenant is bound, and the tenure ſervile; the other where the perſon is free, and the tenure ſervile; (c) Serva terra liberos de ſanguine exiſtentes, villanos facere non poteſt. And therefore it is ſaid, (d) Eſt enim ratio & regula generalis in iſtis duobus caſibus, quod liber homo nihil libertatis propter perſonam (c) Hill. 29 E. 1. coram Rege Ebor. in Theſaur. (d) Bract. li. 4. fol. 170.

perſonam ſuam liberam confert villenagio, nec liberum tenementum è contrario mutat ſtatum aut conditionem villani. **And again**, (e) Villenagium vel ſervitium nihil detrahit libertati, habita tamen diſtinctione utrum tales ſint villani, & tenuerunt in villano ſocagio de dominico Domini Regis. **And again**, (f) Tenementum non mutat ſtatum liberi non magis quam ſervi, poterit enim liber homo tenere purum villenagium faciendo quicquid ad villanum pertinebit, & nihilominus liber erit, cum hoc faciat ratione villenagii, & non ratione perſonæ ſuæ, & ideo poterit quando voluerit villenagium deſerere, & liber diſcedere niſi illaqueatus ſit per uxorem nativam ad hoc faciendum ad quam ingreſſus fuit in villenagium, & quæ præſtare poterit impedimentum, &c. **And again**, (g) Purum villenagium eſt, à quo præſtatur ſervitium incertum & indeterminatum, ubi ſcire non poterit veſpere, quale ſervitium fieri debet mane, viz. ubi quis facere tenetur quicquid ei præceptum fuerit. **And another ſaith to the ſame intent**, Ceux ne ſcavoient le veſpere de quoy ils ſerver' en la Matin. (h) Fuerunt in Conqueſtu liberi homines qui liberè tenuerunt tenementa ſua per libera ſervitia, vel per liberas conſuetudines, & cum per potentiores ejecti eſſent, poſtmodum reverſi, receperunt eadem tenementa ſua tenenda in Villenagio, faciendo inde opera ſervilia ſed certa & nominata, &c. & nihilominus liberi, quia licet faciunt opera ſervilia, cum non faciunt ea ratione perſonarum, ſed ratione tenementorum, &c.

**franke home villein. Mes un villein puit faire franke terr̃ deſte villein terr̃ alon Sñr. Sicome lou un villein purchaſe terr̃ en Fee ſimple, ou en Fee taile, le Seignior del villein poet enter en la terre, & ouſte le villein & ſes heires, a touts jours, & puis le Seignior (ſil voloit) puit leſſer meſme la terre a le villein a tener en villenage.**

Villein may make free land to be Villeine land to his Lord. As where a Villeine purchaſeth land in Fee ſimple, or in Fee tail, the Lord of the Villeine may enter into the land and ouſt the Villeine and his heirs for ever: And after, the Lord (if he will) may let the ſame land to the Villeine, to hold in Villenage.

(e) Idem lib. 1. cap. 6. Brit. c. 31. & 66. Flet. lib. 1. cap. 3.

(f) Bract. fol. 26. 43 E. 3. 5. acc.

(g) Bract. lib. 4. fol. 208. Brit. cap. 32.

(h) Bract. lib. 1. fol. 7.

(i) Forteſc. cap. 42.

**How Villenage or ſervitude began, and for what cauſe, it is ſaid,** (i) Ab homine, & pro vitio introducta eſt ſervitus, ſed libertas à Deo hominis eſt indita naturæ, quare ipſa ab homine ſublata ſemper redire gliſcit, ut facit omne quod libertate naturali privatur. **And another ſaith,** (k) **That the condition of Villeines from freedome unto bondage, of ancient time grew by conſtitutions of Nations,** (l) Fiunt etiam ſervi liberi homines captivitate de jure gentium: **And not by the Law of Nature, as from the time of Noahs Flood forward, in which time all things were common to all, and free to all men alike, and lived under the Law naturall, and by multiplication of people, and making proper and private thoſe things that were common, aroſe battels. And then it was ordained by conſtitution of Nations, That none ſhould kill another, but that he that was taken in battell, ſhould remain bound to his taker for ever, and to do with him, and all that ſhould come of him, his will and pleaſure, as with his beaſt, or any other Chattell, to give, or to ſell, or to kill: And after it was ordained for the cruelty of ſome Lords, That none ſhould kill them, and that the life and members of them, as well as of free men, were in the hands and protection of Kings, and that he that killed his Villeine, ſhould have the ſame judgment, as if he had killed a Freeman. Thereupon they were called** Servi, quia ſervabantur à Dominis & non occidebantur, & non à ſerviendo. **He is called** Nativus à naſcendo, quia plerumque natus eſt ſervus: **And he is called** Villanus, **for that he doth his Villein ſervice in Villis.**

(k) Brit. cap. 31.
(l) Bract. lib. 1. cap. 6. Flet. lib. 1. cap. 3. & cap. 5. Mir. cap. 2. ſect. 18.

Bract. lib. 1. cap. 6. Brit. cap. 31. & ubi ſupra. Fleta lib. 1. cap. 2. & 3.

Eſt autem libertas naturalis facultas ejus quod cuique facere liber, niſi quod de jure, aut vi prohibetur. Servitus eſt conſtitutio de jure gentium qua quis Domino alieno contra naturam ſubjicitur. **And again,** (m) Et tout ſoit que touts creatures duiſſont eſte franks ſolonque le Ley de nature, per conſtitution nequidant, & fait de homes ſont auters creatures en ſervies, ſicome eſt dit beaſts en Parks, piſſons en ſervors, & oyſeaux en cages.

(m) Mirror ca. 2. ſect. 18.

(n) Mirror ca. 2. ſect. 18. Gen. 9. verſ. 10, 11, &c.

(n) **This is aſſured, That bondage or ſervitude was firſt inflicted for diſhonouring of parents: for Cham the father of Canaan (of whom iſſued the Canaanites) ſeeing the nakedneſſe of his father Noah, and ſhewing it in deriſion to his brethren, was therefore puniſhed in his ſonne Canaan, with bondage. And herewith agreeth the Divine,** Ante viai inventionem inconcuſſa libertas. non eſſet hodie ſervitus, ſi ebrietas non fuiſſet.

Ambroſe.

¶ *Hors del Citie ou del Mannor, &c.* **This is falſe printed, for the originall**

originall is, Hors del ſeite del Manor, and ſo would it be amended at the Impreſſions of the Bookes hereafter.

¶ *Et aſcuns frank homes teignont, &c.* This is apparent enough, eſpecially upon that which hath been ſaid. Mirror ca. 2. ſect. 18. Acc.

¶ *Ou un Villeine purchaſe terre en fee ſimple.* Yet the Villaine may purchaſe ſome kind of Inheritances in fee ſimple, which the Lord of the Villaine cannot have. As if a Villain purchaſe a Common ſauns nombre, the Lord ſhall not have it, for the Lord may ſurcharge the ſame, which ſhould be a prejudice to the Terre-tenant, and the ſame Law of a Corody in certaine granted to villeine, and ſuch like Inheritances. And therefore Littleton materially ſaid, Purchaſe terre: when the Villain hath an eſtate of any thing certain, the Lord ſhall have it as a rent granted to the Villain, Commons certain, Eſtovers certain, and ſuch like. Mirror cap. 2. ſect. 18.

(o) But that which lyeth in action as a warranty made to the Villein, his heirs and aſſigns, the Lord ſhall not take advantage of by Voucher, becauſe it is in lieu of an action, neither ſhall the Lord take advantage of any Obligation or Covenant, or other thing in action made to the Villein, becauſe they lye in privity, and cannot be transferred to others. 22. Aſſ. p. 37. (o) Doct. & Stud. cap. 3

(p) If a man be Leſſee of a Villein for life, for years, or at will, and the Villein purchaſeth lands in fee; if the Leſſee entreth into the lands, he ſhall hold the lands as a perquiſite to him and his heirs for ever. But if a Biſhop have a Villein in the right of his Biſhoprick, and he purchaſeth lands, and the Biſhop entreth, the Biſhop ſhall have this perquiſite to him and his ſucceſſors, and not to him and his heirs, for the Law reſpecteth the quality, and not the quantity of his eſtate. So if Executors have a Villein for years, and the Villein purchaſe lands in fee, and the Executors enter, they ſhall have a fee ſimple, but it ſhall be aſſets. (p) Lib. 5 E. 4. 61. 18 E. 3. 29. 21 H. 6. 37. Broo. tit. Vil. 70.

¶ *Fee tail.* By this it is apparent, that if lands be given to a Villein, and to the heirs of his body, the Lord may enter and put out the Villein and the heirs of his body, for Quicquid acquiritur ſervo, acquiritur Domino. And in this caſe the Lord gains a fee ſimple determinable upon the dying of the Villein, without heir of his body, and the abſolute fee ſimple remaineth ſtill in the Donor. And if the Lord enter, and after infranchiſe the Donee, and after the Donee hath iſſue; yet that iſſue ſhall never have remedy; either by Formedon or entry, to recover this land, by force of Statute of Donis Conditionalibus, for that Statute giveth remedy to the iſſues of the Donee that have capacity and power to take and retain ſuch a gift. And the title of the Lord remains as it did at the common law, for that Statute reſtraineth acts done only by the Tenant in tail. And ſo it is, if lands be given to an Alien, and to the heirs of his body; upon office found, the land is ſeiſed for the King, afterwards the King makes the Alien a Denizen, who hath iſſue and dieth, the King ſhall detain the land againſt the iſſue. 15 E. 4. 9. b. Pl. Com. 555. in Walſingham's caſe.

## *Sect.* 173.

¶ ET nota, ſi feoffm̃t ſoit fait a certain perſon ou perſons en fee all uſe dun villeine, ou ſi un villeine, ou auters perſons ſoiēt enfeoffes al uſe le villeine, quel eſtate que le villeine ad ē le uſe, ē fee taile pur terme de vie, ou dans, l' Seignior del villein poit ētrer en touts ceux terres & tenements ſicōe l' villein uſt eſte ſole ſeiſi del demeſn̄. Et ceſt per Leſtatute de Anno 19 H. 7. cap. 15.

AND note, if a feoffment be made to a certain perſon or perſons in fee, to the uſe of a Villein; or if a Villeine with other perſons, be infeoffed to the uſe of the Villein, what eſtate ſoever that the Villeine hath in the uſe, in fee tail, for term of life or years, the Lord of the villeine may enter into all thoſe lands and tenements, as if the villeine had been ſole ſeiſed of the demeſne. And this is given by the Statute of *Anno* 19 *H.* 7. *cap.* 15.

¶ This is an addition to Littleton, and the Statute of 19 H. 7. cap. 15. therein mentioned, for the cauſe that hath been aforeſaid, hath loſt his force.

## *Sect.* 174.

¶ *A Paier un fine pur le mariage, &c.*

(q) And this villein and ſervile Tenure is called in old books Marcheta, or Mercher, Marchetum verò pro filia dare non competit libero homini inter alia propter liberi ſanguinis privilegium, &c. And this is true de Communi jure: ſed modus & conventio vincunt legem. And, as Littleton here ſaith, it is the folly of ſuch a freeman to take ſuch Manors, Lands, or Tenements, to hold of the Lord by ſuch bondage. And yet this doth not make ſuch a Freeman a Villein, (r) Quia hujuſmodi præſtationes fiunt ratione tenementi, & non ratione perſonæ in donatione comprehenſæ & reſervat', non enim unum & idem eſt, ſed longe aliud, tenere libere, & per liberum ſervitium, &c. for the ſignification of this word, vide Sect. 194. 74. 441.

(q) 15 E.3. tit. aid. 33. Bracton lib. 2. fo. 26. Mirror cap. 2. Sect. 18.

See more of this after in this Chapter, Sect. 194.

(r) Fleta lib. 3. cap. 13. Mir. cap. 2. ſect. 18.

¶ *Mes ſi aſcun franke home voille prender aſcun fees ou tenements a tener de ſon Sñr p tiel villeine ſervice, ſ. a payer un fine a luy pur le mariage d ſes fits ou files, donqr il paiera tiel fine pur le mariage, & nient obſtant que il eſt le follie d tiel franke home de prender en tiel forñ terres ou tenemẽts a tener de le ſeignior per tiel bondage, uncore ceo ne fait le franke home villeine.*

But if a Freeman will take any lands or Tenements to hold of his Lord by ſuch villeine ſervice, *viz.* to pay a fine to him for the marriage of his ſons or daughters, then he ſhall pay ſuch fine for the marriage, yet notwithſtanding though it bee the folly of ſuch free-man to take in ſuch form, Lands or Tenements to hold of the Lord by ſuch bondage, yet this maketh not the Free-man a villeine.

## *Sect.* 175.

¶ *Chescun villeine ou eſt villein per title de preſcription, &c.*

Lib. 2. Rub. cap. 76, 77. Bracton lib. 1. cap. 6. Brac. fol. 77.

Every Villeine is either by preſcription or confeſſion, Servi autem naſcuntur aut fiunt. By preſcription, either regardant to a Manor, &c. or in groſs. In groſs either by preſcription or by granting away a villeine that is regardant or by confeſſion. (ſ) Fit enim ſervus liber homo per confeſſionem in curia Regis fact'.

(t) Brac. lib. 1. cap. 6. Fleta lib. 1. cap. 3. 8 Aſſ. p. 13. 11 Aſſ. 11. 24 Aſſ. 1. 73 Aſſ. 1. 17 E. 3. 78, 79. 27 E. 3. 89. 18 E. 4. 2. 27 H. 8. 7 b. Teſtamte de 17 E 3. c. 17.

(t) 17 E. 3. 23, 11 H. 4. 26. 37 H. 6. 21. Dier, M ch. 7. & 8 Eliz. 242. Pl. Com. 79, &c.

¶ *Eh Court de Record.*

Record is derived of the Latine word Recordor, that is, to keep in mind, as the Book ſaith, Si rite audita recordor. And therefore a Record or Inrolment is a memorial or monument of ſo high a nature, (r) as it importeth in it ſelf ſuch an abſolute verity, as if it be pleaded that there is no ſuch Record, it ſhall not receive any tryal by witneſs, jury, or otherwiſe, but only by it ſelf. (u) And every Court of Record is the Kings Court, albeit another may have the profit, wherein if the Judges do erre, a writ of error doth ly. (x) But the County Court, the Hundred Court, the Court Baron, and ſuch like are no Courts of Record, and therefore the proceedings therein may be denyed, and tried by Jury, and upon their judgments a writ of error lieth not, but a writ of falſe judg-

(n) Glanv. lib. 9. cap. 8. Bracton lib. 3. fol. 156. Britton fol. 121.

(x) Lib 5. fo. 11 & 12. in Jentelmas caſe.

ment

ment, for that they are no Courts of Record, because they cannot hold plea of debt or trespass, if the debt or damages do amount to 40. shillings, or of any trespasse Vi & armis.

Monumenta, quæ nos recorda vocamus, sunt veritatis & vetustatis vestigia.

## *Sect.* 176.

¶ MEs si frank home ad divers issues, & puis il confesse luy mesme destre villein a un auter en Court de Record, uncore les issues que il avera devant le confes. sont franks, mes les issues que il avera apres le confession serront villeins.

But if a Free-man hath divers issues, and afterwards he confesseth himself to be a villain to another, in a Court of Record, yet those issues which hee hath before the confession, are free; but the issues which he shall have after the confession, shall be villains.

This is so evident, as it needeth no explication.

## *Sect.* 177.

¶ ITem, si le villein purchase fee & alien la terre a un auter devant que le Seignior enter, donques le Seignior ne poit enter, car il serra adjudge son follie q̃ il nentra pas quant la terre fuit en le maine le villeine. Et illint est des biens si le villein achate biens, & eux vend ou done a un auter devant que le Seignior seisist les biens, donques le Seignior ne poit eux seiser. Mes si le seignior devant ascũ tiel vender ou done, vient deins la ville la ou tiels biens sont, & la overtment enter les vicines claimen les biens & seisist parcel

ALso if a Villaine purchase Land, and alien the Land to another, before that the Lord enter, then the Lord cannot enter, for it shall bee adjudged his folly, that he did not enter when the Land was in the hands of the Villaine. And so it is of goods: If the Villaine buy goods and sell or give them to another, before the Lord seiseth them, then the Lord may not seise the same: but if the Lord before any such sale or gift, commeth into the Towne where such goods be, and there openly amongst the neighbours claime the goods, and seize part of the goods in the name of Seisin

¶ IN this case before the Lord doth enter, he hath neither Jus in re, nec jus ad rem, but only a possibility of an estate, which estate he must gaine by his entry, and therefore if the villein doth by way of prevention alien before the Lord doth enter, the Lord is barred of the possibility which he had to the land for ever. (a) Si autem servus vendiderit feodum quod sibi & hæredibus perquisiverit antequam Dominus seisinam inde ceperit, valet donatio, & Dominus sibi ipsi imputet, quod tantum expectavit. But (b) if the Villain of the King purchaseth lands and alieneth before the King (upon an office found for him) doth enter, yet the King after office found, shall have the land, Quia nullum tempus occurrit Regi, as Littleton himself saith in the next Section. And yet after office found, the King shall not have the mean profits, because the Title is by the seisure.

(a) Fleta lib. 3. cap. 15. Britton fol. 98. 2. 19 E. 2. Dower 17.

(b) 35 E. 3. tit. villen. 22. 9 H. 6. 21. per Babington 12 H 7. 12.

¶ *Purchase terre.* The like Law is of Seigniories, Advowsons, Reversions, Remainders, Rents, Commons certaine, and such like certaine Inheritances, wherein the Villain hath

hath any eſtate or intereſt. If the Villaine purchaſe Land either in Fée-ſimple, Fée-tail, or for life, if the Villain doth alien before the Lord doth enter, he doth prevent the Lord. But yet the iſſue of the villain ſhall recover the land intailed in a Formedon, and then the Lord may enter.

des biens en noſme de ſeiſin de touts les biens q̄ le villein ad ou aver poſt, &c. Ceo eſt dit bon ſeiſin en ley, & le occupation que le villeine ad apres tiel claim en l'z biens, ſerra pris en le droit le Seignior.

of all the goods which the Villain hath, or may have, &c. this is a good Seiſin in Law, and the occupation which the Villain hath after ſuch claim in the goods, ſhall be taken in the right of the Lord.

¶ *Alien la terre.* Alien commeth of the Verbe Alienare, id eſt, alienum facere, vel ex noſtro dominio in alienum transferre, ſive rem aliquam in Dominium alterius transferre. If a freeman hath iſſue, and afterward by confeſſion becommeth bond, and purchaſe lands in Fée, and before the Lord enter he dieth ſeiſed, and the Land deſcends to his iſſue which is free, in this caſe the Lord ſhall not enter upon the heir, and yet this is a deſcent and no alienation. The like Law it is if the land ſo purchaſed by the villain doth eſcheat to the Lord of the Fée before any entry made by the Lord of the Villain: ſo as the Act of the Law, that is, the deſcent or eſcheat may as well prevent the Lord of his entry, as the act of the party by alienation.

If a villain be diſſeiſed before the Lord doth enter, the Lord may enter into the Land in the name of the Villain, and thereby gaine the Inheritance of the Land: but if there be a deſcent caſt, ſo as the entry of the Villain be taken away, then the Villain muſt recontinue the eſtate of the Land by judgment and execution, before the Lord of the Villain can enter: and this word (alien) doth not only extend to alienations of Land in deed, but alſo to alienations in Law, as if the Villain purchaſe land and dieth without heir, and the land eſcheat, or if there be a recovery againſt the Villain in a Ceſſavit, or the like.

¶ *Et iſſint eſt des biens, &c.* Biens, bona, includes all chattels, as well reall as perſonall. Chattels is a French word, and ſignifies goods, which by a word of Art we call Catalla. Now goods or chattels are either perſonal or real; Perſonal, as horſe and other beaſts, houſhold-ſtuff, bowes, weapons, and ſuch like; called perſonal, becauſe for the moſt part they belong to the perſon of a man, or elſe for that they are to be recovered by perſonal actions: Reall, becauſe they concern the Reality, as tearms for years of Lands or Tenements, Wardſhips, the intereſt of Tenant by ſtatute Staple, by ſtatute Merchant, by Elegit, and ſuch like.

Bona dividuntur in mobilia & immobilia, mobilia rurſum dividantur in ea quæ ſe movent, & quæ ab aliis moventur: but by the common law no eſtate of inheritance or freehold is comprehended under theſe words bona or catalla. And it is to be obſerved, that as the title of the Lord to his villains lands beginneth by his entry, ſo his title to the goods beginneth by the ſeiſure of them. And here again it is to be obſerved, that where our Author in this branch concerning goods, uſeth theſe words (ſell or give) that the ſame extendeth as well to gifts in Law as gifts in Deed. And therefore if a Meiſe hath goods, and taketh Baron by this gift in law by force of the marriage, the Lord is barred. And ſo it is if a villain make his Executors, and dieth, by this gift in Law the Lord is barred as ſhall be ſaid hereafter.

¶ *Et claime les biens & ſeiſiſt parcel des biens.* For a claim only of the goods of the Villain is not ſufficient in Law, but he muſt ſeiſe ſome part in the name of all the reſidue, as here it appeareth, or that the goods be within the view of the Lord; for the claim and his view amount to a ſeiſure, as the claim of a Ward being preſent by word is a ſufficient ſeiſure, albeit the Gardian layeth no hands of him. See hereafter Sect. 321. And ſo note a diverſity between a claim of Lands or Tenements, and goods. (c) In an action of treſpaſs or detinue brought by the villain, a releaſe made to the Defendant by the Lord is a good bar, for that amounts to a ſeiſure and grant. If the Villain doth buy goods and make his Executors, and dyeth before the Lord doth ſeize them, the Executors ſhall detain them againſt the Lord of the Villain.

3 H.4.15. 46 E.3. barre 217. Doct. & Stud. ca. 43. fol. 139.
22 E.3.6. Baldwin Frevils caſe.

(c) 18 H.6.23.b.pr. Acough. 3 H.4.16. 46 E.3. bar. 217.

¶ *Ad ou aver poet, &c:* Here (&c.) doth imply an excellent point of learning, for that ſuch a claim doth not only veſt the goods which the Villain then hath, but alſo which he after that ſhall acquire and get. But otherwiſe it is of lands of Freehold or Inheritance, for there ſuch a generall entry or claim extends onely to the lands the Villain hath at that time

time, and not to any other which he shall purchase after, as by our Author in this Section may justly be collected.

## *Sect.* 178.

¶ MEs si le Roy ad un villein que purchase terre, & alien devant que le Roy entra, uncore le Roy poit ẽter en que maines que la terre devienda. Ou si le villein achata biẽs, & eux vendist devant que le Roy seisist les biens, uncore le Roy poit seiser les biens en que maines que les biens sont, Quia nullum tempus occurrit Regi.

But if the King hath a Villeine who purchases Land, and alien it before the King enter, yet the King may enter into whose hands soever the land shall come. Or if the Villein buyeth goods, and sell them before that the King seizeth them, yet the King may seize these goods in whose hands soever they bee. Because *Nullum tempus occurrit Regi.*

¶ *Si le Roy ad villein &c.* This is evident upon that which hath ben said before. Vide Sect. 125. Vid. Stanford prær. f. 32.

¶ *Ou si tiel villeine achata biens, &c.* If the Kings Villein acquire any Goods or Chattels, the property of them is in the King before any seisure or office, and it is well said of an ancient Author, (d) Al Roy quant al droit de la Corone ou a franch estate ne poet nul temps occurre, and another (e) speaking in the person of the King saith, Nul temps nest limit quant a mes droits. 35 E. 3. tit. Villenage 22. (d) Mirror cap. 3. (e) Britton fol. 88. Bract. l. 1. quæ res Domini possint.

## *Sect.* 179.

¶ ITem si home lessa certaine terre a un auter pur term de vie savant le reversion a luy, & un villeine purchase del lessor le reversion: en cest cas il semble q̃ le Seignior del villeine poit maintenãt veñ a la terre, & claime le reversion come le Seignior le dit villein, & per cel claime le reversion est maintenant en luy. Car en auter forme il ne poit vener a le reversion. Car il ne poit enter sur le tenant a terme de vie. Et sil doit demurrer tanque apres le mort le tenant a term

Also if a man let certain land to another for term of life, saving to himself the reversion, and a villein purchase of the lessor the reversion: In this case it seemeth, that the Lord of the Villeine may presently come to the land and claime the reversion as the Lord of the said villeine, and by this claime the reversion is forthwith in him. For in other form or manner he cannot come to the reversion, for hee cannot enter upon the tenant for life. And if hee should stay untill after the death of the Tenant for

¶ *Puit maintenant vener a la terre.* For he cannot claim the reversion but upon the Land, and he by his comming upon the land for that purpose is no trespasser, because the Law giveth him power to claim the reversion, lest he should be prevented, and claim he cannot unless he commeth to the Land. So likewise if the Villeine purchase a Seigniory, Rent, Common, or any other Freehold or Inheritance out of any Lands or Tenements of another; the

the Lord may lawfully come to the land to make his claim to the Seigniory, rent, or other profit out of the land. But if the villeine purchase a Seigniory or a Rent, Common, or other Inheritance, issuing out of the Land of the Lord himself, it is said that the Seigniory, Rent, Common, or such other Inheritance is extinguished in the Lords possession without any claim.

de vie, donques per cas il vienda trope tarde. Car peradventure le villeine voile granter ou alien, le reversion a un autre en le vie le tenant a terme de vie, &c.

life, then perchance hee should come too late. For peradventure the villeine will grant or alien the reversion to another in the life of the Tenant for life, &c.

Vide 41 E. 3 tit. Audita querela 18.
12 H. 4. tit. Execution
28 F. N. B. 104.
1 H. 7. 15. b.

¶ *Grant.* Here must be intended an Attornment: for after the grant and before Attornment, the Lord may not claim the Reversion.

¶ *En la vie del tenant per vie, &c.* Here by (&c.) is included Tenant in Taile, Tenant per autre vie, Tenant by statute Merchant, Staple, Elegit, and for years, for during all these estates, the Lord may claim the Reversion, as well as in case of the Tenant for life.

## *Sect.* 180.

¶ *Advowson.* Advocatio, so called, because the Right of presenting to ꝑ Church was first gained by such as were Founders, Benefactors, or Maintainers of the Church, viz. ratione fundationis, as where the Ancestor was founder of ꝑ Church; or ratione donationis, where he endowed the Church; or ratione fundi, as where he gave the soil whereupon the Church was built, and therefore they were called Advocati: they were also called Patroni, and thereupon the Advowson is called Jus Patronatus. And in one word, Advowson of a Church is the Right of presentation or collation to the Church. Advocatus est ad quem pertinet Jus advocationis alicujus Ecclesiæ, ut Ecclesiam nomine proprio non alieno possit præsentare. Every Church is either presentative, collative, donative, or elective. Vide Sect. 645, 648.

15 H. 14. b.

Fleta lib. 5. cap. 14.

¶ En Meisme le maner est, lou un villeine ꝑchase un Advowson dun Esglise plein dun incumbent le Seignior del villein poit vener al dit Esglise, & claime le dit advowson, & per cel claim ladvowson est ꝑ luy. Car sil doit attendre tanqz apres le mort lincumbent, & adonque a presenter son clerke a le dit Esglise, donque en le meane temps le villeine poit aliener le advowson, & issint ouste le Seignior de son presentment.

IN the same manner it is, where a villeine purchases an Advowson of a Church full of an Incumbent, the Lord of the villein may come to the said Church, and claime the said Advowson, and by this claime the Advowson is in him. For if he will attend till after the death of the Incumbent, and then to present his Clerke to the said Church, then in the mean time, the Villein may alien the Advowson, & so oust the Lord of his presentment.

¶ *Plein dun Incumbent.* If the Church be presentative, the Church is full by admission and Institution against any common person, but against ꝑ King it is not full until Induction.

24 E. 3. 30. 25 E. 3. 47.
38 E. 3. 9. 44 E. 3. 3.
9 H. 6. 31. 22 H. 6. 27.
21 E. 4. 34. b.
Vide Sect. 648.

¶ *Incumbent*, commeth of the Verb Incumbo, that is, to be diligently resident, id est, obnixè operam dare, and when it is written Encumbent it is falsely written, for it ought to be Incumbent, as Littleton doth here. And therefore the Law doth intend him to be resident on his Benefice.

10 H. 6. 7.

¶ Le

¶ *Le Seignior del villein poit vener al Egliſe & clatme le dit advowſon.* Note, albeit the Advowſon is a thing incorporeal, and not viſible, yet becauſe the principall duty of the preſentee of the Patron is to be done in the Church, the claime of the Lord of the Villein muſt be made there, and by ỹ claim the inheritance of the Advowſon ſhall be veſted in the Lord, for every claim or demand to devеſt any eſtate or intereſt muſt be made in ỹ place which is moſt apt for that purpoſe.

¶ *Apres la mort del Incumbent.* Nota, a Church preſentative may become voyd the manner of ways, viz. by death, whereof Littleton here ſpeaketh. 2. By creation. 3. By reſignation. 4. By deprivation. 5. By ceſſion, as by taking a Benefice incompatible. Doct. & Stud. li. 2. ca. 31 5 E. 3. 180. 10 E. 3. 482. 25 E. 3. 49. 9 E. 3. 462. 11 H. 4. 37. 59. & 76. 41 E. 3. 5. F.N.B. 31, 32.

¶ *Et donques a preſenter ſon Clerke al dit Egliſe, &c.* A preſentation is derived à præſentando, quia præſentare nihil aliud eſt quam præſto dare, ſeu offerre. And Littleton here briefly expreſſeth the effect of a Preſentation; for it is the act of the Patron offering his Clerke to the Biſhop of that Dioceſs to be inſtituted to ſuch a Church in theſe or the like words directed to the Biſhop, Præſento vobis A. B. Clericum meum ad Eccleſiam de Dale, &c. This may be done as well by word, as by writing, and if it be by writing it is no Deed; for the preſentation is of the Clerk, and the direction to the Biſhop, ſo as this writing is in nature of a Letter to the Biſhop: and this is the reaſon that the King himſelf may preſent by word, as elſewhere is ſaid. A villein at this day purchaſeth an Advowſon in fee, the Church becomes void, the Lord for 100 pound given by A.B. Clerk, preſents him to the Church, and his Clerk is admitted, inſtituted, and inducted, yet this gaineth not the Advowſon to the Lord. (d) And ſo it is in ỹ caſe if any on the behalf of A.B. had given or contracted with the Lord in conſideration of any valuable thing to preſent A.B. to the ſaid Church, albeit it had been without the conſent or knowledg of A.B. yet it ſhould not have veſted ỹ Advowſon in the Lord. But this was not Law when Littleton wrote. (e) But now by the ſtatute of 31 Eliz. the preſentation, admiſſion, inſtitution, and induction, in both the ſaid caſes and in the like are made void, where before the ſaid ſtatute they were but voydable by deprivation. And if a man preſent by uſurpation to a Benefice by reaſon of any corrupt contract, agrement, &c. ỹ Preſentation, and the inſtitution and induction thereupon are voyd, for ỹ act extends to all Patrons as well by wrong as by right; but where any preſents by uſurpation, ỹ rightfull Patron and not ỹ King ſhall preſent, for otherwiſe every rightfull Patron may loſe his preſentation. And ſuch an Incumbent ỹ commeth in by reaſon of any ſuch corrupt agrement is ſo abſolutely diſabled for ever after to be preſented to ỹ Church, as the King himſelf, to whom the Law giveth the Title of Preſentation in ỹ caſe, cannot preſent him again to that Church; for the Act being made for ſuppreſſion of Simony, and ſuch corrupt agrements, ſo binds the King in that caſe, as he cannot preſent him that the Law hath diſabled; for the words of the Act be, Shall thereupon and from thenceforth be adjudged a diſabled perſon in Law to have or enjoy the ſame Benefice. (f) And the party being diſabled by the Act of Parliament which (being an abſolute and direct Law) cannot be diſpenſed withall by any grant, &c. with a Non obſtante, as it may be, when any thing is prohibited Sub modo, as upon a penalty given to the King. And the ſaid Act doth not only extend to Benefices with cure, but to Dignities, Prebends, and all other Eccleſiaſtical livings. (d) Adjudg. in Communi Banco Mich. 41. & 42. Eliz. inter Baker & Rogers. (e) Adjudged in the Kings Bench, Mich. 13. Jan. in a Quar. imp. brought by the King againſt the Biſhop of Norwich, Thomas Cole and Rob. Secker Clerk, for the Vicarage of Haverell in Suff. (f) Pl. Com. 502. 27 H. 8. 2 H. 7. 6. 11 H. 7. 11. 13 H. 7. 8. b. 11 H. 4. 76. 5 E. 3. 29. F.N.B. 231. E.

¶ *Clerke.* Clericus, is twofold, Eccleſiaſticus (which Littleton here intendeth) and he is either ſecular, or regular, ſo called, becauſe he is Servus & hæreditas Domini: and Laicus, and in this ſenſe is ſignified a Penman, who getteth his living in ſome Court, or otherwiſe, by the uſe of his pen. 4 H. 4. cap. 12.

Note, if the Church becometh void, albeit the preſent avoidance be not by Law grantable over, yet may the Lord of the Villein preſent in his own name, and thereby gain the Inheritance of the Advowſon to him and his heirs, for albeit it be not grantable over, yet it is not meerly a Thoſe in action, (g) for if a Feme covert be ſeiſed of an Advowſon, and the Church becometh void, and the wife dieth, the husband ſhall preſent to the Advowſon, (h) but otherwiſe it is a bond made to the wife, becauſe that is meerly in action. ant 29. a (g) 14 H. 4. 12. 38 E. 3. 35. 12 E. 3. Quar. imp. 57. (h) 43 E. 3. 10. 39 E. 3. 5. 4 H. 6. 5.

*Dum Sola*

## *Sect.* 181.

¶ Item ily ad villeine regarde, & villeine en gros, A Alſo there is villeine regardant, and a villeine in groſs. ¶ V *Illein regardant.* He is called regardant to the Mannour, becauſe he hath the charge 8 H. 7. 5.

charge to do all baſe or villeinous ſervices within the ſame, and to guard and keep the ſame from all filthy or loathſome things that might annoy it: and his ſervice is not certain, but he muſt have regard to that which is commanded unto him. And thereupon he is called Regardant, A quo præſtandum ſervitium incertum & indeterminatum, ubi ſcire non poterit veſpere, quale ſervitium fieri debet mane, viz. ubi quis facere tenetur quicquid ei præceptum fuerit, As before hath been obſerved. And Littleton ſaith hereafter, That no other thing is ſaid to be regardant, but only a Villeine: (i) Yet in old Books it was ſometimes applyed to Services.

Bract. lib. 2. fol. 26. Mir. cap. Sect. 18.

Vide ſect. 184.

(i) 20 E. 3. tit. iſſue 30.

¶ *In groſſe*: Is that which belongs to the perſon of the Lord, and belongeth not to any Manor, Lands, &c.

villeine regardant eſt, ſicome home eſt ſeiſi dun Mañ a que un villeine eſt regardant, & celuy que eſt ſeiſie, del dit mañ, ou ceux q̃ eſtak il ad en meſm̃ le Mannor ount eſte ſeiſies de le dit villein & de ſes Auncеſtors, come villeins & niefs regardants a meſme le mannor de temps dont memorie ne curt. Et villeine en groſſe eſt, lou un home ſeiſie dun Mannor a que un villeine eſt regardant, & il graunt meſm̃ le villein p̃ ſon fait a un auk, donqs il eſt villein en groſſe & nemy regardant.

A villein regardant is, as if a man be ſeiſed of a Mannor, to which a villeine is regardant, and he which is ſeiſed of the ſaid Mannor, or they whoſe eſtate hee hath in the ſame Mannor, have been ſeiſed of the villein and of his Anceſtors, as villeines and niefs regardant to the ſame Mannor time out of memory of man. And villeine in groſſe is, where a man ſeiſed of a Mannor whereunto a Villein is regardant, and granteth the ſame villein by his Deed to another, then he is a Villeine in groſſe, and not regardant.

## *Sect.* 182.

Mir. cap. 2. ſect. 18.

¶ This needeth no explanation, but to adde the ſaying of an ancient Author, Servage ẹ home eſt ſubjection, iſſuant de cy grand antiquitie, que nul franke cep poet eſtre trove per humane remembrance.

¶ Item ſi un home & ſez Anceſtors que h̃e il eſt, ount eſte ſeiſies dun villein & des ſez anceſtors, come des Villeins en groſſe de temps dont memorie ne curt, tiels ſont Villeines en groſſe.

Alſo if a man and his Auncеſtors whoſe heir he is, have been ſeiſed of a villein, and of his Anceſtors as of Villeines in Groſſe, time out of memory of man, theſe are Villeins in Groſſe.

## *Sect.* 183.

Vid. ſect. 441. 194. 174. 74.
(l) Bract. l. 5. tract. 5. cap. 28.

(m) Glanv. lib. cap. 1.

¶ *Ou fine*. In Latine, Finis. (l) Ideo dicitur finalis concordia, quia imponit finem litibus, & eſt exceptio peremptoria. (m) Finis eſt amicabilis compoſitio, eſt finalis concordia ex conſenſu & licentia

¶ Et hic nota, que tiels choſes q̃ ne poient eſte grants, ne aliens ſans fait ou fine, home que voile aver tiels choſes per

And here note, that ſuch things which cannot be granted nor aliened without Deed or Fine, a man which will have

pre-

prescription ne poet autrement prescriber forsque en luy, & en ses Auncestors que heir il est & nemy per ceux parols, en luy & en ceux que estate il ad, p̄ ceo q̄ il ne poet aver lour estate sans fait ou auter escripture, le quel covient deste monstre a le court, si il voile aver ascun advantage de ceo. Et pur ceo que le grant & alienation dun villein en gros ne gist cās fait ou auk escriptuk hōe ne poit p̄scriber en un villein en gros cās mōstrants descripture, sinō & soy meisme que claim le villeine, & en ses Ancestors que heire il est. Mes de tiels choses que sont regardants ou appendants a un Mannor, ou a auters terres & Tenements, home poet prescriber que il & ceux que estate il ad, queux fueront seisies de le Manor, ou de tiels Terres & Tenements, &c. ont este seisies de tiels choses come regardants ou appendants a le Manor, ou a tiels tres & tenements, de temps dont memorie, &c. Et la cause est, pur ceo que tiel Mannor, such things by prescription, cannot otherwise prescribe, but in him and in his Ancestors whose heire hee is, and not by these words, In him & them whose estate hee hath, for that he cannot have their estate without Deed or other Writing, the which ought to bee shewed to the Court, if he will take any advantage of it. And because the grant and alienation of a Villeine in grosse lyeth not without Deed or other Writing, a man cannot prescribe in a Villein in grosse, without shewing forth a Writing, but in himself which claimes the Villeine, and in his Aunceſtors whose Heir hee is. But of such things which are regardant or appending to a Mannour, or to other Lands and Tenements, a man may prescribe, that he and they whose Estate he hath who were seised of the Mannor, or of such Lands and Tenements, &c. have been seised of those things, as regardant or appendant to the Manor, or to such lands and tenements time out of mind of man: And the Domini Regis, vel ejus Justiciariorum. (n) Talis concordia finalis dicitur, eo quod finem imponit negotio, adeo ut neutra pars litigant' ab eo de cætero poterit resedere. Of the several parts of a Fine, and many incidents to the same, you shall read in my Reports.

(n) Lib. 9. cap. 3. Stat. de Modo levandi Fines. P. Com. Com. 357.

Lib. 5. fol. 18. Teyes case.

¶ *Que estate, &c.* Quorum statum, as much to say, Whose estate he hath. Here Littleton declareth one excellent rule, (o) That a man cannot prescribe in any thing by a Que estate, that lyeth in grant, and cannot passe without Deed or Fine, but in him and his Ancestors he may, because he comes in by descent without any conveyance. Neither can a man plead a Que estate in himself, of any thing that cannot passe without Deed, (p) but in another he may, as in bar of an advowry, the Plaintiff may plead a Que estate in the seigniory, in the advowant. But Littletons words are to be observed, (Homo que voile aver tiels choses per prescription) Therefore (q) when a thing that lyeth in grant is but a conveyance to the thing claimed by prescription, there a Que estate may be alledged of a thing that lyeth in grant; as a man may prescribe, that he and his Ancestors, and all those whose estate he hath in an Hundred, have time out of mind, &c. had a Leet &c. this is good, &c.

(o) 22. Ass. 53. 23. Ass. 6. 12. H. 7. 16. 18.

(p) 39 H. 8. 18 E. 3. 23.

(q) 11 H. 4. 89. 19 R. 2. Action sur le case 51. 13 E. 3. Br. 674.

(r) Regularly, the Plaintiff shall not entitle him by a Que estate, but he must shew how he came by it; but after Avowry made, the Plaintiff shall plead a Que estate, because he is now become as a Defendant.

(r) 9 E. 4. 3. b. 19. Ass. 19. 2 H. 6. 10. 48 E. 3. tit. 333. 3 H. 28.

(s) A man may plead a Que estate of a tenancy in tail or of an estate for life, so as he averreth the like of them, but he cannot plead a Que estate of a lease for years, or at will.

(s) 41 Ass. 2. 40. Ass. 28. 2 H. 4. 20. 15 E. 4. 1. 15 H. 7. 39. 18 E. 4. 10. 7 E. 6. tit. Que estate. Br. 31. 27 H. 6. 3. 7 Eliz. Dyer 238.

(t) A Disseisor, Abatour, Intruder, Recoveror or any other that commeth in the post,

(t) 22 H. 6. 24. 6 E. 4. 11. 31 H. 8. Que estate Br. 48. 39 H. 6. 14. 9 H. 6. Estop. 25.

(u) 11 H.4.81.27 H.6.32 9 E.4.3. 2 E. 6. tit. Que eſtate, 8. 1 E.6. Que eſtate Br. 49.

poſt, ſhall plead a Que eſtate.

(u) A Que eſtate muſt be alledged in the Tenant or Defendant himſelf, and not in one in the mean conveyance from whom he claimeth, and yet ſome bookes be to the contrary.

ou terres & tenements poyent paſſer per alienation ſans fait, &c.

reaſon is, for that ſuch Mannor, or lands and tenements may paſſe by alienation without deed, &c.

¶ *Le quel covient deſtre monſtre al Court.* The reaſon wherefore a Deed that is pleaded ought to be ſhewed to the Court, is, becauſe every deed muſt prove it ſelf to have ſufficient words in Law, whereof the Court muſt adjudge, and alſo to be proved by others, as by witneſſes, or other proof if the Deed be denyed, which is matter of fact.

¶ *Per alienation ſauns fait, &c.* Here by (&c.) is implyed, that whatſoever paſſeth by Livery of ſeiſin either in Deed or in Law, may paſſe without Deed, and not only the Rent and Services parcel of the Mannor ſhall with the demeans as the more principal and worthy paſſe the Livery without Deed, but all things regardant, appendant, and appurtenant to the Mannor, as incidents or adjuncts to the ſame, ſhall together with the Mannor, paſſe without Deed; all which, as here it appeareth, and elſewhere is ſaid, ſhall paſſe without saying Cum pertinentiis.

## *Sect.184.*

¶ *Regardant:* Vide Sect. 181.

¶ *Appendants.* Appendant is any Inheritance belonging to another that is ſuperiour or more worthy. In Law it is called Pertinens, quaſi invicem tenens, holding one another, a word indifferent both to things appendant, and things appurtenant, the quality and nature of the things do make the difference; but regardant (as our Author ſaith) is only applyed to a villeine. (†) Appendants are ever by preſcription, but appurtenants may be created in ſome caſes at this day. As if a man at this day grant to a man and his heirs Common in ſuch a Moor for his beaſts levant and couchant upon his Manor; or if he grant to another common of Eſtours or Turbary in Fee ſimple to be burnt or ſpent within his Mannor, by theſe grants theſe Commons are appurtenant to the Mannor, and ſhall paſſe by the grant thereof. In the Civil Law it is called Adjunctum.

Vide Sect. 1.
(†) 5 Aſſ. 9. 8 H.7.4,5. 28 H. 8. Dier 30. b. Pl. Com. 381. F.N.B. fol. 181.

¶ *Et eſt aſcavoir, que nul choſe eſt noſme regardant a un Mannor, &c. forſque villeine, mes certaine auters choſes come advowſon & common d pasture, &c. ſont noſmes appendants al Mannor ou al terres & tenements, &c.*

ANd it is to be underſtood, that nothing is named regardant to a Mannor, &c. but a villein: but certaine other things, as an advowſon, & common of Paſture, &c. are named appendant to the Mannor, or to the Lands and Tenements, &c.

(x) 43. Aſſ. p. 10. 34 E. 3. 22.

(x) If A. be ſeiſed of a Mannor whereunto the franchiſe of waife and ſtray, and ſuch like are appendant, and the King purchaſeth the Mannor with the appurtenances; now are the royal Franchiſes reunited to the Crown, and not appendant to the Mannor: but if he grant the Manor in as large and ample manner as A. had, &c. it is ſaid, that the Franchiſes ſhall be appendant (or rather appurtenant) to the Mannor.

(y) Hill and Granges caſe. Pl. Com. 168.

Concerning things appendant and appurtenant, two things are implyed. (y) Firſt, that preſcription (which regularly is the mother thereof) doth not make any thing appendant or appurtenant, unleſſe the thing appendant or appurtenant agree in quality & nature to the thing whereunto it is appendant or appurtenant, as a thing corporeal cannot properly be appendant to a thing corporeal, or a thing incorporeal to a thing incorporeal. But things incorporeal which lye in grant, as Advowſons, Villeins, Commons, and the like may be appendant to things corporeal, as a Manor, houſe, or lands: or things corporeal to things incorporeal, as lands to an office. (z) But yet, as hath been ſaid, they muſt agree in nature and quality, for

(z) 1 H.7.24. Pl. Com. 169.
(a) 5. Aſſ. 9.
(b) 10 E. 3.37 H.634. 26 H.8.4. lib.4.fol.36937. in Tirringhams caſe.

(a) common of Turbary or of Eſtours cannot be appendant or appurtenant to land, but to a houſe to be ſpent there. (b) Nor a Leet that is temporal, to a Church or Chappel which is Eccleſiaſtical. Neither can a Nobleman, Eſquire, &c. claim a ſeat in a Church by preſcription

tion as appendant or belonging to land, but to a house, for that such a seat belongeth to the house in respect of the inhabitancy thereof, and therefore if the house be part of a Mannor, yet in that case he may claim the seat as appendant to the house for the reason aforesaid.

Secondly, that nothing can be properly appendant or appurtenant to any thing unless the principal or superiour thing be of perpetual subsistence & continuance, for example: An Advowson, that is said to be appendant to a Mannor, is in rei veritate, appendant to the Demesnes of the Mannor, which are of perpetual subsistence and continuance, & not to Rents or services, which are subject to extinguishment and destruction. 5 E. 6. Dyer 70. b.

An Advowson is appendant to the Mannor of Dale, of which Mannor the Mannor of Sale is holden, the Mannor of Sale is made parcell of the Mannor of Dale by way of Escheat, the Advowson is only appendant to the Mannor of Dale.

And where it is said that a Chamber may be parcell of a Cozody, and pass by the name of the Cozody which may be extinguished, there he that hath the Cozody hath but his habitation in the Chamber, as a Fellow of Trinity Colledg in Cambridg hath in his Chamber, or as one that had a Cozody and a chamber in a house of Religion, he had but his habitation only. As for Offices of Fee whereunto land may appertain, they are of perpetual subsistence, either being in esse, or in that they are grantable over. 31 H.6.15.b.

Note that an Advowson at one turn may be appendant, and at another turn in gross, as if the Mannor be divided between Coparceners, and every one hath a part of the Mannor without saying any thing of the Advowson appendant, the Advowson remains in coparcenary, and yet in every of their turns it is appendant to that part which they have, & so it is if they make composition to present against common right, yet it remains appendant. But if upon such a partition an express exception be made of the Advowson, then the Advowson remains in Coparcenary and in gross, and so are the books reconciled. 13 E. 2. Quar. Imp. 170. 43 E.3.35. 13 E.3. Quar. imp. 58. 17 E.3.38. 9 Eliz. Dyer 219. 7 E.3. 20. 19 E. 2. Quar. imp. 59. 35 H.6.32,33. 38 H. 6.9. 2 H.7.5.

¶ *Common de pasture.* (c) Communia, it cometh of the English word Common, because it is common to many, and thereupon, & accordingly is here called by Littleton Common of Pasture, for that the feeding of beasts in the land wherein the Common is to be had, belongs to many. (c) Glanv. lib.13.cap.36. Bract. lib.4.cap.19 & 40. Britt. cap.55,56,57. Fleta lib.2. cap.19. Mirror, cap.5. sect.3.

(d) There be four kinds of Common of pasture, viz. Common appendant which is of common right, and therefore a man need not prescribe for it) for beasts commonable (that is) that serve for the maintenance of the plough, as horse and oxen to plow the land, and for kine and sheep to compester the land, and is appendant to arable land. (d) 20 E. 3. Admesurement 8 Temps E. 1. Common, 24. 17 h.2. ibid.23. 4 H.6. 22 H.6.

(e) The second is Common appurtenant, that is for beasts not commonable, as swine, goats, and the like. (f) If a man purchase part of the land wherein Common appendant is to be had, the Common shall be apportioned, because it is of common Right, but not so of a Common appurtenant or of any other Common of what nature soever. But both Common appendant & appurtenant shalbe apportioned by alienation of part of ỹ land to which Common is appendant or appurtenant, and for Common appurtenant one must prescribe. (e) 37 H.6.34.26 H.8.4. F. N. B. 181. (f) lib.4. f.37,38,&c. Tirringhams case.

(g) The third is Common per cause de vicinage, which differeth from both the other Commons, for that no man can put his beasts therein, but they must escape thither of themselves by reason of vicinity, in which case one may inclose against the other, though it hath been so used time out of mind, for that it is but an excuse for trespass. (g) Lib.8. fol.78,79. W. Wildes case.

The last is Common in gross, which is so called, for that it appertaineth to no land, and must be by writing or prescription. Of Common appendant, appurtenant, and in gross, some be certain that is for a certain number of beasts, some certain by consequent, viz. for such as be levant and couchant upon the land, and some be more incertain, as common sauns number in gross, and yet the Tenant of the land must common or feed there also.

There be also (h) divers other Commons, as of Estovers, of Turbary, of Pischary, of digging for Coals, Minerals, and the like. (i) If Common appendant be claimed to a Mannor, yet in rei veritate it is appendant to the Demesnes and not to the Services and therefore if a Tenancy escheat, the Lord shall not encrease his Common by reason of that. (h) Fleta ubi supra. (i) 13 E.3. fol. 43.

(k) If a man claim by Prescription any manner of Common in another mans land, and that the owner of the land shall be excluded to have Pasture Estovers, or the like, this is a prescription or custome against the Law, to exclude the owner of the soyle for it is against the nature of this word Common, and it was implyed in the first grant ỹ the owner of the soyl should take his reasonable profit there, as it hath been adjudged. † (l) But a man may prescribe or allodge a custome to have and enjoy Solam vesturam terræ, from such a day till such a day, and hereby the owner of the soile shall be excluded to pasture, or feed there, and so he may prescribe to have Separalem pasturam, and exclude the owner of the soile from feeding there. Nota diversitatem. (m) So a man may prescribe to have Separalem pischariam in such a water, and the owner of the soile shall not fish there, but if they claim to have Communiam pischariæ, or Liberam pischariam, the owner of the soyle shall fish there, and all this hath been (k) 15 E.2. Prescript. 51. 12 H.8. fol.2. †. Pasch. 26 Eliz. in the Kings Bench, inter White & Shirland in Com. Oxon. Vide Sect.1. & 2. (l) Vide 3 E. 3.29,30. 4 E.3.7. 46 E.3.23. 15 E.2. Prescript. 51. (m) 20 H.6.4. 10 H.7. 24. Temps E. 1. Assiz. 422.

(†) Inter Chinery & Fiſhen in le Com.banke in replevin & Mic. 29 & 30 Eliz. inter Shirland & White in Com. Oxon. & inter Foiſton & Crachrode eodem termino in Eſſex.
(n) 19 H.6. 33.
(o) Vide ſect. 541.

been reſolved. (†) And therefore it is neceſſary for every man by learned advice to plead according to the truth of his caſe, for Parols ſont plea.

(n) A man ſeiſed of land whereunto common is appendant, and is diſſeiſed, the Diſſeiſee cannot uſe the Common until he entreth into the land whereunto it is appendant. (o) But if a man be diſſeiſed of a Mannor whereunto an Advowſon is appendant, he may preſent unto the Advowſon before he enters into the Mannor, and the reaſon of this diverſity is, becauſe in the caſe of the Common it ſhould be a prejudice to the Tenant of the ſoil. For if the Diſſeiſee might doit, the Diſſeiſor alſo might put on his Cattell, which ſhould be a double charge to the Tenant, but not ſo of the Advowſon.

## *Sect.* 185.

Bract. lib. 1. cap. 6.
Britton fol. 78.
Fleta l. 1. c. 3. 43 E. 3. 4. b.
19 E. 2. tit. vill. 34. 18 E. 4. 29.
(p) 19 H. 6. 32. 26 Aſſ. 52
37 Aſſ. 17.
21 H. 4. 16. in Appeal.

¶ This is intended in ſome action brought againſt him that made ſuch confeſſion, (p) or where he is brought into Court by courſe of Law; for if he cometh into the Court extrajudicially, and not by any due courſe of Law, ſuch confeſſion is without warrant of Law, & bindeth not the party, becauſe the Court had no warrant to take it. But if a Præcipe be brought againſt one, he may confeſs himſelf villein to an eſtranger, and that he holds the land in villenage of him, and this is good, and ſhall bind him. And if in that caſe the Demandant reply, that he the day of his Writ purchaſed was a freeman, and thereupon iſſue is taken, and he is tryed to be free, yet he ſhall remain villein to the ſtranger in reſpect of his confeſſion.

¶ Item ſi home voile en Court d̄ record ſoy' conuſter deſtre villein, que ne fuit villein advant, tiel eſt villeine en groſſe.

Alſo if a man will acknowledg himſelfe in a Court of Record to bee a villeine, who was not a villeine before, ſuch a one is a villeine in groſſe.

41 E. 3. tit. vill. 6.

19 H. 6. 32. b.

If a Writ of Nativo habend' be brought againſt one, and the Plaintiff, as he ought, offereth in his Count to prove the villenage by the Couſins and Kindred of the Defendant, and thereupon produceth the Uncles of the Defendant, who upon examination confeſs themſelves to be Villeins to the Demandant; this confeſſion being entred of record, doth ſo bind, that albeit they were ſo free before, they and the heirs of their bodies are by this confeſſion bond, and villeins for ever, for the Uncles came in by due courſe of Law in an action depending in Court.

## *Sect.* 186.

F. N. B. 161. a.
Regiſt. 132. & 277.
Brit. fol. 20. Bract. lib. 3. tract. 2. c. 12, 13.
Fleta lib. 1. cap. 28.
3 H. 5. tit. Vtlawry Statham.

¶ Nief, or Naife is in Latine Naturalis, ſeu nativa, becauſe for the moſt part Niefs are bond by Nativity.

¶ *Feme que eſt utlage eſt dit waive.*

Waive, Waviata, and not utlagata or exlex, for ỹ women are not ſworn in Leets, or Torns, as men which be of ỹ age of 12. years or more be, and therefore men may be called utlagati, id eſt, extra legem poſiti, but women are Waiviatæ, id eſt, derelictæ, left out, or not regarded, becauſe they were not ſworn to the Law: wherein it is to be noted, that of ancient time a man was not ſaid to be within the Law, that was not ſworn to the Law which is intended of the Oath of Allegiance in the Leet.

¶ Item home que eſt villein eſt appelle villein, & feme que eſt villeine eſt appelle Nief: Sicome home que eſt utlage eſt dit utlage, & feme que eſt utlage eſt dit waive.

Alſo a man which is a villein, is called a Villein, and a woman which is villein, is called a Niefe. As a man which is outlawed, is called outlawed: and a woman which is outlaw'd, is called waived.

Regiſt. orig. 132.

And the Outlawry of a woman is legally called Waiviaria mulieris.

Sect.

## *Sect.* 187.

¶ Item ſi un Villeine prent fraūk-feme a feme, & ad iſſue entre eux, iſſues ſerront Villeines. Mes ſi neiſe prent franke home a ſa baron, lour iſſues ſerra franke.

* Et ceſt contrarie a la Ley Civil, car la eſt dit, Partus ſequitur ventrem. *

Alſo if a Villeine taketh a free woman to wife, and have iſſue between them, the iſſues ſhall be Villeines. But if a Niefe taketh a free man to her husband, their iſſue ſhall be free.

* This is contrary to the Civill Law, for there it is ſaid, *Partus ſequitur ventrem.* *

¶ Sturculus totum alimentum à ſtipite capit, poma tamen edit ſua. The Stiens takes all his nouriſhment from the ſtock, and yet it produceth his own fruit. Forteſcue cap. 42. Glanvil lib. 5. cap. 6. Hill. 29 E. 1. coram Rege Eborum in Theſaur.

(b) Si quis de ſervo patre natus ſit & matre libera, pro ſervo reddatur occiſus in ea parte, quia ſemper à patre non à matre generationis ordo texitur: ſi pater ſit liber & mater ancilla, pro libero reddatur occiſus. (r) Lex Angliæ nunquam matris, ſed ſemper patris conditionem imitari partum judicat. q) Lib. rub. cap. 77. r) Forteſcue ubi ſupra.

(ſ) The husband and wife are all one perſon in law, and the Niefe marrying a freman is infranchiſed during the coverture, and therefore by the Common Law of England the iſſue is free. ſ) Here with agreeth Britton fol. 78, b.

(t) Si mulier ſerva copulata ſit libero, &c. quod partus habebit hæreditatem, & mater nullam dotem, quia mortuo viro ſuo libero redit in priſtinum ſtatum ſervitutis niſi hæres ei dotem fecerit de gratia. And when a bondman marrieth a freewoman, they are all one perſon in Law, and Duæ animæ in carne una, and Uxor ſubjecta eſt viro, & ſub poteſtate viri. t) Bract. lib. 4. fol. 298, b. Idem lib. 1. cap. 6. Mirror cap. 2. ſect. 18.

(u) Obſervatur in Com' Cornubiæ de tali conſuetudine, quæ talis eſt, quod ſi liber homo ducat nativam aliquam in uxorem ad liberum tenementum & liberum thorum, ſi ex ea duæ procreantur filiæ, una erit libera & altera villana, quia ibi partiti ſunt pueri inter liberum patrem & dominum uxoris villanæ. u) Bract. lib. 4. fol. 271.

(x) Qui vero procreantur ex nativa unius, & nativo alterius, proportionabiliter inter Dominos ſunt dividendi. a) Glanvil lib. 5. cap. 6.

¶ *Et ceo eſt contrarie al Ley Civil.* For true it is that by that Law Partus ſequitur ventrem, as well where a freman takes a bondwoman to wife, as where a bondman takes a freewoman to wife. In the firſt caſe the iſſue is by the Civill Law bond, and in the other free, both which caſes are contrary to the Law of England: but this is no part of Littleton and therefore we in this manner paſs it over. Forteſcue cap. 42.

## *Sect.* 188.

¶ Item nul baſtard poet eſtre villeine, ſi non que il voyle ſoy conuſter eſtre villeine en court de record, car il eſt en ley quaſi nullius filius, pur ceo que il ne poit enheriter a nulluy.

Alſo no baſtard may be a villein, unleſs he will acknowledg himſelf to be a villeine in a Court of Record, for hee is in Law, *quaſi nullius filius*, becauſe hee cannot be heir to any.

¶ *Nullius* (a) *filius.*

Cui pater eſt populus, pater eſt ſibi, nullus, & omnis.

Cui pater eſt populus, non habet ille patrem. a) Vide ſect. 399. 13 E. 1. tit. villein 36.

(b) Some hold that the Baſtard of a Niefe ſhal be a villein, (c) And others hold that if a Villeine hath a Baſtard by a woman, and after marrieth the woman, this Baſtard is a villein, but the Law is contrary in both caſes, for in both caſes the iſſue by the Common Law is a Baſtard, and conſequently, quaſi nullius filius, as Littleton here ſaith. b) Bract. lib. 1. fol. 5. 2. Fleta lib. 1. cap. 3. Britton fol. 78. c) 39 E. 3. 34. 43 E. 3. 4. Britton ubi ſupra.

(d) Though a Baſtard be a reputed ſon, yet is he not ſuch a ſon in conſideration whereof an uſe can be raiſed for the reaſon that Littleton here yelds, becauſe in judgment of Law he is Nullius filius. d) 23 Eliz. Dyer 374.

(e) And for e) 13 Eliz. Dyer 296.

14 Eliz. Dyer 313.
18 Eliz. Dyer 345.

for the ſame reaſon where the ſtatute of 2 H.8. of Wills ſpeaketh of Children, baſtard children are not within the ſtatute, and the baſtard of a woman is no child within the ſtatute where the mother conveys lands unto him.

(f) Trin. 18 E.1. Rot. 61. Bedf. coram Rege.

(f) It was found by verdict the Henry the ſon of Beatrice which was the wife of Robert Radwell deceaſed, was born per undecim dies poſt ultimum tempus legitimum mulieribus conſtitutum. And thereupon it was adjudged, Quod dictus Henricus dici non debet filius prædicti Roberti, ſecundum legem & conſuetudinem Angliæ conſtitut. Now Legitimum tempus in the caſe appointed by the Law at the furtheſt is nine moneths, or forty weeks, but ſhe may be delivered before the time, which judgment I thought good to mention. And this agreeth with that in Eſdras. Vade & interroga prægnantem, ſi, quando impleverit novem menſes ſuos, adhuc poterit matrix ejus retinere partum in ſemetipſa? & dixi, Non poteſt Domine.

4 Eſd. 25 4. 41. Vide Pancirolli, nova reporta, pag. 485, &c.

## *Sect.* 189.

*Chescun Villeine eſt able & franke de ſuer, &c.* (g) In an Action brought by a Villeine, Verſus non Dominum, non valebit ei exceptio, quia eſt ſervus alienus ex quo nihil ad ipſum utrum liber ſit an ſervus. (h) And it is to be obſerved, that he that hath but a particular eſtate in a Villein, as Tenant for life or for years, ſhall diſable the villein if he brings an action againſt him, but the Lord ſhall not (as it is ſaid) diſable him, (i) Examinatio villenagii non tenet, niſi ex ore veri Domini fuerit pronunciata.

(g) Bracton lib. 4. fo. 196. Britton cap. 49. fol. 125.

(h) 14 E.4. 6. b. 15 E.4. 32. 20 E.3. tit. Villein 19. 38 E.3. 21.

(i) Fleta lib. 2. cap. 4.

Item cheſcun villein eſt able & franke de ſuer touts maners dactions envers cheſcun perſon forſprys envers ſon Seignior a que il eſt villeine. Et uncore en certain choſes il poit aver action envers ſon Seignior. Car il poit aver envers ſon Seignior un action dappeale de mort ſon pere, ou dauters de les auncеſters que heire il eſt.

Alſo every Villein is able and free to ſue all manner of Actions againſt every perſon, except againſt his Lord to whom he is villeine: and yet in certain things he may have againſt his Lord an Action. For hee may have againſt his Lord an action of appeale for the death of his father, or of his other Anceſtors whoſe heir he is.

*Appeale.* Appellum cometh of the French word Appeller, that ſignifieth to accuſe, or to appeach. An Appeach.

(k) Brit. cap. 12. fol. 38. Bracton lib. 1. tol. 6. 1.

(k) An Appeal is an accuſation of one upon another with a purpoſe to attaint him of felony by words ordained for it.

(l) 18 E.3. 32. 11 H.4. 93. 1 H.4. 6. 29 H.6. tit. Corone 17.
(m) Fleta lib. 1. cap. 5. 1 H.4. 6.

*De mort.* (l) for a Villein ſhall not have an appeal of Robbery againſt his Lord, for the may lawfully take the goods of the Villein as his own. (m) And if in an Appeal of death it be found for the Plaintiff, he is infranchiſed for ever. Hinc enim eſt quod eo ipſo ſunt hujuſmodi Domini ſervos ſuos amiſſuri cum de injuriis fuerint convicti. And there is no diverſity herein whether he be a Villein regardant, or in groſs, although ſome have ſaid the contrary.

## *Sect.* 190.

(n) Mirror cap. 1. Sect. 12. Cap. 3. de Rape. & cap. 41. de homicide.

*Rape.* (n) Raptus is when a man hath carnall knowledge of a woman by force & againſt her will.

Auxy un Nieſe que eſt ravie per ſa Seignior poit aver un appeale de rape envers luy.

Alſo a Nieſe that is raviſhed by her Lord, may have an appeal of Rape againſt him.

(†) W.1. c. 13. W.2. c. 35. 6 R.2. cap. 6. 11 H.4. cap. 13. 4 H.4. cap. 2.
(o) 29 H.6. tit. Coro. 17. Bracton lib. 3. fol. 147.

*Appeale de Rape.* By the generall purview of the ſtatutes, (†) that give the Appeale of Rape, the Nieſe ſhall have an Appeal of Rape againſt the Lord. (o) And it ſeemeth by the ancient Authors of the Law, that this ſo hainous an offence was ſeverely puniſhed by loſs of eyes and other members, but of old time it was felony, which you may read at large in the ſecond part of the Inſtitutes, W.1. cap. 13.

(p) And

(p) And this word Rape which our Author here useth is here appropriated by Law to this case, as without this word (Rapuit) it cannot be expressed by any Periphrasis or circumlocution; for Carnaliter cognovit eam, or the like, will not serve.

(p) 9 E. 4. 26. Mir. cap. 1. sect. 13.

## *Sect.* 191.

¶ AUxy si un villeine soit fait executr a un autr, & le Sr del villeine fuit en dette a le testator en un certaine summe dargent que nest my paie, en ceo case le villeine come executor de le testator avera action de det envers son Seignior, pur ceo que il ne recovera le det a son use demesne mes al use le testator.

ALso if a Villeine be made executor to another, and the Lord of the villeine was indebted to the Testator in a certain sum of money which is not paid, in this case the villeine as executor of the Testator, shall have an Action of debt against his Lord, because he shall not recover the debt to his own use, but to the use of the Testator.

¶ Of this matter sufficient hath bin spoken in this Chapter before. The Villeine shall have an action as executor against his Lord, and it is no plea for the Lord, to say, that the Plaintiff is his villein, for he shall not be enfranchised by the user of this action, because he hath it by a gift in Law to the use of the Testator, and not to his own use.

21 E. 4. 30. 4.

## *Sect.* 192.

ITem le Sr ne poit prender hors del possession de tiel villein q̄ est Executor les biēs le mort, & sil face, le villein cōe Executor avera action de trespasse de mesmes les bīs ilsint prises envers son Sr, & recovera damages al use le testator. Mes en touts tielx cases, il covient que la Sr que est defendant en tielx actions face protestation q̄ le plaintife est son villeine, ou autrement le villein serra enfranchise, co-

ALso the Lord may not take out of the possession of such Villeine who is Executor, the goods of the deceased; and if he doth, the Villeine as Executor shall have an action for the same goods so taken against his Lord, and shall recover damages to the use of the testator. But in all such cases it behoveth that the Lord which is defendant in such Actions, maketh protestation, that the Plaintiff is his villeine, or otherwise the villeine shall bee infran-

¶ *LE Seignior ne poit prender hors del possession, &c.* Of this also sufficient hath been said before.

¶ *Et recovera damages al use del Testator.*

(q) Note, damages recovered by the Executor in an action of trespasse shall be assets, and yet they were never in the Testator. And so it is in other like cases, as by our books it appeareth.

(q) 21 E. 4. 4. b. 11 H. 6. 35. b. 3 H. 6. 1. 2 H. 4. 21. 1 H. 4. 6.

(r) If an Executor hath a villeine for years, and the villein purchases lands in fee, the Executor entreth, he shall have the whole fee simple, but because he had the Villeine in auter droit, viz. as Executor to the use of the dead, it shall be assets in his hands. Note a diversity between the quantity of the estate, and the quality of it, for the Law respecteth not the quantity of the estate; for not onely

(r) Doct. & Stud. Brook tit. Villenage. 70.

(s) Tenant

(s) L. 5 E. 4. 61.

(t) 21 H. 3. 6. 37.

(s) Tenant in tail, and Tenant for life of a Villeine shall have the perquisite of the Villeine in fee, but (t) Tenant for years, and Tenant at will shal also habe it in fee.

ment que le matter soit trove p̄ le Sñr, & encoūter le villein, come est dit.

chised, although the matter bee found for the Lord, and against the villeine, as it is said.

But the Law respecteth the quality, for in what right he hath the villeine, in the same right shall he have the perquisite, as in the case of the Executor abovesaid, and in the case of the Bishop (u) that hath the Villein in right of his Church, he shall have the perquisite in the same right.

(u) 41 E. 1. 21.

(x) 18 E. 3. 29.

(x) So if a man hath a Villein in the right of his wife, he shall have the perquisite also in her right. But if the purchase be after issue had, then the Baron shall have the perquisite to him and his heirs, because by the issue he is entituled to be Tenant by the Curtesie in his own right.

Vide sect. 193. (y) Pl. Com. 276. b. in Greisbroks case.

¶ *Protestation.* (y) Protestatio is an exclusion of a conclusion that a party to an action may by pleading incurre, or it is a safegard to the party which keepeth him from being concluded by the plea he is to make, if the issue be found for him: but in this case without a protestation, albeit the issue be found for the Lord, the Villein shall be enfranchised, as it appeareth hereafter in this Section.

## Sect. 193.

Brit. fol. 79. 125. 126. a.

¶ *Coserra trie en le County, &c.*

We tried, that is, as it is intended by the verdict of xij. men, that is called in Law a tryall, triatio.

(a) 7 E. 3. 50. 26 E. 3. 73. 38 E. 3. 34. 40 E. 3. 36. 36 E. 3. 4. 31. 44 E. 3. 36. 47 E. 3. 26. 22 H. 6. 52. 35 H. 6. 12. 39 H. 6. 24. Vide sect. 534.

(a) In this case the Law doth favour the villein in the issue, for otherwise by the rule of Law in like cases he ought to answer to the special matter, viz. to the regardancy, but in favour of liberty he may reply that he is free and of free estate, and consequently this issue concerning the person shall be tryed where the writ is brought.

(b) 2 Mar. Dyer, 112.

(b) The like Law it is, if issue be joyned upon the Ideocy of the Plaintiff or Defendant, it shall be tryed where the writ is brought, because it concerneth the person.

¶ *In favorem libertatis.* It is commonly said, that three things be favoured in Law, Life, Liberty, Dower.

(c) Fortescue cap. 42.

(c) Impius & crudelis judicandus est qui libertati non favet: Angliæ jura in omni casu libertati dant favorem.

Tryall is to find out by due examination the truth of the point in issue or question between the parties, where-

¶ Item si Villeine suist un action de tresp̄as, ou un auter action envers son Sñr en un Countie, & le Sñr dit q̄ il ne serra respondus, pur ceo q̄ il est son villein regardant a son manor en auter Countie, & le Plaintife dit que il est franke & de franke estate, & nemy villein, ceo serra trie en le Countie lou le Plaintife avoit conceive son action, & nemy en le cōūty lou le manor est, & ceo est in favorem libertatis, & pur cel cause un estatute fuit fait, an. 9 R. 2. cap. 2. le tenor de quel ensuest en tiel forme. Item pur la ou pluſors villeins, & Nieſes, sibien des graundes Seigni-

Also if a Villeine sueth an action of tresp̄asse, or any other action against his Lord in one County, and the Lord saith, that he shall not be answered, because he is his Villeine regardant to his Mannour in another County, and the Plaintife saith, that hee is free, and of a free estate, and not a villein, this shall be tryed in the County where the Plaintife hath conceived his action, and not in the County where the Mannor is, and this is in favour of liberty. And for this cause, a Statute was made *an. 9 R. 2. cap. 2.* the tenor whereof followeth in this forme. Also for that where many villeins & neifs,

Ogly

ors, come des auters gentes, sibñ espirituals come temporals sentuent, deins, cities, villes, & lieur enfranchise, come en la citie de Londres, & auters semblables, & feignont divers suits envers lour Sñrs a cause de eur fait franks per le respons de lour Sñrs: Accorde est & assentus, q̃ les Sñrs, ne auters, ne soyent my forbarres de lour Villeines per cause de lour respons en ley. Perforce de quel estatute, si alcun villeine voylloit suer alcun maner de action a son use de mesn en alcun Countie, ou il est fort a trier envers son Seignior, le Sñr poyt estyer de pleader que le Plaintife est son villein, ou de faire protestation que il est son villein, & de pleder son auter matter en barre. Et si ils sont a issue, & issue soit trove pur le sñr, donqs le villein est villeine come il fuit devant per force de mesme le statute. Mes si le issue soit trove pur le villeine, donque le villeine est franke, pur ceo que le

as well of great Lords as of other men, as well of spirituall and temporal, flie and go into Cities, Townes and Places franchised, as into the City of London and other like places, and feigne divers suits against their Lords, because they would make themselves free by the answer of their Lords: It is accorded and assented, that Lords nor others, shall not be forebarred of their villeins by reason of their answer in Law. By force of which statute, if any villeine will sue any manner of action to his owne use in any County where it is hard to try against his Lord, the Lord may chuse whether he will plead that the Plaintife is his villeine, or make protestation that hee is his villeine, and plead his other matter in bar. And if they be at issue, and the issue be found for the Lord, then the villeine is a villeine as hee was before, by force of the same Statute. But if the issue be found for the villeine, then the villeine is free, because that the Lord tooke

upon judgement may be given. And as the question between the parties is twofold, so is the tryal thereof: for either it is quæstio juris, (and that shall be tryed by the Judges, either upon a Demurrer, special verdict or exception, for Cuilibet in sua arte perito, est credendum: & quod quisque norit, in hoc se exerceat, and it is commonly and truly said, Ad quæstionem juris non respondent juratores) or it is quæstio facti. And the tryal of the fact is in divers sorts, whereof a light touch is given before, Sect. 102. of these a tryal by 12 men (here intended by Littelton) is the most frequent and common: And some few rules of Law are necessary here to be remembred (for the better understanding of the Books of Law hereafter) where and from what place, viz. De quo vicineto, out of what neighbourhood, the Jury shall come, a necessary point to be known; for if there be a mistryall (that is) if the Jury commeth out of a wrong place, or returned by a wrong Officer, and give a verdict, judgement ought not to be given upon such a verdict; (d) Wherein the most general rule is, that every tryall shall be out of that Town, Parish, or Hamlet, or place known out of the Town, &c. within the Record, within which the matter of fact issuable is alledged, which is most certain and nearest thereunto, the inhabitants whereof may have the better & more certain knowledge of the fact: as if the fact be alledged in quadam platea voca' King-street in Civitate Westm', in Com' Midd. In this case the Visne cannot come out of Platea, because it is neither Town, Parish, Hamlet, nor place out of the neighbourhood whereof a Jury may come by Law, but in this case it shall not come out of Westminster, but out of the Parish of St. Margaret, because that is the most certain. But therein

Vide sect. 234.

Vide sect. 102.

Vide sect. 234. more of this matter.

(d) 3 E. 3. 73. 20 H. 6. 30. 7 H. 4. 27. 9 H. 5. 8. 8 H. 6. 34. 7 H. 6. 27. 17 E. 3. 56. 43 E. 3. 5. 47 E. 3. 6, 34 H. 6. 4.

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therein also it is to be noted, that if it had been alledged in Kingſtreet, in the Parish of St. Margaret, in the County of Middleſex, then it ſhould have come out of Kingſtreet, for then ſhould Kingſtreet have been eſteemed in Law a Town: (e) for whenſoever a place is alledged generally in pleading (without ſome addition to declare the contrary, as in this caſe it is) it ſhall be taken for a town. (f) And albeit Parochia generally alledged is a place incertain, and may (as we ſee by experience) include divers towns, yet if a matter be alledged in Parochia, it ſhall be intended in Law that it containeth no more towns then one, unleſſe the party doth ſhew the contrary. (g) But when a parish is alledged within a City, there without queſtion the Viſne ſhall come out of the parish, for that is more certain then the City.

Seignior ne poſſt al commencement pur ſon plee q̃ le villeine fuit ſon villein, mes ceo poſſt per proteſtation, &c. not at the beginning for his Plee that the Villeine was his Villeine; but took this by proteſtation, &c.

(h) If a treſpaſſe be alledged in D. and Nul tiel ville is pleaded, the Jury ſhall come out De corpore comitatus; but if it be alledged in S and D. and nul tiel ville de D. is pleaded, the Jury ſhall come out de Vicineto de S. for that is the more certain. So if a matter be alledged within a Mannor, the Jury ſhall come de Vicineto manerii; but if the Mannor be alledged within a Town, it ſhall come out of the Town, becauſe that is moſt certain, for the Mannor may extend into divers Towns. And all theſe points were reſolved by all the Judges of England, upon conference between them in the caſe of John Arundel Eſquire, indited for the death of William Parker †.

(i) In a real action where the Demandant demands land in one County, as heir to his father, and alledges his birth in another County, if it be denyed that he is heir, it ſhall not be tryed where the birth was alledged, but where the land lyeth, for there the Law preſumes it ſhall be beſt known who is heir. But if the Defendant make himſelf heir to a woman, for that is the ſurer and more certain ſide, and the mother is certain, when perhaps the father is incertain; and therefore there it ſhall be tryed, where the birth is alledged, becauſe they have more certain connuſance then where the land lyeth. And ſo it is where generally baſtardy is alledged, the tryal ſhall be in like caſe Mutatis mutandis. (k) If a man plead the Kings Letters Patents, and the other party plead Non conceſſit, it ſhall be not be tryed where the Letters patents bear Date, for they cannot be denyed, but where the land lyeth.

Every tryal muſt come out of the neighbourhood of a Caſtle, Mannor, Town or Hamlet, or place known out of a Caſtle, Mannor Town or Hamlet, as ſome forreſts, and the like, as before, and by the Authorities thereupon quoted, appeareth.

Every plea concerning the perſon of the Plaintiff, &c. ſhall be tryed where the Writ is brought as it appeareth before.

When the matter alledged extendeth into a place at the Common Law, and a place within a Franchiſe, it ſhall be tryed at the Common Law.

(l) In an action againſt two, the one pleads to the Writ, the other to the Action, the plea to the Writ ſhall be firſt tryed; for if that be found, all the whole Writ ſhall abate, and make an end of the buſineſſe.

(m) In a plea perſonal againſt divers Defendants, the one Defendant pleads in bar to parcel, or which extendeth only to him that pleadeth it, and the other pleads a plea which goeth to the whole, the plea that goeth to the whole, (that is) to both Defendants, ſhall be firſt tryed, and of this opinion was Littleton in our Books, for the tryal of that goeth to the whole, and the other Defendant ſhall have advantage thereof; for in a perſonal Action the diſcharge of one is the diſcharge of both. As for example, if one of the Defendants in treſpaſſe plead a releaſe to himſelf, (which in Law extends to both) and the other pleads not guilty (which extends but to himſelf); or if one plead a plea which excuſes himſelf only, and the other plead another plea, which goeth to the whole, the plea which goeth to the whole ſhall be firſt tryed, for if that be found it maketh an end of all; and the other Defendant ſhall take advantage hereof, becauſe the diſcharge of one is the diſcharge of both: but in a plea-real it is otherwiſe, for every Tenant may loſe his part of the land: (n) as if a Præcipe be brought as heir to his father againſt two, and one plead a plea which extendeth but to himſelf, and the other pleads a plea which extends to both as baſtardy in the Demandant, and it is found for him; yet the other iſſue ſhall be tryed, for he ſhall not take advantage of the plea of the other, becauſe one joyntenant may loſe his part by his miſplea. (o) But where an iſſue is joyned for part, and a demurrer for the reſidue, the Court may direct the tryal of the iſſue, or judge the Demurrer firſt at their pleaſure.

(p) If a Venire fac. be awarded to the Coroners where it ought to be to the Sheriff, or the Viſne commeth out of a wrong place, yet if it be Per aſſenſum partium, and ſo entred of record,

(e) 4 E.3.30. 8 E.3.68. 39 H.6.13. Brooke pleading, 61.

(f) 4 E.4.41. 5 E.4.20. 22 E.4.2. 35 H.6.30. 22 H.6.47. lib.1.162. Digges caſe, lib.11. f.25. lib.6. fol. 14.

(g) 1 E.3.8. 7 H.6.38.

(h) 22 E.4. tit. viſne F. 27. 0 H.7.3. b. 31 H.2.7. 22.b. 9 E.4. 3.2. 3 E.4.26. 39 H.6. tielp. 93. 4 E.3.30.

(†) Lib.6, fo.14. Arundels Caſe.

(i) 45 E.2.5.2. 45 E.3.6. & 7. Gernons caſe. 18 E.3.58. 11 H.4.56.b. 57. 19 E.3.36.b. 39 Aſſ.10. 38 Aſſ.30. 35 Aſſ.7.

(k) Mich. 31 & 32 Eliz. Rot.365. in the Kings Bench, inter Edan & Frankline, adjudg.3 Mar. Dyer 129. 18 Eliz. Dyer 353. 17 Eliz. Dyer 342.

(l) 8 E.4.24. 9 H.6.46, 47. 21 H.6.4. 18 Aſſ.7. 30 E.3.16, 17. 7 E.4.11. 27 H.8.30. 11 H.4.68.

(m) 15 E.4.25.b. 9 H.6. 46. 26 E.3. 7 E.4.31. 39 E.3.16,17.

(n) 9 H.6.46. 39 E.3. 16,17.

(o) Lib.10.f.54. and the books there cited.

(p) Mich. 21 & 22 Eliz. Dyer 367. Lib 5.fo.36.b. Barnhams caſe. 39 E.3.2.b. 44 E.3.6. 31 H.6.13. lib.5.fol.40. Dormers caſe.

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it ſhall ſtand: for Omnis conſenſus tollit errorem. And thus much of theſe excellent points of learning: and if you deſire to know the inſtitution and right uſe of this tryal by 12. men, and of the antiquity thereof, and more of this matter, read the 234. Section hereafter, which is worthy of your obſervation. Vid. ſect. 234.

¶ *Eſtatute.* Or ſtatute. This cometh of the Latine word Statutum, which is taken for an Act of Parliament made by the King, the Lords and Commons, and is divided into two branches, general and ſpecial. This ſtatute here mentioned is a general ſtatute, and is darkly and obſcurely penned. Vid. 25 E. 3. cap. 18. F.N.B. 77. c. 26 E. 3. 73.

¶ *Et ſils ſont a iſſue.* (q) Iſſue, exitus, a ſingle, certain, and material point iſſuing out of the allegations and pleas of the Plaintiff and Defendant, conſiſting regularly upon an affirmative and negative to be tryed by twelve men; and it is two-fold a ſpecial iſſue as here in the caſe of Littleton; or general, as in trelpals, not guilty: in aſſiſe, Nul tort, nul diſſeiſin, &c. And as an iſſue natural cometh of two ſeveral perſons, ſo an iſſue legal iſſueth out of two ſeveral allegations of adverſe parties. q) Vid ſect. 414. 7 H. 6. 43. 9 E. 4. 35. 36 H. 6. 15. 5 E. 4. 26. 11 H. 4. 79.

And to make our books more eaſy to be underſtood concerning this point, it is good to ſet down ſome neceſſary rules, among many other concerning joyning of iſſues. An iſſue being taken generally, referreth to the Count and not to the Writ. As in an Account & Writ chargeth him generally to be his Receiver, the Count chargeth him ſpecially to be his Receiver by the hands of T. The Defendant pleadeth that he was never his Receiver in manner and form, &c. this ſhall refer to the Count, ſo as he cannot be charged but by the receipt by the hands of T. 7 E. 3. 14.

(r) A ſpecial iſſue muſt be taken in one certain material point which may be beſt underſtood, and beſt tryed. r) 20 E. 3. iſſue 31. 22 E. 4. 28. 8 E. 3. 8. 9 H. 6. 18. 38 E. 3. 33.

(ſ) An iſſue ſhall not be taken upon a negative pregnant, which implyeth another ſufficient matter, but upon that which is ſingle and ſimple, as Ne dona pas per le fait, imply a gift by parol, therefore the iſſue muſt be Ne dono pas modo & forma. ſ) 21 H. 6. 9. b. 16 E. 4. 5. 24 E. 3. 32. 33. 75. 31 E. 3. Iſſue 17. 13 E. 3. ib. 27. 21 E. 3. 49. 30 E. 3. 8. 10 E. 3. 32. 22 E. 3. 13. 18 E. 3. iſſue 35. 5 H. 7. 8. 31 Aſſ. 25.

(t) An iſſue joyned upon an Abſque hoc, &c. ought to have an affirmative after it: two affirmatives ſhall not make an iſſue, unleſs it be leſt the iſſue ſhould not be tryed. t) 12 E. 4. 4. 8. 2 H. 4. 23. 38 H. 6. 22. 40 E. 3. 5. 5 E. 3. 24.

(u) Some iſſues be good upon matter affirmative and negative, albeit the affirmative and negative be not in preciſe words, as in debt for Rent upon a leaſe for years, the Defendant pleads that the Plaintiff had nothing at the time of the Leaſe made, the Plaintiff replyeth that he was ſeiſed in fee, &c. this is a good iſſue. u) 2 H. 7. 4. 5 H. 7. 12. 26. 11 H. 4. 83. 6 E. 4. 6. b. 26 H. 8. Dier 6. in Formedon. 28 H. 8. Dier 311. 18 H. 6. 8. 9. 15 E. 4. 32. 32 H. 6. 23. 7 H. 6. 7. 43 Aſſ. 4. 9 E. 4. 36. Pl. Com. 127. a. 36 H. 6. 15.

(w) Where the iſſue is joyned of the part of & Defendant, the entry is, Et de hoc ponit ſe ſuper patriam, but if it be of the part of the Plaintiff, the entry is, Et hoc petit quod inquiratur per patriam. w) 26 H. 8. 3. 18. El. Dier 353.

(x) There be ſome negative pleas that be iſſues of themſelves, whereunto the Demandant or Plaintiff cannot reply, no more than to a general iſſue, which is, Et prædictus A. ſimiliter. As if the Tenant do vouch, and the Demandant counterplead that the Vouchee or any of his Anceſtors had any thing, &c. whereof he might make a Feoffment, he ſhall conclude, Et hoc petit quod inquiratur per patriam, & prædictus Tenens ſimiliter. So in a fine pleaded by & Tenant, &c. the Demandant may ſay, Quod patres finis nihil habuerunt, & hoc petit quod inquiratur per patriam, & præd' tenens ſimiliter. And ſo in a Writ of Dower, the Tenant plead Unques ſeiſie que Dower, he ſhall conclude, Et de hoc ponit ſe ſuper patriam, & præd' petens ſimiliter, and ſo in many other caſes, and of this opinion was Littleton in our book. (y) A man leadeth his wife enſeint with a child, iſſue ſhall not be taken that ſhe was not enſeint by her husband on the day of his death, for Filiatio non poteſt probari, but the iſſue muſt be, Whether ſhe was not enſeint the day of his death. x) 22 H. 6. 57. 59. 33 H. 6. 21. 3. H. 7. 9. 12 E. 4. 13. 19 E. 3. 53. 77. 78. 22 E. 3. 16. 17. 24 E. 3. 50. 40 E. 3. 19. y) 41 E. 3. 11. b.

(z) A proteſtation availeth not the party that taketh it, if the iſſue be found againſt him, and therefore if the iſſue be found for the Villein, he is infranchiſed for ever. And yet in ſome ſpecial caſe albeit the iſſue be found againſt him that maketh the proteſtation, yet he ſhal take benefit of his proteſtation; (†) as if a man entreth into Warranty, and taketh by proteſtation the value of the land, albeit the plea be found againſt him, yet the proteſtation ſhall ſerve him for the value. z) 10 E. 4. proteſt. 5. 10 E. 4. 12. 32 Aſſ. 9. 30 E. 3. 14. 9 H. 6. 59. Vide ſect. 192. †) 30 E. 3. 14.

## *Sect.* 194.

¶ Item le Sñr ne poet mayhemer ſon villeine. Car ſil mayhem a ſõ villein, A Lſo the Lord may not mayme his Villeine. For if he mayme his Villeine, ¶ M *Ayhemer*, (a) or Mehaigner, a French word of which commeth Mayhim; Mayhemium (id eſt) membri mutilatio, and a) Stanf. li. 1. cap. 41. Glanvil lib. 14. cap. 5. Bract. lib. 3. fol. 144. 145. Brit. cap. 25. fol. 48. 49. Fleta lib. 1. cap. 38.

Mirror cap. 1. Sect. 9.

and membrum eſt pars corporis habens deſtinatam operationem in corpore. Mayhemium vero dici poterit ubi aliquis in aliqua parte ſui corporis effectus ſit inutilis ad pugnandum. And the Law hath ſo appropriated this word Mayhem, which our Author here uſeth to this offence, as mayhemavit cannot be expreſſed by any other word, as mutilavit, truncavit, or detruncavit, or the like.

Vide Sect. 1.

¶ *Il ſerra indite*, or rather endite, and ſo is the originall, for it commeth of the French word enditer, and ſignifieth in Law an accuſation found by an Enqueſt of 12. or more upon their Oath, and the accuſation is called Indictamentum. And as the Appeal is ever the ſuit of the party, ſo the Inditement is alwayes the ſuit of the King, and as it were his Declaration.

(b) Lamb. Juſt. of peace.

(b) Some derive it from the Greek word ἐνδείκνυμι, to accuſe.

(c) Vide 1 H. 4 6. b.

¶ (c) *Navera, &c. Appeale de mayhem.* Becauſe in that Appeal he ſhal recover but damages, which the Lord after Execution might take again, and ſo the judgment inutile and illuſory, and Sapiens incipit à fine. And the Law never giveth an action where the end of it can bring no profit or benefit to the Plaintiff. But here it is to be obſerved, that albeit the party grieved can have no action for the Mayhem, yet at the Kings ſuit he ſhall be puniſhed therefore, for the reaſon hereafter expreſſed in this Section.

(d) Fleta lib. 8. cap. 40. Britt. cap. 25. Brack. 145. Mirror cap. 3.

(d) And in ancient time there were Appeals de plagis & de impriſonamento, but they are out of uſe, and turned to actions of treſpaſs.

(e) Regiſt. Judic. 25. Lib. 8. fol. 59. Beechers caſe.

¶ *Fine*, Finis. Here Fine ſignifieth a pecuniary puniſhment for an offence, or a contempt committed againſt the King, and regularly to it Impriſonment appertaineth. And it is called finis, becauſe it is an end for that offence. (e) And in this caſe a man is ſaid Facere finem de tranſgreſſione, &c. cum Rege, to make an end, or fine with the King for ſuch a tranſgreſſion.

(f) Vide ſect. 74. 174. 441.

It is alſo taken for a Summ given by the Tenant to the Lord for concord, and an end to be made. (f) It is alſo taken for the higheſt and beſt aſſurance of Lands, &c.

(g) Lib. 8. f. 59. Beechers caſe, F. N. B. 76.
(h) Glanv. lib. 9. cap. 11. Magna Charta cap. 14. Fleta lib. 2. c. 43. & 60. & lib. 1. cap. 43. Brack. lib. 3. fol. 116.
(i) 22 E. 3. 1. & 2. 14 F. 2. amerciam. 16. 2 R. 2. ibid. 26. &c.
(k) Pl. Com. 401. Coles caſe, 37 H. 6. 21. Lib. 5. fol. 49. Vaughans caſe.
(l) Vaughans caſe ubi ſupra, Beechers caſe ubi ſupra.

Here it is good to ſee what a fine differeth from an amerciament. (g) Amerciament in Latine is called Miſericordia, for that it ought to be aſſeſſed mercifully, and this ought to be moderated by affeerment of his equals, or elſe a Writ De moderata miſericordia, doth lye: and thereof Glanvill ſaith thus. (h) Eſt autem miſericordia Domini Regis qua quis per juramentum legalium hominum de vicineto eatenus amerciandus eſt, ne aliquid de ſuo honorabili contenemento amittat.

(i) The cauſe of an amerciament in plea real, perſonal, or mixt, (where the King is to have no fine) is for that the Tenant or Defendant ought to render the demand (as he is commanded by the Kings writ) the firſt day: which if he do, he ſhall not be amerced, ſo as for the delay of the Tenant or defendant doth uſe he ſhall be amerced. (k) And albeit the amerciament cannot be impoſed nor the King fully intituled thereunto until judgment be given, becauſe by the judgment the wrong is diſcerned, yet a pardon before judgment, after judgment given, ſhall diſcharge the party, becauſe the originall cauſe, viz. the delay, &c. is pardoned. (l) What then if a Præcipe be brought againſt an Infant, and hanging the plea, he cometh of full age?

il ſerra de ceo endite a le ſuit le Roy, & ſil ſoit de ceo attaint, il ſerra pur ceo un grievous fine & ranſome al Roy. Mes il ſemble que villeine navera pas per le ley un appeale de Mayhem envers ſon Sir, Car en appeale de Mayhem home recovera forſq; dams, & ſi le villeine en ceo cas recovera dams evers ſon Seignior, & ent avoit execution, le Seignior poit prender ceo que le villeine avoit en execution de le villeine, & iſſint le recoverie voide, &c.

he ſhall of that be indicted at the Kings ſuit. And if he be of that attainted, he ſhall for that make grievous Fine and Ranſome to the King. But it ſeemeth that the villein ſhall not have by the Law any Appeal of Mayhem againſt his Lord; for in Appeal of Mayhem, a man ſhall recover but his damages. And if the Villein in that caſe recover dammages againſt his Lord, and hath thereof execution, the Lord may take that the villein hath in execution from the villein, and ſo the recovery is voyd, &c.

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he ſhall be amerced for the delay after his full age. So likewiſe if the Demandant or Plaintiff be Nonſuit, or Judgment given againſt him, he ſhall be likewiſe amerced pro falſo clamore.

(m) And for the payment of this amerciament, the Defendant or Plaintiff, &c. ſhall find pledges, and thoſe Demandants or Plaintiffs, that ſhall find no pledges (as the King, the Queen, an Infant, &c.) ſhall not be amerced. And therefore when ſuch are Demandant or Plaintiff, the Writ ſhall not ſay, Si Rex, &c. fecerit te ſecurum de clamore ſuo proſequendo.

(m) F.N.B. 31. f. 47. c. & 101. a. Bract. l. 4. fol. 254. 17 E. 3. 75. 18 E. 3. 2. Britt. amerciam. 53. 43 Aſſ. 45. &c.

(n) If a Writ do abate by the act of the Demandant or Plaintiff, for matter of form, the Demandant or Plaintiff ſhall be amerced; but if it abate by the act of God as by the death of one, where there is two, or the like, there ſhall be no amerciament. And to an amerciament, impriſonment belongeth not, as it doth to a fine or ranſome. If you deſire to read more of fines and amerciaments, Vide lib. 8. fol. 38, 39, &c. Greſleys caſe, & lib. 11. fol. 43, 44. Godfreys caſe.

(n) Beechers caſe, lib. 8. fol. 60. b.

(o) It is to be known that Wit, Wita, is an old Saxon word, and ſignifieth an amerciament, as Fledwit an amerciament for fleeing or being a fugitive, and ſo is Fleſmeſwite, Blodwite an amerciament for drawing of blood, Fredwite concerning warfare, and ſo Letherwite, Childwite, Wardwite, and the like. Sometimes it ſignifieth forfeiture, ſometime freedom, or acquittall.

(o) Fleta lib. 1. cap. 43. Stat. de expoſit. vocabulorum.

(p) And Bote is alſo an ancient Saxon word, and ſometime ſignifieth amerciament, or compenſation, as Theftbote, Manbote, or freedom from the ſame, as Brigbote, Caſtlebote, Burghbote.

p) Lam. explication of Saxon words. Leges Inæ, cap. 19.

Wera or Were (q) ſometime ſignifieth amerciament or compenſation, but properly Wera Anglice idem eſt in Saxonis lingua vel pretium vitæ hominis appretiatum. Which and the like words you ſhall often read in ancient Charters.

q) Lamb. ubi ſupra. Fleta lib. 1. cap. 43.

¶ *Ranſome.* (r) Redemptio is here taken for a grand ſum of money, for redeeming of a great Delinquent from ſome heynous crime, who is to be captivate in priſon until he payeth it; ſome hold it to amount to his whole eſtate, and others hold that ranſome is a treble fine. (ſ) But in legal underſtanding a fine and ranſome are all one, for upon the Statute of Merlebridge cap. 3. upon theſe words Non ideo puniatur Dominus per Redemptionem.

r) Dyer 6 Eliz. 232.

ſ) See the ſecond part of the Inſtitutes Merlebr. cap. 3.

(t) The Tenant ſhall not have (where the Lord diſtraineth within his fee where nothing is behind) an Action of Trepaſſe Quare vi & armis againſt his Lord, for therein the Lord ſhould be puniſhed by redemption, that is, by fine, and in that action the fine is very ſmall. And this is manifeſt by many Authorities in all ſucceſſion of ages; and this appeareth by our Author in this place, for he ſaith, Il ſerra pur ceo un grievous fine & ranſome. Where fine and ranſome muſt of neceſſity in his opinion be taken for all one: for if the fine and ranſome were divers, then ſhould the party, that mayhemed the Villein pay two ſums, one for a fine, and another for a ranſome, which never was done. And aptly a redemption and a fine is taken to be all one; for by the payment of the fine he redeemeth himſelf from impriſonment that attendeth the fine, and then there is an end of the buſineſſe.

t) 5 H. 7. 10. 48 Eaſt. 5, 6. 41 E. 3. 26. 44 E. 3. 13. 2 H. 4. 4. 11 H. 4. 78. 1 H. 6. 6. 9 H. 7. 14. 8 E. 4. 15. 10 E. 4. 7. 20 E. 4. 3. 21 E. 4. 3. Mich. 17 & 18 Eliz. Bevels caſe, lib. 4. fol. 11 & lib. 9. fol. 76. Combs caſe.

It ſignifieth properly a ſum of mony paid for the redemption of a captive, and is compounded of re and emo, that is, to redeem or buy again. And it is to be known, that (u) by the ancient Law of England, if the Defendant in an Appeal of Mayhem had been found guilty, the judgment againſt the Defendant had been, that he ſhould loſe the like member, that the Plaintiff loſt by his means, as if the Plaintiff had loſt an hand, the Defendant alſo ſhould loſe one, & ſic de cæteris: In reſpect whereof the Writ ſaid, (w) Felonice mayhemavit, for that the Defendant ſhould loſe a member.

u) 40 Aſſ. 9. Mirror c. 4. & cap. 5. ſect. 18 Britton, cap. 25. fol. 48. Bract. lib. 3. fol. 144, 145. Fleta, lib. 1. cap. 38.

w) Bract. ubi ſupra. Britt. cap. 3. fol. 77. b.

Alwayes at the Common Law, when the Defendant ſhould loſe life or member, the Writ ſaid Felonice, &c. And now albeit the Law be changed (for at this day the Plaintiff ſhall, as our Author ſaith recover but damages) yet the Writ of Appeal ſaith ſtill Felonice.

Note the life and members of every ſubject are under the ſafeguard and protection of the King; for as Bracton (x) ſaith, Vita & membra ſunt in poteſtate Regis. And therewith agreeth a notable Record, Paſch. 19 E. 1. coram Rege Rot. 36. Northr. vita & membra ſunt in manu Regis, to the end that they may ſerve the King and their Country when occaſion ſhall be offered. Nay, the Lord of the Villein for the cauſe aforeſaid cannot mayheme the Villein, but the King ſhall puniſh him for mayheming of his Subject (for that hereby he hath diſabled him to do the King ſervice) by fine, ranſome, and impriſonment, until the fine and ranſome be paid. So as there is a manifeſt diverſity between a ranſome and an amerciament. For ranſome is ever when the Law inflicteth a corporall puniſhment by impriſonment, (and ſo is alſo a fine) but otherwiſe it is of an amerciament, as hath been ſaid. And (y) Ancients have ſaid, that Ranſome neſt forſque redemption de paine corporel per fine des deniers. This offence of mayheme is under all felonies deſerving death, and above all other inferiour offences, ſo as it may truly be ſaid of it, that it is, Inter crimina majora minimū, & inter minora maximum. And in my Circuit in Anno 11. Jacobi Regis in the County of Leiceſter, one Wright, a young, ſtrong, and luſty

x) Bract. lib. 1. fol. 6. Paſch. 19 E. 1. coram Rege Rot. 36. Northt.

y) Mirr. ca. 5. ſect. 1, & 3.

Rogue to make himſelf impotent, thereby to have the more colour to beg or to be relieved without putting himſelf to any labour, cauſed his companion to ſtrike off his left hand; and both of them were indited, fined, and ranſomed therefore, and that by the opinion of the reſt of the Juſtices for the cauſe aforeſaid.

¶ *Voyde, &c.* Here, by (&c.) is applyed a maxim in Law, Quod inutilis labor & ſine fructu non eſt effectus Legis. And again, Non licet, quod diſpendio licet. And, Sapiens incipit à fine; and, Lex non præcipit inutilia. (z) Therefore the Law forbiddeth ſuch recoveries whoſe ends are vain, chargeable and unprofitable.

(z) Vide ſect. 273. & 578.

## *Sect.* 195.

¶ *DEmandant*, Perens, Is he which is Actor in a reall Action, becauſe he demandeth Lands, &c. And Plaintife, Querens, in actions perſonals and mixt, quia queritur de injuria &c. Tenant, tenens, in reall actions, and defendant, defendens in actions perſonal and mixt.

¶ *Defence.* Commeth of the word defendo, ſo called of the manner of the pleading, viz. prædict' A. B. defendit vim & injuriam, &c.

For example, in a perſonal action brought by A. B. againſt C. D.; the defence is, & prædictus C. D. defendit vim & injuriam quando, &c. & damna, & quicquid quod ipſe defendere debet, &c.

In this defence there be three parts to be conſidered; Firſt, when he defendeth the wrong and the force, this hath a double effect, viz. to make himſelf party to the matter; and this is the reaſon, that the defendant in this and the like actions can plead no plea at all before he makes himſelf party by this part of the defence, as it appeareth here by Littleton, that (a) if the Defendant will plead in diſability of the perſon of the Plaintiff, he muſt firſt make himſelf party by this firſt part of the defence. Neither can he plead to the juriſdiction of the Court without this part of the defence. Secondly, (b) By the defence of the Dammages, he affirmeth, that the Plaintiff is able to ſue, and (upon juſt cauſe) to recover Damages. Thirdly, In the laſt part, viz. and all which he ought to defend, when and where he ought, he affirmeth the juriſdiction of the Court, Et ſic de ſimilibus. And of ſuch neceſſity is it for the Tenant or Defendant to make a lawful defence, as (c) albeit he appeareth and pleads a ſufficient bar without making defence, yet judgement ſhall be given againſt him.

¶ ITem ſi un Villeine ſoit demandant ẽ action real, ou Plaintife en action perſonal, vers ſon Sñr, ſi le Sñr voile plede en diſabilitie de ſon perſon, il ne poit faire pleine defence, mes il defendera forſq; tort & force, & demandera judgement ſil ſerra reſpondus, & monſtre ſon matter maintenant, coñt il eſt ſon villein, & dõera judgment ſit ſerra reſpondue.

ALſo if a Villein be demandant in an action real, or plaintiff in an action perſonall againſt his Lord, if the Lord will plead in diſability of his perſon, he may not make plain defence, but he ſhall defend but the wrong and the force, and demand the judgment if he ſhall be anſwered, and ſhew his matter by and by how he is Villeine, and demand judgment if he ſhall be anſwered.

(a) 40 E.3.16, 14. H.6.18. 35 H.6.12. 1 E.4.15.

(b) 29 E.3.23. 8 H.6.3.

(c) 36 H.6. Judgment 58.

(d) If Villenage be pleaded by the Lord in an action real, mixt or perſonal, and it is found that he is no villein, the bringing of a Writ of Error is no enfranchiſement, becauſe thereby he is to defeat the former judgement; and if in the mean time, the Plaintiff or Demandant bring an action againſt the Lord, he need make no proteſtation, ſo long as the record remains in force, for at that time, he is free, but the Lord ſhall be reſtored to all by a Writ of Error.

(d) 18 E.4.6. & 7.

## *Sect.* 196.

Bract. lib. 5. fol. 421. Britton. cap. 49. fol. 135. Mirror, cap. 2. Sect. 18.

¶ *UN eſt lou Villeine ſuiſt action, &c.* Littleton Here

¶ ITem 6. maners de homes y ſont queux ſils ſuont ac-

ALſo there are ſix manner of men who if they ſue judgment

tion

tion, judgement poit eſtre demands ſils ſerrõt reſpondus, &c. Un eſt, lou villeine ſuiſt action envers ſon Seignior, come en le cas avantdit.

may be demanded, if they ſhall be anſwered, &c. One is where a villeine ſueth an Action againſt his Lord, as in the caſe aforeſaid.

rehearſeth ſix kinds of diſabilities of the perſon, diſabling him to ſue any action real, perſonal, or mixt. 13 H. 4. Surety 12. a Gardian ſhall diſable.

¶ *Sils ſerront reſpondus.* This is the legal concluſion of the Plea, when the plea is in diſability of the perſon. And of the verb reſpondere came reſponſalis, often uſed in the ancient Authors of the Law. (f) Reſpõſalis was he, that was appointed by the Tenant or Defendant, in caſe of extremity and neceſſity, to alleage the cauſe of the parties abſence, and to certifie the Court upon what tryal he will put himſelf, viz. the Combate or the Country. So as his power was more then the Eſſoiner which caſteth an Eſſoign only to excuſe the abſence of the party, as an eſtranger which caſteth a protection doth. For by the Common Law, the Plaintiff or Defendant, Demandant or Tenant could not appear by Attorney without the Kings ſpecial Warrant by Writ or Letters Patents, but ought to follow his Suit in his own proper perſon (by reaſon whereof there were but few Suits) (g) Abuſion eſt à reteiner Attorny ſans breve de la Chancery. And therefore Bracton ſaith truly, (h) Attornatus hæc omnia facere poteſt (that is, plead all manner of pleas) Eſt igitur magna differentia inter Attornatum & Reſponſalem. So as the Statutes that give the making of Attorneys, habe worn out Reſponſalis. Now what manner of men Attorneys ought to be, or rather what they ought not to be; hear what Antiquity hath ſaid, (i) Attorneys poient eſtre touts ceux aux queux ley voile ſuffer, ſems ne poient eſt Attorneys, ne enfans, ne ſeife, ne nul que eſt en garde ou autrement faut de foy, ne nul criminous, ne nul eſloigne, ne nul que neſt à le Foy le Roy, ne nul que ne poet eſte Counter, &c.

(f) Bract. lib. 4. 4 fol. 215. b. & lib. 5. fol. 349. Fleta lib. 6. cap. 11. Glanvil lib. 11. cap. 1. Britton cap. 126. Vide W. 1. cap. 42. F.N.B. 25. C. Regiſt. 9.

(g) Mirr cap. 5. Sect.

(h) Bracton ubi ſupra.

(i) Mirror cap. 2. ſect. 21.

## *Sect.* 197.

¶ Et ii. eſt lou un home eſt utlage ſur action d'det, ou Treſpas, ou ſur auſ act, ou Indictment, le Tenant ou defendant poit monſtre tout le matter de record, & lutlagarie, & demaunde judgement ſil ſerr reſpondue, pur ceo que il eſt hors de la ley de ſuer aſcun action durant le temps que il ſoit utlage.

THe 2. is, where a man is outlawed upon an Action of Debt or Treſpaſſe, or upon any other action or indictment, the tenant, or the defendant may ſhew all the matter of Record and the Outlawry, and demand judgement if he ſhall be anſwered, becauſe he is out of the Law to ſue an Action during the time that he is outlawed.

¶ *Et 2. eſt* (k) *lou un home eſt utlage, &c.* But theſe generall words receive a diſtinction, viz. (l) if an Executor or an Adminiſtrator ſueth any Action, Utlary in the Plaintiff ſhall not diſable him, becauſe the Suit is in auter droit, that is, in the right of the Teſtator, and not in his own right. And for the ſame reaſon, (m) a Mayor and Communalty ſhall habe an action though the Mayor be outlawed. (n) In a Writ of Error to reverſe an Utlary, Utlary in that ſuit, or at any ſtrangers ſuit, ſhall not diſable the Plaintiff, becauſe if he in that action ſhould be diſabled, if he were outlawed at ſeveral mens ſuits, he ſhould never reverſe any of them. (o) In an Attaint, Outlary in the Plaintiff cannot be pleaded in diſability of the perſon. (p) Outlary in Cheſter or Durham ſhall not diſable the Plaintiff in any Court at Weſtminſter, &c. (q) Minor vero & qui infra ætatem 12 annorum fuerit, utlagari non poteſt, nec extra legem poni, quia ante talem ætatem non eſt ſub lege aliqua nec in decenna. (r) He that is abjured the Realm, may be diſabled, for that he is extra legem, and yet he is not properly outlawed.

(k) Bracton lib. 5. fol. 421. Britton cap. 22. fol. 39. Mirr. c. 3. de exceptions a provors ca. 4. de faults puniſhable.

(l) 21 E. 4. 49. b. 21 H. 5. 30. b. 14 H. 6. 15.

(m) 12 E. 4. fol. 12.

(n) 7 H. 4. 42.

(o) 23 H. 8. c. 3. 2 H. 7. 7

(p) Mirror cap. 3. acc. 12 E. 4. 16. 33 H. 6. cap. 2.

(q) Bract. lib. 3. fol. 125. 3 H. 5. utlagary 11. 38 E. 3. 5.

(r) Britton fol. 39.

¶ *Monſtre tout le matter de record.* Here note two things firſt, by this word, (Monſtre) that (ſ) when any man pleads an Utlary in diſability of the perſon, that he muſt ſhew

(ſ) 20 E. 2. Coron. 232. 19 Aſſ. p. 10. 3 H. 6. 25. b. 37 H. 5. 23. 5 H. 7. 6 Eliz. Dyer 228. F.N.B. 244 Stanf. Pl. Coron. 105

shew forth the Record of the Outlawry, maintenant sub pede sigilli, (because the Plea is but dilatory) unless the Record be in the same Court. But if he plead an Outlawry in bar, if it be denyed, he shall have a day to bring it in.

(r) 28 Ass. 19. 12 E. 3. Vtlagarie 3. M. 4 & 5 E. 3. Dyer 222. 3d E. 3. 13.

Secondly, (r) before the Defendant can disable the Plaintiff, the Outlawry must appear of Record, and the Judgment after the Quinto exactus given by the Coroners in the County Court, is not sufficient untill the Writ of Exigent be returned, and the Outlawry appear of Record: which is manifested by Littletons own words, (viz.) Matter de Record, whereof see more hereafter, Sect. 503.

(u) Trin. 44 El. in Com. Banc. inter Mere & Dolounte, 33 H. 6. 1. 11 H. 4. 31. Dier 3 Eliz. 192. 5 Eliz. 227. 4 H. 4. c. 1. case 8 H. 4. 17. 37 H. 6. 17. 33 E. 3. Err. 77. 21 H. 5. 20.

It is to be observed, That there be two kinds of appearances before the Quinto exactus, to avoid the Outlawry, viz. an Appearance in deed, that is, to render himself, &c. And the other is by an appearance in Law, (u) that is, by purchasing a Supersedeas out of the Court where the Record is, which is an appearance of Record: and therefore though it be not delivered to the Sheriff before the Quinto exactus, yet it shall avoid the Outlawry, and so are the books that speak hereof to be intended.

(w) 33 H. 6. 19. b. &c.

(w) If a man be outlawed at the suit of one man, all men shall take advantage of this personal disability. And so it is in case of Alien nee, and of Excommengement: but otherwise it is in case of Villenage, for that disability is only given to the Lord.

(x) 44 E. 3. 17.

¶ *Durant le temps que il utlage.* (x) If the Defendant plead an Outlawry in the Plaintiff, in disability of his person, and the Plaintiff after that plea pleaded purchase a Charter of Pardon because the Charter hath restored him to the Law, the Defendant shall answer. So note, the disability abateth not the Writ, but disinableth the Plaintiff untill he obtaineth a Charter of Pardon, and so it appeareth here by Littleton.

(y) 9 El. Dyer 262. 7 H. 4. 1. b. Stam. Pl. Coron. 188. Lib. 5. fol. 109. in Foxleys case, 28 E. 3. 92. 29 Ass. p. 47. 63. 30 H. 6. 5.

¶ *Judgement sil serra respondue.* (y) If the ground or cause of the Action be forfeited by the Outlawry, then may the Outlawry be pleaded in barr of the Action, as in an Action of Debt, Detinue &c. But in reall Actions, or in personall, where dammages be incertain, (as in Trespass of Battery, of Goods, of breaking his Close, and the like) and are not forfeited by the Outlawry, there Outlawry must be pleaded in disability of the person.

(z) Mir. c. 1. sect. 3. &c. 3. & 4. æque cap. 5. sect. 1.

(z) And it is to be observed, That in the Reign of King Ælfred, and untill a good while after the Conquest, no man could have been outlawed but for Felony, the punishment whereof was death: but now the Law is changed, as it appeareth by that which hath been said, and hereby you shall understand old books and Records which say, That an outlawed man had Caput lupinum, because he might be put to death by any man, as a Wolf that hatefull beast might.

(†) Fleta lib. 2. cap. 27. Bract. lib. 3. fol 421. Britt. fol. 20. b.

(†) Utlagatus & waiviata capita gerunt lupina, quæ ab omnibus impunè poterunt amputari, merito enim sine Lege perire debent, qui secundum legem vivere recusant. And another saith,

(a) Mir. cap 4. sect de faults punishable.

(a) Utlage pur felon e tegnie leu pur loup, & est criable Woolfeshered, pur ceo que loup est beast hay de routs gents, & de ceo en avant list al ascun de le occire ou soer del loup dont custome soloit este de Porter les testes al chiefe lieu del Countie, ou de la Franchisa, & soloit leu avoire dun man del Countie pur chescun teste de utlage & de loup. And this agreeth with the Law before the Conquest,

(b) Lamb. fol. 128.

(b) Utlagatus lupinum gerit caput, quod Anglicè Woolfeshead dicitur, & hæc est Lex communis & generalis de omnibus utlagatis.

(c) 2 Ass. P. 3. 2 E. 3. tit. Coron. 148.

(c) But in the beginning of the reign of King E. 3. it was resolved by the Judges, for avoyding of inhumanity, and of effusion of Christian blood, That it should not be lawfull for any man but the Sheriff onely, (having lawfull warrant therefore) to put to death any man outlawed, though it were for Felony, and if he did, he should undergo such punishments and pains of death, as if he had killed any other man, and so from thenceforth the Law continued untill this day. (Note, Woolfeshead and Wulferford is all one.)

† Bract. lib. 3. fol. 421. 8 H. 6. 9. b. 40 E. 3. 5. 35 H. 6. 9. 40 E. 3. 2.

† And after in Bractons time, and somewhat before, Process of Outlawry was ordained to lye in all Actions that were Quare vi & armis, which Bracton calleth Delicta, for there the King shall have a Fine. But since by divers Statutes, Process of Outlawry doth lye in Account, Debt, Detinue, Annuitie, Covenant, Action sur le Statute de 5 Rich. 2. Action sur le Case, and in divers other Common or Civill Actions. But now let us hear what Littleton will say unto us.

## *Sect.* 198.

(a) Bract. l. 3. fo. 415. 427 Mir. c. 1. sect. 3. c. 5. sect. 1. & c. 2. except 2 provers. Flet. l. 6. c. 47. Brit. fol. 29. 13 E. 1. Bre. 677. 25 E. 3. de Natis ultra mare. 31 E. 3. Cosinage 5. 42 E. 3. 2. 9 E. 4. 7.

¶ *A Lien.* (a) Alienigena is derived from the Latine word Alienus, and according

¶ *Le 3. est, un Alien que est nee hors de la ligeance*

The third is, an Alien which is born out of the ligeance of

nostre

noſtre Seignior le Roy, ſi tiel alié voille ſuer un Action reall ou perſonall, le Tenant ou Defendant poit dire que il fuit nee en tiel pais, que eſt hors ô la ligeãce le Roy, & demaund judgement ſi il ſerra reſpondue.

our Soveraigne Lord the King, if ſuch alien will ſue an action real or perſonal, the tenant or defendant may ſay, That he was born in ſuch a Coũtry which is out of the Kings Allegeance, and aske Judgement, if he ſhall be anſwered.

to the Etymology of the word, it ſignifieth one born in a ſtrange Country, under the obedience of a ſtrange Prince or Countrey, (And therefore Bracton ſaith, That this exception, Propter defectum Nationis, ſhould rather be Propter defectum ſubjectionis) or as Littleton ſaith, (which is the ſureſt) out of the ligeance of the KING. Note, here Littleton ſaith not Hors del realme, but Hors de ligeance; for he may be born out of the Realm of England, yet within the ligeance.

11 H.4.26. 14 H.4.19.20 3 H.6.55. 22 H.6.38. Stanf.Pl.Cor. 197.a. Lib.7.fo.1. Calvins caſe. Pl.Com.168. per Sanders. Vid.Sect.1.439.440.441.

And he that is born within the Kings liegeance, is called ſometime a Denizen, quaſi deins nee, born within, and thereupon in Latine called Indigena, the Kings Liegeman, or Ligeus is ever taken for a natural born ſubject. But many times in Acts of Parliament, Denizen is taken for an Alien born, that is infranchiſed or denizated by Letters Patents, whereby the King doth grant unto him, (b) Quod ille in omnibus tractetur, reputetur, habeatur, teneatur, & gubernetur, tanquam ligeus noſter, infra dictum Regnum noſtrum Angliæ oriundus, & non aliter, nec alio modo. But the King may make a particular Denization: (c) As he may grant to an Alien, Quod in quibuſdam Curiis ſuis Angliæ audiatur ut Anglus, & quod non repellatur per illam exceptionem quod ſit alienigena, & natus in partibus tranſmarinis, to enable him to ſue only. The ſeveral ſenſes of which word muſt be gathered, ex antecedentibus, adjunctis, & conſequentibus, and they that take him in that ſenſe, derive the word from Donaiſon, (i) Donatio, becauſe his freedom is given unto him by the King.

(b) 9 E.4.f.8. Pl.Com. 130.b.

(c) Rot.Parl.23 E.1. Elias de Daubinie.

There is another kind, and that is an Alien naturalized, and he muſt be by Act of Parliament. And this Alien naturalized to all intents and purpoſes, is as a natural born ſubject, and differeth much from Denization by Letters Patents, for if he had iſſue in England before his Denization, that iſſue is not inheritable to his father: but if his father be naturalized by Parliament, ſuch iſſue ſhall inherit. So if an iſſue of an Engliſhman be born beyond Sea, if the iſſue be naturalized by Act of Parliament, he ſhall inherit his fathers lands; but if he be made Denizen by Letters Patents, he ſhall not: and many other differences there be between them.

¶ *Liegeance*, à Ligando, Being the higheſt and greateſt obligation of duty and obedience he can be. Liegeance is the true and faithful obedience of a Liegeman or Subject, to his Liege Lord or Soveraign. Ligeantia eſt vinculum fidei: ligeantia eſt legis eſſentia.

Vid. Calvins caſe ubi ſupra.

Ligeantia Domino Regi debita, eſt duplex.

- Perpetua
  1. Originaria, ſive naturalis, ſive nata, (d) and this is always abſolute and incident inſeparable, Nemo patriam in qua natus eſt exuere, nec ligeantiæ debitum ejurare poſſit.
  2. Data, aut per denizationem, aut per naturalizationem, (ut ſupra dictum eſt) iſta ligeantia per denizationem poteſt eſſe ſub conditione.
- Temporanea aut
  - Localis, quia quilibet alienigena qui in hoc Regno ſub protectione Regis degit, Domino Regi ligeantiam debet. And if he be indicted of high Treaſon, the Indictment ſhall ſay, (e) Contra Ligeantiæ ſuæ debitum, & ideo dicitur temporanea & localis, quia non durat niſi quouſque infra Regnum moratur.
  - Limitata, as when one is made Denizen for life, or in Tail, (f) but one cannot be naturalized either with limitation for life, or in tayle, or upon condition: for that is againſt the abſoluteneſs, purity, and indebility of naturall Alliegiance.

(d) 13 El.Dier fo.300.b. Doctor Stories caſe.

(e) 3 & 4 P.& M.Di.144. L.7.f.6.&c. Calvins caſe.

(f) 9 E.4.7. Calvins caſe ubi ſupra.

† An Abbot, Prior, or Priorels Alien ſhall have Actions, reall, perſonall, or mixt, for any thing concerning the poſſeſſions or goods of his Monaſtery here in England, though he be an Alien born out of the Kings Liegeance, becauſe he bringeth it not in his own Right, but

† 13 E.3.br.264.20 E.3. Annuity 24.17 E.3.21. 40 E.3.18.27 Aſſ.48. 14 H.4.37.22 E.4.44. 21 H.7.7. Stanf.Prær.54. Leſtat.de Carliſle. 35 E.1.

but in the right of his Monaſtery, and not in his natural, but in his politique capacity.

(h) Bract.426,427,430. 8 E.3.51. 5 E.2. Aicl.8. 13 E.3. Bre.677. 22 E.3. 14.20. 21 E.3. Coſinage 5.42 E.3.2. 13 E.4.9. 11 H.4.26. 9 E.4.7. 19 E.4.7. 20 E.4.6. 13 E.4.9,10. 32 H.6.23. 38 H.8. Br. Denizen 10. 1 E.6. Nonhab. Br. 13. & 62. Vid. 4 H.3. Dower 179. 6 E.3.26.3. 31 H.6.cap.4. Livre de Entries in eject.7. 6 H.8. Dyer 2. 6 H.7.15.

¶ *Reall ou perſonall.* (h) In this caſe the Law doth diſtinguiſh between an Alien that is a ſubject to one that is an enemy to the King, and one that is ſubject to one that is in league with the King: and true it is, that an Alien enemy ſhall maintain neither real nor perſonal Action, Donec terræ fuer' communes, that is, untill both Nations be in peace; but an Alien that is in league, ſhall maintain perſonal actions; for an Alien may trade and traffique, buy and ſell, and therefore of neceſſity he muſt be of ability to have perſonal actions, but he cannot maintain either reall or mixt actions. An Alien that is condemned in an information, ſhall have a Writ of Error to relieve himſelf: Et ſic de ſimilibus.

† 29 E.3.Br.Denizen 15. Vid. Stanf. Pl. Com. 197. a.

† If an Alien be made a Prior or Abbot, the plea of Alienage ſhall not diſable him to bring any real or mixt action concerning his houſe, becauſe he is in autre droit, as before is ſaid.

¶ *Hors del ligeance noſtre Seignior le Roy.* Here Littleton doth not ſay, out of the Realm, or beyond the Sea, (as he doth, Sect.439,440,441,677.) But out of the Ligeance; for (as hath been ſaid before) a man may be born out of the Realm, viz. of England, as in Ireland, Jerſey, and Gernſey, &c. and yet ſeeing he is not born out of the Ligeance of the King, as Littleton here ſpeaketh he is no Alien. But hereof there is ſo much, and ſo plentifully ſpoken in our books, and eſpecially in the caſe of Calvin ubi ſupra, as this ſhall ſuffice.

¶ *Et demaund judgement ſil ſerra reſpondue.* So as the Tenant or Defendant ſhall neither plead Alien nee to the Writ or to the Action, but indiſability of the perſon, as in caſe of Villenage and Outlawry before. (i) And Littleton is to be intended of an Alien in league, for if he be an Alien enemy, the Defendant may conclude to the Action.

(i) Livre de Entries Alien 1.

## Sect. 199.

For Statutes, Vid. 35 E.1. ſtat. de Carlile 25 E.3.ca.22. 25 E.3. ſtat. de proviſors, 27 E.3. ca.1. 38 E.4.ca.3. 2 R.2. c.12. 3 R.2.c.3. 12 R.2. c.5. 16 R.2. c.5. 2 H.4. c.3. & 4. 6 H.4. c.1. 24 H.8. c.12. 25 H.8. cap.19,20. 26 H.8. c.16. 1 Eliz. c.1. 5 Eliz. c.1. 13 Eliz.c.1,2,8. 27 Eliz. c.2. 39 Eliz. c.18.

For Preſidents, Vid. Mich. 29 E.3. coram Rege in Theſaur. Paſch. 44 E.3. ibid. Melborns caſe. Mich. 38 H.6. ibid. The caſe of Rich. Beauchamp and others. Hill. 25 H.8. coram Reg. The caſe of Nic. Biſhop of Norwich. Trin. 36 H.8. Rot. 9. Coram Rege. The caſe caſe of the Biſhop of Bangor. Mich. 26 & 27 El. coram Rege. Perrot againſt D. Bevance & others, Book of Entries, fo. 429. & 430. & ibid. Mich. 9 H.7. fol. 23.

Book Caſes. 21 E.3.48.b. 18 H.6.6. 9 E.4.2. 35 E.3.7. 24 H. 8. tit. Præmunire 16. 10 H.4.12, 27 E.3.84. 6 H.7.14. 44 E.3.36.

¶ *Præmunire.* Some hold an opinion that the Writ is called a Præmunire, becauſe it doth fortify Juriſdictionem jurium regiorum Coronæ ſuæ of the Kingly Laws of the Crown againſt forreign juriſdiction, and againſt the uſurpers upon them, as by divers Acts of Parliaments appear. But in truth it is ſo called of a word in the Writ, for the words of the Writ be, Præmunire facias præfatum A. B. &c. quod tunc ſit coram nobis, &c. where Præmunire is uſed for præmonere, and ſo do divers interpreters of the Civill and Canon Law uſe it; for they are præmuniti that are prædmoniti. By the Statutes before quoted in the margent you ſhall perceive what ſtatutes were made before Littleton wrote, and what have been ordained ſince to make offences in danger of a Præmunire.

¶ *Hors del protection le Roy.* The judgement in a Præmunire is, that the Defendant ſhall be from thenceforth out of the Kings protection, and his Land Tenements, Goods and Chattels forfeited

¶ Cest a eſt, un hõe q̃ p' judgem̃ done envers luy ſur un brief de Præmunire facias, &c. eſt hors de protection le Roy, ſi il ſuiſt aſcun action, & le Tenant ou le def. mſa tout le Record envers luy, il poit demaund judgement ſil ſerra reſpondu, car la ley le Roy, & les bẽs le Roy, ſont les choſes per queux home eſt protect & aide, & iſſint durant l'temps que home en tiel cas eſt hors de la protection le Roy, il eſt hors de eſtre aide ou ꝓtect per la ley le Roy, ou per brẽ le Roy.

THe 4. is, a man who by judgment given againſt him upon a Writ of *Præmunire facias, &c.* is out of the Kings protection, if he ſue any action, and the tenant or defendant ſhew all the Record againſt him, he may ask judgment if he ſhall be anſwered; for the Law and the Kings Writs be the things by which a man is protected and holpen, and ſo during the time that a man in ſuch caſe is out of the Kings protection, he is out of help and protection by the Kings Law, or by the Kings Writ.

forfeited to the King, and ẏ his body ſhall remain in priſon at the Kings pleaſure. So odious was this offence of Præmunire, that a man that was attainted of the ſame might have been ſlain by any man without danger of Law, becauſe (k) it was provided by Law, that a man might do to him as to the Kings enemy, and any man may lawfully kill an enemy. But Queen Elizabeth and her Parliament † liking not the extream and inhumane rigour of the Law in ẏ point, did provide that it ſhould not be lawfull for any perſon to ſlay any perſon in any manner attainted in or upon any Præmunire, &c. Tenant in Tail is attainted in a Præmunire, he ſhall forfeit the land but during his life; for albeit the ſtatute of 16 R. 2. c. 5. enacteth, ẏ in caſe their lands and tenements, goods and chattels, ſhall be forfeit to the King, that muſt be underſtood of ſuch an eſtate as he may lawfully forfeit, and that is during his own life. And theſe generall words do not take away the force of the ſtatute De donis conditionalibus, but he ſhall forfeit all his Fee ſimple lands, eſtates for life, goods and chattels, and ſo was it reſolved in Trugins caſe.

11 H. 7. tit. Præmunire, F. 5. 17 H. 7. Juſtice Spilmans in Turberviles caſe, Kilwey, fol. 195. Doct. & Stud. lib. 2. cap. 32. Brook, tit. Præmunire 21. Temps E. 6. Biſhop Barloes caſe.

(k) 24 H. 8. Brook Coron. 196.

† 5 Eliz. cap. 1. Hill. 12 El. Trugins caſe reſolved per les Juſtices, 7 H. 4. 20. Simon Beverleys caſe.

¶ *Car la Ley le Roy, & les briefes le Roy, &c.* There be three things as here it appeareth whereby every ſubject is protected, viz. Rex, Lex, & Reſcripta Regis, ẏ King, the Law and the Kings Writs. The Law is ẏ rule, but it is mute: The King judgeth by his Judges, and they are the ſpeaking Law, Lex loquens. The proceſs and the execution which is the life of the Law conſiſteth in the Kings Writs. So as he that is out of the protection of the King cannot be aided or protected by the Kings Law, or the Kings Writ. Rex tuetur legem, & lex tuetur jus. (l) Beſides men attainted in a Præmunire, every perſon ẏ is attainted of high treaſon, petit treaſon, or felony, is diſabled to bring any action, for he is † Extra legem poſitus, and is accounted in Law Civiliter mortuus.

(l) 4 E. 4. 8. 1 E. 4. 1. b. 39 E. 3. 4. 8 Eliz. Dyer 245.

† Mich. 9 E. 3. coram Rege Rot. 84. Warw.

It is to be underſtood, that there is a general protection of the King, whereof Littleton here ſpeaketh, and this extends generally to all the Kings loyal Subjects, Denizens and Aliens within the Realm, whoſe offences have not made them uncapable of it, as before it appeareth. And there is a particular protection by Writ, which is one of the Kings Writs that Littleton here ſpeaketh of. This particular protection is of two ſorts, one, to give a man an immunity or freedome from actions or ſuits, the ſecond, for the ſafety of his perſon, ſervants and goods, lands and tenements, whereof he is lawfully poſſeſſed from violence, unlawful moleſtation or wrong. The firſt is of right, and by Law; the ſecond are all of grace (having one) for the generall protection implyeth as much. Of the firſt ſort ſome are Cum clauſula (volumus) ſo called, becauſe the Writ hath this word (volumus) in it, viz. Volumus quod interim ſit quietus de omnibus placitis & querelis, &c. And the other a protection Cum clauſula (volumus) ſo called for the like reaſon. Of protections Cum clauſula (volumus) for ſtaying of pleas and ſuits, there be four kinds, viz. Quia proſecturus (ſo called, by reaſon they are part of the words of the Writ, 2. Quia moraturus (ſo named, for diſtinction for the like cauſe). 3. Quia indebitatus nobis exiſtit of the matter. 4. When any ſent into the Kings ſervice in war, is impriſoned beyond Sea. The former are for ſtaying of actions and ſuits in generall. The third is for ſtaying of ſuits of the ſubject for his debts and duties due by the Kings debtor to them. Of the fourth you ſhall read hereafter in this place. For the former two theſe nine things are to be obſerved. Firſt, for what cauſe they are to be granted. 2. For what perſons they are allowable. 3. A three-fold time is to be conſidered, viz. the time of the purchaſe of them, the time of the continuance of them, and the time when they ſhall be caſt. 4. In what place the ſervice is to to be performed. 5. In what actions theſe protections are allowable. 6. Under what ſeal and to whom they are directed. 7. Who is to allow, or diſallow of them. 8. By whom they are to be caſt, and in what manner. 9. How upon juſt cauſe they may be repealed or diſallowed. I muſt but point at theſe matters, to make the ſtudious Reader capable of them, and refer him to the Books and other Authorities at large, being excellent points of learning.

As to the firſt, it is of two natures, the one concerns ſervices of war, as the Kings Souldier, &c. the other wiſdom and counſel, as the Kings Imbaſſador or Meſſenger Pro negotiis regni, both theſe being for the publique good of the Realm, private mens actions and ſuits muſt be ſuſpended for a convenient time; for Jura publica anteferenda privatis; and again, Jura publica ex privatis promiſcuè decidi non debent. (a) And the cauſe of granting of the protection muſt be expreſſed in the protection, to the end it may appear to the Court, that it is granted Pro negotiis regni & pro bono publico, (b) or as ſome others ſay, pur le common profit del realme. And Britton ſaid, Noſtre ſerv ce, ſicome eſtre en noſtre force, & le defence de nous & de noſtre people, &c. † A man in execution in ſalva cuſtodia ſhall not be delivered by a Protection.

(a) 39 H. 6. 39. 3 H. 6. tit. protection 2. 13 R. 2. cap. 16.

(b) Mirror cap. 3. ſect. Britton 281. Fleta lib. 6. cap. 7, 8, &c. Bracton.

† 5 Mary Dyer 162.

(c) To the ſecond, theſe protections are not allowable only for men of full age, but for men within age, and for women, as neceſſary attendants upon the Camp, and that in three caſes, Quia lotrix, ſeu nutrix, ſeu obſtetrix.

(c) 19 H. 6. 51. 30 E. 3. 21. F. N. B. 28. I. 11. E. 4. Rot. par. 3. part for the Counteſſe of Warw.

(d) Corporations aggregate of many, are not capable of theſe two protections, either Proſecturæ, or Moraturæ; becauſe the Corporation it ſelf is inviſible, and reſteth onely in con-

(d) 30 E. 3. 1, 21 E. 4. 36. 21 E. 3. 27.

consideration of Law. (e) Protection for the husband shall serve also for the wife.

(f) Albeit the Vouchee, Tenant by receit, Prier in aid or Garnishee, be no parties to the Writ, yet before they appear, a Protection may be cast for them, because when the Demandant grants the Vouchee or receit in judgment of Law they are made privy; but if the Demandant counterplead the Vouchee or receit, then untill it be adjudged for them, and so privy in Law, a Protection cannot be cast for them. And so it is of the Garnishee, a Protection may be cast for him at the day of the return of the Scire fac. (g) No Protection can be cast for the Demandant or Plaintiff, because the Tenant or Defendant cannot sue a Resummons, or a Reattachment; but the Plaintiff only that sued out the summons or attachment, &c. must sue also the resummons or reattachment. And so it is of an Actor in nature of a Plaintiff, &c. as the Garnishee after appearance, and an avowant and the like. (h) An Officer of the Kings receit, or any other Officer in any Court of Record, whose attendance is necessary for the Kings service, or administration of Justice being sued, cannot have a Protection cast for him.

(i) In every action or plea, reall or mixt, against two (where Protection doth lye) a Protection cast for the one doth put the plea without day for all. So it is in debt, detinue, and account. But in trespasse, or in any action in nature of trespasse, which is in Law several, where every one may answer without the other, there a Protection cast for the one shall serve for him only, unlesse they joyn in pleading; or if they plead several pleas, and one Venire facias is awarded against all, there a Protection cast for one, shall put the plea without day for all, and therefore in former times the Plaintiff used to sue out severall Venire fac' in those cases for fear of a Protection, &c.

(k) As to the threefold time. First, a Protection proseturæ, regularly must not be purchased hanging the plea, but this faileth when he goeth in the Kings service in a Voyage royal; and that is twofold, either touching War, and that only is when the King himself or his Lieutenant, that is Prorex goeth, or when any goeth in the Kings ambassage, pro negotio regni, or for the marriage of the Kings daughter, or the like; this also is called Voyage royal. But a Protection Moraturæ may be purchased, and cast, pendente placito.

(l) Regularly, a Protection cannot be cast, but when the party hath a day in Court, and when if he made default, it should save his default: therefore when execution is to be granted against body, lands, or goods, no Protection can be cast, because the Defendant hath no day in Court. If a Protection be cast at the Nisi prius for one, if before the day in banke it be repealed by Innotescimus; yet because it was once well cast, it shall save his default: but if the Protection be disallowed, either for variance, or that it lay not in the action, or the like, there it shall turn to a default.

(m) If a man hath a Protection, and notwithstanding plead a plea, yet at another day of continuance after he a Protection may be cast, so at a day after an Exigent; but after appearance he cannot cast a Protection in that Term untill a new continuance be taken.

(n) Thirdly, no protection either Prosecturæ or Moraturæ, shall endure longer then a year and a day next after the teste or date of it. And so it is of an Essoigne de service le Roy. If a Protection bear teste 7. die Januarii, and have allowance pro uno anno, the resummons, reattachment or regarnishment may be sued 8. Januarii the next year, and yet that is the last day of the year.

And where Britton treating of an Essoygn beyond the Græcian Sea in a Pilgrimage, &c. saith thus, (o) Ascun gent nequident se purchasent nous letters de protection patents durable à un an, ou a 2. ou a 3. ans, & jalameyns font attorneys generals, ausi per nous letters patents: & ceux font bien & sagement, car nul grand Seignior ne chivalier de nostre realme ne doit prender cheymin sauns nostre conge, car issint poet le realme remainer disgarny de fort gente.

Three things are hereupon to be observed, First, that this was a protection of grace, whereof more shall be said hereafter. Secondly, that it was for safety of the great men of the Realm, and that they should make general Attorneys, so as no actions, or suits should be thereby stayed. Thirdly, (by the way) that great men could not passe out of the Realm without the Kings licence. (p) A Protection granted to one, &c. untill he returned from Scotland, was disallowed for the incertainty of the time.

(q) To the fourth, the Protection as well Moraturæ as Prosecturæ must be regularly to some place out of the Realm of England, and that must be to some certain place, as super salva custodia Caliciæ, &c. and not to Carlisle or Wales, which are within the Realm, or the like. But it may be to Ireland or Scotland, because they are distinct Kingdoms, or to Calice, Aquitaine, or the like: but a Protection, Quia moratur super alium mare, will not serve, not only because (as some think) that mare non moratur, but for the incertainty of the place, and for that a great part of the sea is within the Realm of England.

(r) To the fifth, In some Actions, Protections shall not be allowed by the Common Law, and in some actions they are ousted by Act of Parliament, Actions at the Common Law, as all Actions that touch the Crown, as Appeals of Felony, and Appeals of Mayhem. (s) So where

(e) 35 H.6.3.43 E.3.23. 48 E.3.7. 4 H.5. protection, 107.
(f) 45 E.3.protect.37. 5 H.6.18.30. 8 H.6.16. 9 H.6.36. 40 E.3.18. 32 E.3. protect. 54. 21 E.3. 14 H.4. 16. 45 E.3.tit. protect.40. 14 E.3. protect.66.
(g) 24 E.3.26. 47 E.3.5. 5 H.5.5.18 E.3.1.F.N.B. 28.g. 20 R.2. protect.106 22 H.6.28. 9 H.6.36. 43 E.3.36. 17 E.3.24. 25 E.3.43. 24 E.3.26. 13 E.3. protection 71. 14 E.3. ibid. 56,63. 20 E.3. ibid. 84.
(h) 7 H.4. 3.2.
(i) 19 E.3.protect.80,81. 32 E.3.ibid.55.16 E.2.ib. 77. 13 E.3.ib.70. 41 E.3. ib.95. 41 E.3.32. 42 E.3. 9. 5 H.5.7. 3 H.4.15. 2 R.2. protect.45. 43 E. 3. ib.31. 2 H.6.22. 21 H. 6.41. 38 E.3.12. 7 H.6. 21. 33 E.3.protect.116. 4 H.4.4. 29 E.3.41. 45 E.3.24,28. 11 E.4.7. F.N.B.28.k.
(k) 3 H.6.pro.2. 39H.6. 30. 44 E.3.12. 13 R.2. ca.16. 3 H.4.16. 11 H.4. 7. 7 E.4.27. 28 H.6.1. 17 H.6.prot.56. 10 E.3.54. 13 E.3. amerciament,18. lib.7. fol. 7,8. Calvins case. 13 R. 2. c.16.
(l) 4 H.6.22. 17 E.3.76. 33 E.3. tit. protect.115. 34 E.3.ib.124. 27 E.3.79 29 E.3. prot.85,88. 2 E. 4.15. 19 E.3 prot.82.79. 13 E.3.ibid.72. 9 E.3.21. 3 H.6.55. 4 H.6.22. 11 H.6.14. 14 H.6.22. 21H. 6.10. 27 H.6.4. 28 H.6. 1. 35 H.6.58. 44 E.3.2. 16. 48 E.3.8. 7 H.4.5. 14 H.4.23. 27 E.3.78.
(m) 22 E.3.4. 16 E.3. prot.47. 44 E.3.16. 3 E. 3. amerciam.18. 34 E.3. Protection, 123.
(n) 39 H.6.39. F.N.B. f.28, Fleta,lib.6. cap.8. Temps E.1.grand ca.26.
(o) Brit.282,283.& 280. Flet.lib.6. ca.8. accord.
(p) 1 E. 3.25.
(q) L.7.f. 8.Calvins case. 7E 4.25.F.N.B.38.c g.h. 7 H.4.14. 19 H. 6.33. 38 H.6.32 H.6. 3 R 2. Rot. Parliament nu. 21. 22 E.4.prot.18.8 R.2,ib. 125. 11 H.4.57. Regist. judic.14. 36 H.6.tit.protect.27. 6 R.2. ibid.14. Regist. orig. 88. fæpe.
(r) Bract. lib.5.1139,140. Britton 181. Flet.lib.6.c. 7989&c. 14 E.2. protect. 109. 34 E.3. ibid. 122. 19 E.3.ibid.78. 33 E. 3. 3b, 99. 21 E.3.13.
(s) 10 H.6.Protect. 105.

where the Kings is sole party no protection is to be allowed; in like manner in a Dedies tantum, where the King and the Subject are Plaintiffs, but in late Acts of Parliament, Protections in personall actions are expresly ousted. A Protection may be cast against the Queen the Consort of the King.

In a Writ of Dower unde nihil habet, no protection is allowable because the Demandant hath nothing to live upon. Otherwise it is in a Writ of right of Dower. Likewise in a Quare impedit, or Assise of Darrein presentment a protection lieth not, for the imminent danger of the laps. Neither lieth a Protection in an Assise of Novel disseisin, because it is festinum remedium, to restore the Disseisee to his freehold, whereof he is wrongfully and without judgment disseised. (u) In a Quare non admisit, a Protection is not allowable because it is grounded upon the Quare impedit; and the like in a Certificate upon Assise for the like reason, and sic de similibus. A protection, Quia profecturus is not allowable, (as hath been said) in any Action commenced before the date of the Protection, unlesse it be in a Voyage Royal. (w) In Infant is vouched, and at the Pluries venire fac. a Protection was cast for the Infant, and disallowed, because his age must be adjudged by the inspection of the Court.

(x) By act of Parliament, no Protection shall be allowed in an attaint. But at the Common Law a Protection for one of the Petite Jury had put the plea without day for all) nor in an Action against a Gaoler for an escape; nor for victuals taken or bought upon the voyage or service, nor in pleas of Trespasse, or other contract made or perpetrated after the date of the same Protection.

(y) In a Writ of Error brought by an Infant upon a fine levied, the Plaintiff sued a Scire facias against the Conusee, for whom a Protection was cast; and the Court examined the age of the Plaintiff, and by inspection adjudged him within age, and recorded the same and then allowed the Protection; and this can be no mischief to the Plaintiff: wher eupon it followeth, that albeit the Plaintiff dyeth afterwards before the fine reversed, yet after his age adjudged and recorded, his heir shall in that case reverse the fine for the nonage of his Ancestor. (a) And so it was resolved in the case of Kekewiche in a Writ of Error brought by him, by the opinion of the whole Court of the Kings Bench; otherwise it is, if the Plaintiff dyeth before his age inspected.

(b) Note in judicial Writs, which are in nature of Actions, where the party hath day to appear and plead, there Protection doth lye, as in Writs of Scire facias upon Recoveries, Fines, Judgments, &c. albeit by the Statute of W. 2. Essoigns and other delays be ousted in Writs of Scire facias, yet a Protection doth lye in the same. So it is in a Quid Juris clamat, and the like. But in Writs of Execution, as Habere facias seisinam, Elegit, Execution upon a Statute, Capias ad satisfaciendum, Fieri facias, and the like, there no protection can be cast for the Defendant, because he hath no day in Court, and the Protection extendeth only ad placita & querelas, and must be allowed by the Court, which cannot be but upon a day of appearance.

(c) In a Writ of Dissent brought against him that obtained, and cast a protection upon an untrue surmise in delay of the Plaintiff, that protection is allowable. In an Action brought upon the Statute of Labourers, a protection doth lye, & sic de similibus.

(d) To the sixth, no Writ of protection can be allowed, unlesse it be under the great Seal, (f) and it is directed generally.

(e) To the seventh, the Courts of Justice where the protection is cast, are to allow or disallow of the same, be they Courts of Record, or not of Record, and not the Sheriff, or any other Officer or Minister.

(f) To the eighth, the protection may be cast either by any stranger, or by the party himself, an Infant, Feme Covert, a Monk, or any other may cast a protection for the Tenant or Defendant. And this difference there is when a stranger casteth it, and when the Tenant or Defendant, casteth it himself. (g) For the Defendant or Tenant casting it, he must shew cause wherefore he ought to take advantage of the Protection, but an estranger need not shew any cause, but that the Tenant or Defendant is here by the Protection.

(h) As to the ninth, A protection may be avoyded three manner of wayes: First, upon the casting of it before it be allowed: Secondly, by repeal thereof after it be allowed: by disallowing of it many ways, as for that it lyeth not in that Action, or that he hath no day to cast it, or for material variance between the Protection and the Record, or that it is not under the great Seal, or the like. (i) Thirdly, after it be allowed by Innotescimus, as if any carry in the Country without going to the service for which he was retained, ober a conbenient time after that he had any Protection, or repair from the same service, upon information thereof to the Lord Chancellor, he shall repeal the Protection in that case by an Innotescimus. But a Protection shall not be avoyded by an Averment of the party of that case, because the Record of the Protection must be avoyded by matter of as high nature.

(k) There

t) 39 H.6.19. 43 E.3.6. & 32.27 H.6. 4. F.N.B. 28 17 E.3.23. lib.4. f.35. Bozoms case. Bract. lib. 5. fol. 139, 140.

u) 13 E.3. tit. protection 52.12 E.3. ibid. 69. 31 E.1. ibid. 112.

w) 19 E.3. protect. 111. 32 E.3. ibid. 94.

x) 23 H.8.c 3.34 E.1. protection 38. 7 H.4.c.4. 1 R.2. cap. 8.

y) 21 E.3.24. 31 E.3. protect. 97. I. 5 E.4.50. 35 H.6.43.46.8 E.4 8.17 E. 3.22.13 E. protect. 3.72.

a) Pasch. 12. Ja Regis in the Kings Bench.

b) 13 E.3. protect. 72. Fleta l.2.c.12.40 E.3.18. 48 E.3.18,19.37 H.6.32. 21 E.4.19. 15 H.7. 8. 47 E.3.5.17 E.3.68.14 E.3. Protect. 64. W.2. cap. 45.

c) 20 E.3. protect. 83.

d) 35 H.6 2. artic. super Cart. 6.46.b.3. petition. 19.

f) Li.2.f.17 Lanes case. Lib.8.f.68. Trallops case 20 H.6.25. 2 E.4.4. 38 H.6.23.

e) 43 E.3. protect. 96.

f) 21 E.4.18.

g) 38 H.6.23.

h) 44 E.3.12.47 E.3.6.

i) 13 R.2.c.16. 11 H.4. 70.7 H.6.22. 22 H.6.56. 30 H.6.3.19H.6.25.21 E. 4.20.1 H.6.6.42 E.3.9. 44 E.3.2. 39 E.3.45.20 E. protect.86. 34 E.3. ibid.119.

(k) 44 E.3.4.12. 47 E.3. 24 E.3. protect. 119. 28 H.6.3. 34 H.6.22. 30 H.6.3. 32 H.6.4.

(k) There is a clauſe in the Protection to this effect, Præſentibus minime valituris, ſi contingat ipſum, &c. à cuſtodia caſtri præd. cti recedere. Or, ſi contingat iter illud non arripere, vel infra illum terminum à partibus tranſmarinis redire. Whereupon there be two concluſions to be obſerved.

Firſt, That though the protection be allowed by the Court for a year, yet if it be repealed by an Innoteſcimus that the Reſummons or Re-attachment ſhall be granted upon the Repeal within the year, for the Protection that was allowed had the ſaid clauſe in it. And of that opinion be our latter books, and the Repeal by Innoteſcimus ſhould ſerve for little purpoſe, if the Law ſhould not be taken ſo.

Secondly, That albeit he that had the Protection either Moraturæ or Profecturæ, return into England, and haply be arreſted and in priſon, yet if he came over to provide Munition, Habiliments of War, victuals, or other neceſſaries, it is no breach of the ſaid conditionall clauſe, nor againſt the Act of 13 R. 2. cap. 16. for that in judgment of Law coming for ſuch things are of neceſſity for the maintenance of the Warr, moratur, according to the intention of the Protection and ſtatute aforeſaid. And thus much of the two firſt Protections, Cum clauſula volumus, Profecturæ and Moraturæ.

(l) Regiſtrum 281.b. F.N.B.28. b. 13 H 8 c 29. in the præamble, 41 E.3.tit.Execution 38.18 E.3. ibid. 56. 27 E.3.88.b.4 E.4 16. 3 Eliz. Dier 197. Rot. par. 27 E.3. part. 1. m. 2.

(l) As to the third Protection, Cum clauſula Volumus, The King by his Prerogative regularly is to be preferred in payment of his duty or debt by his Debtor before any Subject, although the Kings debt or duty be the latter: and the reaſon hereof is, for that Theſaurus Regis eſt fundamentum Belli, & firmamentum pacis. And thereupon the Law gave the King remedy by Writ of Protection to protect his Debtor, that he ſhould not be ſued or attached untill he paid the Kings debt; but hereof grew ſome inconvenience, for to delay other men of their ſuits, the Kings debts were the more ſlowly paid. And for remedy thereof (m) it is enacted by the ſtatute of 25 E. 3. that the other Creditors may have their actions againſt the Kings Debtor, and to proceed to Judgment, but not to Execution, unleſs he will take upon him to pay the Kings debt, and then he ſhall have Execution againſt the Kings Debtor for both the two debts.

(m) 25 E 3. cap. 19.

(n) 41 E.3.25.17 E.3.73. 29 E.3.13.4 E.4.16.

This kind of Protection hath (as it appeareth) no certain time limited in it. But in ſome caſes the ſubject ſhall be ſatisfied before the King (n) for regularly whenſoever the King is intitled to any fine or duty by the ſuit of the party, the party ſhall be firſt ſatisfied as in a Decies tantum. And ſo if in action of Debt, the Defendant deny his Deed, and it is found againſt him, he ſhall pay a fine to the King, but the Plaintiff ſhall be firſt ſatisfied, and ſo in all other like caſes. And ſo it is in Wils preferred by ſubjects in the Starchamber, their coſts and damages (if any be) ſhall be anſwered before the Kings fine, as it is daily in experience.

(o) Regiſt. ſæpe. F. N. B. 28. c.

The fourth Protection, Cum clauſula Volumus, is when a man ſent into the Kings Service beyond Sea is impriſoned there, ſo as neither Protection, Profecturæ or Moraturæ, will ſerve him, and this hath no certain time limited in it, (o) whereof you ſhall read at large in the Regiſter, and F.N.B.

(p) Vide lib. 7. fol. 899. Calvins caſe.

(p) Now are we at length come to Protections, Cum clauſula Nolumus, All which, ſaving one, are of grace, and, as hath been ſaid, are implied under the general protection: for as Fitzherbert ſaith, every loyal ſubject is in the Kings Protection. Of theſe Protections of grace, you ſhall not read much in our year Books, becauſe they ſtayed no Actions or Suits; (q) Of the divers forms of theſe you ſhall read at large in the Regiſter, and F. N. B. which were too long and needleſs to be here recited.

(q) Regiſter 289 &c. F.N.B.29. A.B.C.D.E.F. G.H. Regiſter 280. Statut. de 14 E 3. F.N.B.30 A.

The Protection Cum clauſula Nolumus, that is, of Right, is, that every ſpiritual perſon may ſue a Protection for him his goods, and for the fermors of their lands and their goods, that they ſhall not be taken by the Kings Purveyor, nor their carriages or chattels taken by other Miniſters of the King, which Writ doth recite the ſtatute of 14 E. 3.

Of theſe Protections I cannot ſay any thing of mine own experience; for albeit Queen Elizabeth maintained many Wars, yet ſhe granted few or no Protections; & her reaſon was, that he was no fit ſubject to be imployed in her ſervice, ꝑ was ſubject to other mens actions, leſt ſhe might be thought to delay Juſtice.

## *Sect.* 200.

*Entre & profeſſe en Religion.*

Item eſt, un home eſt enter & profeſs en Religion: Si tiel

THE fifth is, where a man is entred and profeſſed in Religion, if ſuiſt

ſuiſt un action, le tenant ou defendant poit monſtrer, que tiel eſt enter en religion en tiel lieu, & lorder de Saint Benet, & la eſt moigne profeſſe, ou en lorder des Friers Preachers, ou Minors, & la eſt Frere profeſſe, & iſſint des auters orders de Religion, &c. & demaunder a judgment ſil ſerra reſpondue. Et la cauſe eſt, pur ceo que quant un home entra en religion, & eſt profeſſe, il eſt mort en ley, & ſon fits ou auter coſin maintenant luy inheritera, auxy bien ſicome il fuit mort en fait. Et quant il entra en Religion il poit fair ſon teſtament, & ſes executors, les ſur executors averont un action de det due a luy devāt lentre en Religion, ou auter action que executors poient aver ſicome il fuit mort en fait. Et ſil ne fait ſes executors quant il entra en Religion, deſques Lordinarie poit committer ladminiſtration de ſes biens a auters homes, ſicome il fuit mort en fait.

ſuch a one ſue an action, the Tenant or Defendant may ſhew that ſuch an one is entred into Religion in ſuch a place, into the Order of Saint *Benet*, and is there a Monke profeſſed, or in the orders of Friers Minors and Preachers, and is there a brother profeſſed, and ſo of other Orders of Religion, &c. and ask judgment if he ſhall be anſwered. And the cauſe is this, That when a man entreth into Religion, and is profeſſed, he is dead in the Law, and his Sonne or next Couſin incontinent ſhall inherit him, as well as though he were dead indeed: and when he entreth into Religion, he may make his Teſtament and his Executors, and they may have an action of debt due to him before his entry into Religion, or any other action that Executors may have, as if he were dead indeed. And if that he make no Executors when he entreth into Religion, then the Ordinary may commit the Adminiſtration of his goods to others, as if he were dead indeed.

(a) It is to be obſerved that a man doth enter into Religion at his firſt comming, and liveth under obedience, but he is not profeſſed till a yeare be paſt, or ſome time of probation. And he is ſaid to be profeſſed when he hath taken the habit of Religion, and vowed theſe things, Obedience, Wilfull Poverty, & perpetuall Chaſtity. And therefore our Author ſaith here enter & profeſſe.

(a) Bract. lib. 5. fol. 415. 421. Britt. ca. 22. fol. 39. Fleta lib. 6. cap. 41. 5 E. 2. tit. nonabil. 26. 3 H. 6. 24. 1 R. 3. 9. 7 H. 4. 2. Doct. & Stud. 142 21 R. 2. judgment. 263. 11 R. 2. ibid. 107.

¶ *En Lorders de Freres Preachers ; ou* (b) *Minors.* It appeareth in our Books that of Friers there were four Orders, viz. Minors, Auguſtines, Preachers, and Carmelites ; and the Franciſcani, Capuchini, and Obſervantes are included under the Title of Minors, and they were called Obſervants, becauſe they be not Conventual or joyned together in a Brother-hood, but live ſeparately, and bound themſelves to obſerve more ſtrictly the rights of their Order. (c) Cum quis ſemel ſe Religioni conulerit, renunciat omnibus quæ ſeculi

(b) 4 H. 4. cap. 17. 23 H. 8. cap. 12.

(c) Bracton fol. 421. b.

ſunt, habita diſtinctione, utrum habitum probationis ſuſceperit, vel habitum profeſſionis.

¶ *Il eſt mort en Ley.* Civiliter mortuus, or mortuus ſeculo. (d) There is a death in deed, and there is a civill death or a death in Law. Mors civilis and mors naturalis, as here it appeareth, and therefore to ouſt all ſcruples, Leaſes for life are ever made, during the naturall life, &c. If the father enter into Religion, then ſhall his ſon and heir have an iſſue of Mordanceſter, and the Writ ſhall ſay, (e) Si pater, &c. die quo obiit habitum religionis aſſumpſit, in quo habitu profeſſus fuit ut dicitur.

(d) Bract. fol. 341. 436. Britt. fol. 226, 227. 232. Fleta, lib. 6. c. 41.

(e) F. N. B. 196. 5 R. 2. 4.

¶ *Auxiſien*

¶ *Auxibien come il fuit mort en fait.* But yet to three purposes, profession, that is, the civill death hath not the effect of a natural death.

First, This civill death shall never derogate from his own grant, nor be any mean to avoid it. And therefore if Tenant in Tail maketh a feoffment in Fee, and entreth into Religion, his issue shall have no Formedon during his life, because that should be in derogation of his own Grant, and be a mean to avoid the same.

(f) Secondly, it shall never give her avail, without whose consent he could not have entred into Religion, and therefore his wife after his civill death shall not be indowed until his naturall death. But if the wife, after her husband had entred into Religion, alien the land, which is her own right, and after her husband is deraigned, the husband may enter and avoid the alienation.

Thirdly, It shall not work any wrong or prejudice to a stranger that hath a former right, and therefore if the Disseisor entreth into Religion, and is professed, so as the land descends to his heire, yet this descent shall not toll the entry of the Disseisee.

(g) A woman cannot be professed a Nun during the life of her husband: but some do hold a diversity, (h) *per ante carnalem copulam*, the husband or wife may enter into Religion without any consent, but *post carnalem copulam* neither of them can without consent of the other.

(i) But if a man holdeth lands by Knights service, and is professed in Religion, his heir within age, he shall be in ward. (k) If I be disseised, & my brother releaseth with warranty; and is professed in Religion, and the warranty descendeth upon me, this warranty shall bind me, because I am his heir, and such inheritance as my brother had shall descend upon me.

(l) And if one Joyntenant be professed in Religion, the land shall survive to the other. If a man or a woman be professed in Religion in Normandy, or in any other forreign part, such a profession shall not disable them to bring any Action in England because it wanteth tryal, but they must be professed in some house of Religion within this Realm, for that may be tryed by the Certificate of the Ordinary, so as of forreign professions, the Common Law taketh no knowledge. (m) And yet in some case one that is professed in Religion within the Realm shall have an Action, as if he be made an Executor, or if he be an Administrator he shal maintain an Action not in his own right, but in the right of the Dead.

(n) If a Monk be made a Bishop, or a Parson, or a Vicar, he shall have an Action concerning his Bishoprick, Parsonage, or Vicarage, & sic de similibus.

(o) And if a Monk be Farmer of the King, yielding a Rent, he shall have an Action concerning that Farm. And albeit Littleton speaketh generally of one that is professed in Religion, yet must it not be understood of the Soveraign or Head of the religious house, as of the Abbot, Prior, or the like, (†) for albeit they be professed in Religion, yet by the policy of the Law, they are persons able to purchase, and to implead, and to be impleaded, to sue, and to be sued for any thing that concerns the house of Religion; for otherwise the house might be prejudiced, and other men also of their lawful Actions. And this is the ancient Law of England, as it appeareth in these words, (p) Des biens des gents de Religion appent laction al Chiefe en son nosme pur luy & son Covent. But what if a Monk, &c. were beaten, wounded, or imprisoned, &c. Doth the Law give no remedy therefore? Yes verily (q) for in that case the Abbot and the Monke shall joyn in an Action against the wrong doer, and if the Writ be, Ad damnum ipsius Prioris, the Writ is good; and if it be ad damnum ipsorum, it is good also. Also if a Monke be by conspiracy falsly and maliously indicted of Felony and Robbery, and afterwards is lawfully acquited, his Soveraign and he shall joyn in a Writ of Conspiracy, and the like. And where Littleton speaketh of a man that is professed in Religion, the same Law is of a Nun sanctimonialis, mutatis mutandis.

(r) A wife is disabled to sue without her husband, as much as a Monke is without his Soveraign; and yet we read in Books, that in some cases a wife hath had ability to sue and be sued without her husband: (t) for the wife of Sir Robert Belknap, one of the Justices of the Court of Common Pleas, who was exiled or banished beyond sea, did sue a Writ in her own name, without her husband, he being alive; whereof one said, Ecce modo mirum, Quod fœmina fert Breve Regis, Nom nominando virum conjunctum robore Legis.

(t) King Edward the third brought a Quare impedit against the Lady of Maltravers, and she pleaded, that she was Covert Baron; whereunto it was replyed for the King, that her husband, the Lord Maltravers, was put in exile for a certain case, and she was ruled to answer.

(u) King H.4. brought a Writ of Ward against Sibell B. who pleaded, that she was Covert Baron, &c. whereunto it was replyed for the King, that her husband for a crime that he had committed against the King and the Peers, was relegate or exiled into Gascoign, there to remain until he obtained the Kings grace: And Gascoign Chief Justice, Ex assensu sociorum, awarded that she should answer.

Sir Tho: Egerton Lord Chancellor, in his argument which he published apart by himself in Cal-

(f) 32 E.1. Dower 176. 31 E.3. Collusion 29. 33 E.1. Entre conge 52. 21 E.4.14.

(g) 5 E.4.3. 2.

(h) 18 H.6.33. per Fortel.

(i) 31 E.3. Collusion 29.

(k) 34 E.3. Garranty, 71 Vid. the Chapter of Warranty, Sect.

(l) 21 R.2. judgem.263.

(m) 10 E.3.511. 14 E 3. Executors 87. 5 H.7.25. 21 H.6.30. 3 H. 6.24.

(n) 44 E.3.9. Nonability 3. 14 H.8.16.

(o) 2 p.4.7. 8 H. 5. 6. 7 E.4.30. 44 E.3.4. 20 E. 3. Vill.10. & Nonability 9. 49 E.3.4.

(†) Bract.f.415,416,419. Mir.c.1,sect.12. 11 H.4. 37.b. 5 H.7.26. Vid.sect. 294. 14 E. 4.36.

p) Mir. ubi supra.

q) 12 Ass.87. 21 E.3.41, 42. 22 E.3.2. 27 H.6.8. 32 H.6.36. Bract. lib. 5. 1.416,429. 13 E. 3. Br. 261. 22 E.3.2. 38 H. 6. 7. b. 24 E. 3.34.b. 45. 7 R.2. Nonability 3.9.

r) 4 H.3. Br. 766.

t) 2 H. 4. fol. 7. a.

t) 10 E.3.53.

u) 1 H. 4. 6. b.

Calvins case De Post-natis, demanded what former President there was for the warrant of the Lady Belknaps case in 2 H. 4 7. which occasioned me to search, and upon search I found ẏ the like judgement had been given before at the Parliament holden in Crast. Epip' An. 19 Edw. 1. where the case was, that Thomas of Weyland being abjured the Realm for Felony, in the year before, Margerie de Mose his wife, and Richard sonne of the said Thomas exhibited their petition of Right unto the Parliament, for the Mannor of Sobbir, wherein her husband had but an estate for life joyntly with her, and the inheritance in Richard the sonne by Fine. The Earle of Glocester, Lord of the Fee, (who claiming the land by Escheat, had taken the possession thereof) alledged, Quod non fuit juri consonum quod aliqua fœmina intraret in aliquas terras vivente marito suo, eo quod prætatus Thomas abjuravit Regnum, & adhuc vivit; & asserit idem Comes nunquam hujusmodi casum accidisse, & inde petit post multas allegationes quod possit prædictum manerium tenere ut escaetam suam. Super quo per ipsum Dominum Regem præceptum fuit, quod tam Justic' sui de utroque Banco, quam cæteri de Regno suo tam milites quam servientes in legibus & consuetudinibus Angliæ experti, mandarentur, quod essent coram Rege & ejus Concilio, &c. ad certiorandum ipsum Regem qualiter & quemodo in casu isto fuerit procedendum, & qualiter temporibus præteritis, & antecessorum suorum in casibus consimilibus fieri consuevit, & interim scrutantur Recorda de consimilibus, ubi recitantur duo vel tres consimiles casus. Et quia licet prius non videbatur aliquibus juri consonum fuisse, quod uxor in vita viri secundum sanctam Ecclesiam, qualitercunque deliquisset quoad forum Regium, non posset, nec deberet à viro suo separari, & sic quicquid foret in possessione uxoris, converteretur in potestatem viri sui; & hoc manifestè imminuerit contra consuetudinem Regni. Et etiam quia quidam dubitabant quod de possessionibus & bonis uxoris vir possit aliqualiter sustentari. Tamen coram Concilio Domini Regis vocatis Thesaur' & Baronibus & Justiciariis de utroque Banco concordatum est, quod prædicta Margeria rehabeat talem seisinam, &c. secundum purportum finis prædict. &c. Pater etiam consimile exemplum tempore Henrici patris Regis. I have cited this solemn resolution the more at large, because there be many excellent things to be observed in it: so as by ẏ which hath been said, it plainly appeareth, that this opinion concerning the hability of the wife of a man abjured or banished, was not first hatched by the Judges in Henry the fourths time. And here it is to be observed, that an abjuration, that is, a deportation for ever into a forrein land, like to a Profession, (whereof our Author (speaketh here) is a civil death, and that is the reason that the wife may bring an Action, or may be impleaded during the naturall life of her husband.

Pl. in Parliam. 19 E. 1.

Note the ancient triall of difficult matters in Law.

The great authority of Judiciall Records and Presidents.

A solemn resolution of the Law in this point.

And so it is, if by Act of Parliament the husband be attainted of Treason or Felony, and saving his life, is banished for ever, as Belknap, &c. was, this is a civil death, and the wife may sue as a Feme sole. And hereby you may understand your Books which treat of this matter. But if the husband by Act of Parliament have judgment to be exiled but for a time, which some call a Relegation, that is no civil death. And in 8 E. 2. an Abjuration is called a divorce between the husband and wife. Sed opus est interprete; for by Law no subject can be exiled or banished his Country, whereby he shall perdere patriam, but by Authority of Parliament, or in case of Abjuration, and that must be upon an ordinary proceeding of Law, as it was in the case of Weyland.

8 E. 2. Coron. 425. So resolved in Parliam. upon the making of the Statute of 35 E. 1. c. 1. Exilium Hugonis de Spencer patris & filii tempore E. 2.

Another example we have in our books to this effect: If the husband had alienes ẏ land of his wife, and after had commited felony and been abjured the Realm, the wife shall have a Cui in vita in his life time, agreeable with the said Resolution in Parliament, for that the Abjuration was a civil death.

31 E. 1. Cui in vita 31.

See in the Register, a woman was banished out of the Town of Calice for adultery, by the law or custom of that place, and there appeareth Carta pardonationis pro muliere bannita. Sed nos non habemus talem consuetudinem.

Regist. fol. 312. b.

(a) But by the Common Law, the wife of the King of England is an exempt person from the King, and is capable of lands or tenements of the gift of the King, as no other Feme covert is, and may sue and be sued without the King; for the wisedome of the Common Law would not have the King (whose continuall care and study is for the publique, & circa ardua Regni) to be troubled and disquieted for such private and petty causes: so as the wife of the King of England is of ability and capacity to grant and to take, to sue and be sued as a Feme sole by the Common Law.

(a) Vid. in my Preface to the sixth Book, This was Law before the conquest. 10 E. 3. 27. b. 508. 30 E. 3. 5. 18 E. 3. 1. 22 E. 3. 21. 49 E. 3. 4. 49. Ass. 8. 11 H. 4. 67. 14 E. 3. Voucher 110. 20 E. 3. Nona 9. 31 E. 3. Quare Imp. 146. 3 H. 7. 14. 19 H. 6. 2. 28 H. 6. 12. 7 H. 7. 7. a. 26 H. 6. Aid le Roy 24. Pleta li. 2. ca. 63. in Fine. Pl. Com. 231. Stant. Prer. 10. b.

(b) And such a Queen hath many prerogatives, as, she shall find no pledges; for such is her dignity, as she shall not be amerced.

(b) 18 E. 3. 2. 33 E. 3. briefe 916. F. N. B. 101. a.

The Queen nor the Kings son are restrained by the statute of 1 H. 4. cap. 6. concerning grants by the King.

(c) In a Quare impedit brought by her some say that Plenarty is no plea, no more than in the case of the King.

(c) 18 E. 3. 32. 24 E. 3. 35. 75.

(d) If any Bailiff of the Queens bring an action concerning the Hundred, he shall say, In contemptum Domini Regis & Reginæ.

(d) 32 E. 3. Brev. 316. 9 E. 3. 33.

The Queen ſhall pay no Toll.

(c) F.N.B.235.A. (c) If the Tenant of the Queen alien a certain part of his Tenancy to one, and another part to another, the Queen may diſtrain for any one part for the whole, as the King may do: but other Lords ſhall diſtrain but for the rats, and therefore where the Queen ſo diſtraineth, there lyeth a Writ De onerando pro rata portione. (f) The Writ of right ſhall not be directed to the Queen no more than to the King, but to her Bailiff; otherwiſe it is, when any other is Lord.

(f) F.N.B.1.F.

(g) 14 E.3. Vouch.110. 21 E.3.51.22 E.3.3.b. 17 E.3.65.10 E.3.17. 5 E.3.4.15 E.3.Aide del Roy 66.10 E.3.18.26 H.6. Aide le Roy 24. (h) 21 E.3.13.34 E.3. Protect.132.1 H.4.67 b. (i) 30 E.3.5. (k) Leſtat. de 25 E.3. de Proditionibus. (l) Rot. Parliam. 8 H.6. nu.7.

(g) In caſe of aid prier of the Queen, it is Domina regina inconſulta, and the cauſe of the aid prier ſhall not be counterpleaded no more than in the Kings caſe. And ſee where aid ſhall be granted of the King and Queen, and where of the Queen only, and the of the King. (h) But a Protection ſhall be allowed againſt the Queen, but not againſt the King neither ſhall the Queen be ſued by petition, but by a Præcipe. (i) The Queen is not bound by the ſtatute of Marlebridge for driving a Diſtreſs into another County.

(k) If any do compaſs the death of the Queen, and declare it by any overt fact, the very intent is treaſon, as in the caſe of the King.

(l) No man may marry the Queen Dowager without the Kings licence. But let us now return to Littleton.

(m) 4 E.4.25. 6 E.4.4. 43 E.3.10.a.18 E.4.19. 22 H.6.5. 3 H.7.2.b.

¶ *Il poet faire ſon teſtament & ſes executors, &c.* (m) If A. be bound to the Abbot of D; A. is profeſſed a Monke in the ſame Abby, and after is made Abbot thereof; he ſhall have an action of Debt againſt his own Executors.

(n) Pl. Com.282.381. Greisbrooks caſe.

¶ *Donques lordinarie poet commit adminiſtration, &c. ſicome il fuit mort en fait.* (n) Note the ſtatute of 31 E.3.cap.11. that giveth actions to the Adminiſtrators, ſpeaketh of a man that dies inteſtate, which by the authority of Littleton extendeth as well to a civill death as to a naturall.

## *Sect.* 201.

(a) Bracton lib.5.415. 416,427. Fleta li.6.c.44. Britton cap.49.fol.125.

¶ *EXcommenge, excommunicatus, excommunicatio.* (a) Sicut quis poterit habere lepram in corpore, ita & in anima. Excommunicato interdicitur omnis actus legitimus, ita quod agere non poteſt, nec aliquem convenire, licet ipſe ab aliis poſſit conveniri.

†F.N.B.64.P.

Excommunicatio eſt nihil aliud quam Cenſura à Canone vel Judice Eccleſiaſtico prolata & inflicta, privans legitima communione Sacramentorum, & quandoque hominum. † It is divided into the greater and the leſſer. Minor eſt, per quam quis à Sacramentorum participatione conſcientia vel ſententia arcetur. Major eſt, quæ non ſolum à Sacramentorum, verum etiam fidelium communione excludit, & ab omni actu legitimo ſeparat & dividit: but either of them both diſableth the party. (b) Cum excommunicato autem nec orare, nec loqui, nec palam, nec abſconditè, nec veſci licet, exceptis quibuſdam perſonis. But every Excom-

(b) Bracton 426.b. acc.

¶ Et iv. eſt, lou un home eſt excommenge per la ley de ſaint Eſglíſe, & il ſuiſt un action real ou perſonal, le tenant ou defendū poit plede que celuy que ſuiſt eſt excommenge, & ō ceo covient mꝰe lettꝰ de Leveſqꝫ ſouth ſon ſeale, teſmoignant lexcommengement, & demaundera judgement ſil ſerra reſpondue, &c. Mes en ceſt cas ſi le Demandant ou Plaintife ceo ne poit dedire, le bꝰe nabatera my, mes le judgement ſerra, que le Tenant ou Defendant aleꝰ quite ſans

THe *vi.* is, where a man is excommunicated by the Law of Holy Church, and hee ſueth an action reall or perſonal, the Tenant or Defendant may plead that he that ſueth is excommunicated, and of this it behoves him to ſhew the Biſhop's letters under his Seale, witneſſing the excommunication, and aske judgment if he ſhall be anſwered, &c. But in this caſe, if the demandant or Plaintife cannot deny it, the Writ ſhall not abate; but the judgment ſhall be, that the tenant or defendant ſhall go quite without

jour,

jour, pur ceo q̄ quant le Demandant ou plaintife ad purchase les letters de absolution, & ceux sont monstres a le Court, il poit aū un resommons, ou reattachment sur son original, solonque la nature de son ac̄e. Mes en les autres v. cases le bē abatera, &c. si le matter mē ne poit estre dedit.

day, for this, that when the Demandant or Plaintife hath purchased his letters of absolution, and shewed them to the Court, he may have a resummons or reattachment upon his originall, after the nature of his Writ, &c. But in the other cases the Writ shall abate, &c. if the matter shewed may not be gainesaid.

¶ *Letter del Evesque de south son seal.* (c) None can certifie excommengement but only the Bishop, unlesse the Bishop be beyond sea, or in remotis, or one that hath ordinary jurisdiction, and is immediate Officer to the Kings Courts. As the Archdeacon of Richm. or the Deane and Chapter in time of vacation. (f) But in ancient time every Officiall or Commissary might testify excommengement in the Kings Court; and for the mischiefe that ensued thereupon, it was ordained by Parliament, that none should testify excommengement but the Bishop only.

munication disableth not the party. (c) If Bailiffs and Commons, or any other Corporation aggregate of many bring an Action Excommengement in, the Bailiffs shall not disable them, for that they sue and answer by Attorney, otherwise it is of a sole Corporation. But if Executors or Administrators be excommunicated, they may be disabled, because they which converse with a person excommunicate, are excommunicate also. (d) If a Bishop be defendant, an excommunication by the same Bishop against the Plaintiff shall not disable him, & it shall be in ended for the same cause if another be not shewed.

(c) 30 E.3.15.42 E.3.15. 21 H.6.30. 21 E.4.49.

(d) See Artic. Cleric 7. 5 E.3.8.8.E.3.70. 9 H.7.21.10 H.7.8,& 9. 18 E.3.58. 28 E.3.97. 16 E.3. Excom.5. 20 E.3.ibid.9.3 H.4.3.

(e) Bract.lib.5. f.426 b. 12 E.4.15.20 H.6.17. 20 E.3. Excommengement 20.33 E.3.ib.29. 44 E.3.ib.23. 11 H.4.14. F.N.B. 64,65,239. 7 E.4.14.8 H.6.3. Regist. 67.

(f) 11 H.4.62. in Debt.

(g) If a Bishop certify, that another Bishop hath certified him, that the party which is his Diocesan is excommunicated, this Certificate upon anothers report is not sufficient. (h) If the Bishop of Rome, or any other having forrein authority, doth excommunicate any subject of this Realm, and certifieth so much under his seal of lead, this shall not disable the party: For the Common Law disallows all Acts done in disability of any subject of this Realm by any forrein power out of the Realm, as things not authentick, whereof the Judges should give allowance. (i) If the Bishop certifieth the excommunication under seal, albeit he dyeth, yet the Certificate shall serve. (k) Si quis innodatus fuerit per excommunicationes diversas pro diversis delictis, & profert literas absolutionis de una sententia, non erit absolutus quousque de omnibus aliis absolvatur.

(g) 33 E.3.Excom.29. F.N.B. 65.

(h) 16 E.3. Excom. 4. 31 E.3.ibid.4.& 6. 30 Ass.19. F.N.B. 64. 4 H.7.15.12 E.4.15. 14 H.4.14.

(i) 14 E.3. Excom. 8. 8 E.2. ibid. 26.

(k) Hill.14 E.3.Coram Rege, London in Trel.

¶ *Evesque.* Episcopus, A Bishop is regularly the Kings immediate Officer to the Kings Court of Justice in causes Ecclesiastical. And all the Bishopricks in England are of the Kings foundation, and the King is Patron of them all, (l) and at the first they were donative, and so it appears by our Books, and by Acts of Parliament, and by History, and that was Per traditionem annuli & pastoralis baculi, i. the Crosier. And King Henry the first being perswaded by the Bishop of Rome to make them elective by their Chapter or Covent, refused it. (m) But King John by his Charter acknowledging the custome and right of the Crown in former times, yet granted De communi consensu Baronum, that they should be eligible, which after was confirmed by divers Acts of Parliament. And afterward the manner and order as well of election of Archbishops and Bishops, as of the Confirmation of the election and Consecration is (n) enacted and expressed in the Statute of 25 H. 8. But by the Statutes of 31 H. 8. and 1 E. 6. they were made donative by the Kings Letters Patents, both which Statutes are repealed, and the Statute of 25 H. 8. doth yet remain in full force and effect.

(l) 17 E.3.fo.40. 25 E.3. cap.de provis. 25 H.8. cap.10.lib.3 f.73. le case de Dean & Chapter de Norwich. Mat. Par.pag. 62. Vide sect.133,134.

(m) Rot.Patent.15. January 17. Regis Johannis, Mat. Par.pag. 252.35 E.1. Lestat. de Carlisle,25 E.3.Lestatute de provis.13 R.2.cap.2.

(n) 25 H.8.cap.22.

And where Littleton saith, that the Bishop under his seal must testify, &c. it is to be known (o) that none but the Kings Courts of Record, as the Court of Common Pleas, the Kings Bench, Justices of Gaol delivery, and the like, can write to the Bishop to certify bastardy, mulierty, loyalty of matrimony, and the like Ecclesiastical matters: for it is a rule in Law, that none but the King can write to the Bishop to certify, and therefore no inferiour Court, as London, Norwich, York, or any other Corporation can write to the Bishop; but (p) in those cases the plea must be removed into the Court of Common Pleas, and that Court must write to the Bishop, and then remand the Record again. And this was done in respect of the honour and reverence which the law gave to the Bishop being an Ecclesiastical Judg,

(o) 2 E.3. Corone,160. 8 E.2.59. 24 E.3.33. 44 E.3.28. 8 R.2. Consuetud. 88.

(p) 41 E.3. 42 E.3.fol.2. 18 E.3.61. 14 H.4.25. 3 H.4.12. Regist.71. F.N.B.6 E.

and a Lord of Parliament, by reaſon of the Barony which every Biſhop hath. And this was the reaſon (a) a Quare Impedit did lye of a Church in Wales, in the County next adjoyning, for that the Lordſhips Marchers could not write to the Biſhop, (b) neither ſhall conuſance be granted in a Quare Impedit, becauſe the inferiour Court cannot write to the Biſhop. And herewith agreeth Antiquity, (c) Nullus alius præter regem poteſt epiſcopo demandare inquiſitionem faciendam. (d) And another ſpeaking of loyalty of marriage, Nec alius quàm rex ſuper hoc demandaret epiſcopo quod iſde inquireret: epiſcopus alterius mandato quam regis non tenetur obtemperare. And herewith agreeth Britton alſo.

a) 8 E.3.59. 36 H.6.33. tit. Quar. Imp. Brooke 109. 35 H.6.30. 11 H.6. 3. 24 E.3.33.
b) 15 E.3. Conuſans 41. juriſdict. 24. 49 E.3.2. Vide Sect. 134.
c) Bract. lib. 3. 106.
d) Fleta lib.5. cap.24. Britton fol. 248. b.

¶ *Le briefe nabatera, &c.* Abater is a French word, and ſignifieth Deſtruere, or Proſternere, to deſtroy or proſtrate. And Abatement de brieſe is a proſtration or overthrowing of the Writ.

(†) Bract.lib.5. fol.425. 11 R. 2. Excom. 25. 13 E.4.8. 3 Aſſ. p.12. Vide Sect. 691.

¶ * *Alera quite ſauns jour, &c.* That is, to go quiet without any continuance to any certain day; and therefore the Defendant is not bound to any certain attendance, untill the party purchaſeth his Letters of abſolution, and the re-attachment or re-ſummons be ſued, the entry of which award is, Ideo loquela prædicta remaneat ſine die quouſque, &c.

c) 51 H 3. cap.1. & 2. Marlebr. cap.12. 32 H.8. cap.21.

¶ *Jour.* Dies (e) in legal underſtanding is the day of appearance of the parties, or continuance of the plea. And you ſhall underſtand, that firſt in real actions there are Dies communes, common dayes, whereof you ſhall read in divers ancient Statutes.

f) Articul. ſuper. Cart. cap.15. 28 E.1.

(f) Alſo in all Summons upon the original, there muſt be fifteen dayes after the Summons before the appearance. (g) But if the original be returned tarde, and Summons alias goeth forth, there muſt be nine Returns between the Teſte and the Return. And ſo in other judicial proceſſe in real actions, ſaving if Conuſans be demanded to be holden within his manor, there proceſſe ſhall be awarded from three weeks to three weeks.

g) 8 H.6.10. 30 H. 6.35. 8 Eliz. Dyer 252.

And before the Statute of Articuli ſuper cartas, in all Summons and Attachments in plea of Land there ſhall be contained the term of fifteen dayes. (q) And it appeareth as well by the Statute, as by the ancient Authors of the Law, who wrote before the Statute, that this was the ancient Common Law: and the reaſon of theſe long dayes given in reall Actions, was (the recovery being ſo dangerous) that the Tenant might the better provide him both of anſwer and of proofs, (†) but by conſent they may take other than common dayes.

q) Mirr. cap.2. ſect.19. Bract. lib.5. fo. 324. & lib.4. fol.255. Britt. fol. 279. b. Flet. lib.6. cap.6. 12 E. 4.15.

(†) 11 H.6.23. 15 E.3. jour. 22. 21 E.3.29. 15 Aſſ. Britton fol.13.b.

And it is not amiſſe to note what the ancient Law was in proceeding againſt a man for his life. And therefore hear what Britton ſaith, Sur le preſentment de ceſt felony (under which he includeth alſo Treaſon) voilons nous (for he wrote in the Kings name) que treſtous ceux que ent ſerr' endites, face le Viſcont haſtiment prender, & ſafement lour corps en priſon garder, & que ilz ſont menes devant nous, ou devant nous Juſtices: & pur ceo que nulluy ne ſoit deſgarnis de lour reſpons, voilons que ceux que iſſint ſoient priſe que ilz eynt temps de purveyer lour reſpons 15, jours au meyns ſilz le prient, & en dementiers ſoient ſafement gardes: (r) Vide Forteſcue of this matter. And ſee the Mirror (s) in ſome caſes the party convicted had forty dayes, or at leaſt thirty dayes to ſhew ſome matter to diſturb (that is, to arreſt) Judgment, which now I know is gone in deſuetudinem, and great expedition is now made in pleas of the Crown concerning the life of man. Sed de morte hominis nulla eſt cunctatio longa.

(r) Forteſcue in libro de laudibus legum Angliæ, Mirror ca.4. ſect. Sept. choſes diſturbeat judgement mortels.
(s) Lib.9.118.b. Zanchers caſe.

(f) And the uſe of the Kings Bench at this day is, that if the offence be committed in another County than where the Bench ſits, and the Inditement be removed by Certiorari, there muſt be fifteen dayes between every proceſs and the return thereof, but if it be committed in the ſame County where the Bench ſit, they may proceed de die in diem, but ſo they will do rarely: but let us return again to the Common Pleas.

(a) Artic. ſuper cart. ubi ſupra F.N.B.177. c.11. Aſſ.30. 12 Aſſ.4. 22 Aſſ. 79.3 H.6.Aſſ.2.9 E.3.5.2. 27 E.3.1.2. W.1.ca. ult.
(†) F.N.B.177.D.7. Aſſ. 7. 14 Aſſ. 4. 24 E.3.31. 39 b. 3. 20. 9 E. 4. 18. 12 E.4.15. 8 H.5.Err.87.

Secondly, there is a day called Dies ſpecialis, (a) as in an Aſſiſe in the Kings Bench or Common Pleas, the Attachment need not be 15. dayes before the appearance. Otherwiſe it is before Juſtices aſſigned, but generally in Aſſiſes, the Judges may give a ſpeciall day at their pleaſure, and are not bound to the common dayes, (†) and theſe dayes they may give as well out of term as within. So upon an imparlance the Court may give any ſpecial or particular day, but that muſt be in the term time, and likewiſe in a Scire facias, upon a fine or a recovery in a reall action, becauſe it is a Writ of Execution, and ſo it is in a Per quæ ſervicia, & the like, and in all judicial Writs, in proceſs againſt an Infant to judge of his age, or where the husband prayeth in aide of his wife, or in a Pone at the ſuit of the Defendant, there need not be fifteen days. And after Demurrer in a Law, the Court may give what day they will.

12 E. 4. 15.

(b) And it is worthy the noting, that if in an Aſſize the parties be adjourned to Weſtm. uſque 15. Paſch. there they be not demandable till the fourth day; but if it be adjourned uſque diem Lunæ or diem Martis, there the parties are demandable on that day.

(b) 41 E.3. jour 16. 8 E.4. a. 1 H.6. 4. 27 Aſſ. 33.
(c) 3 E.2. avowry 188. 15 E. 3. jour. 26. 22 E.3. 20. 1 E.3.4. lib.9. fol.49. Count de Salops caſe. 33 H. 6. 42.

Thirdly, (c) there is a day of grace, dies gratiæ, or a day of courteſy; the name doth ſhew of what kind it is. And regularly this day is granted by the Court, at the prayer of the Demandant

mandant or Plaintiff in whose delay it is, and never at the prayer of Tenant or Defendant. But it is worthy of observation, (d) that a day of grace is never granted where the King is party by Aide prayer of the Tenant or Defendant; nor where any Lord of Parliament, or Peer of the Realm is Tenant or Defendant. (e) And sometime the day that is 4. die post, is called dies gratiæ; for the very day of return is the day in Law, and to that day the Judgment hath relation; but no default shall be recorded till the fourth day be past, unlesse it be in a Writ of right, where the Law alloweth no day, but only the day of return. This day is sometime called dies amoris, and sometime a dies datus, but it were too long to enumerate all. This shall be sufficient to give the Reader a taste to understand the residue concerning this matter.

(d) 14 E.3. jour. 24. 15 E.3. ibid. 21. 22 E.3. 9. 27 E.3. 88.

(e) 22 E. 4. jour. 39. 18 E.3. ibid. 20. 38 E.3. 20. 9 Ass. 41. 21 E.3. 13. 41 E.3. ibid. 16. 33 H.6. 42. 34 H.6. 27. 10 Eliz. Dyer 269. 39 H.6. 29. 24 E.3. 28. 24 E. 3. breve 556. Bract. l. 5. f. 367.

(f) There is also a day of appearance in Court by the Writ, and by the Roll: by Writ when the Sheriff returns the Writ: by the Roll, when he hath a day by the Roll and the Sheriff returns not the Writ, there the Defendant to save himself from corporal pain, as by imprisonment, or to prevent the losse of issues, or to save his freehold or inheritance, may appear by the day he hath by the Roll.

(f) 21 E. 3. 43. 3 H.6. 2. 22 H.6. 20. 3 E. 4. 15. 9 E.4. 7 E.4. 15. 8 E.4. 18. 3 H.7. 8. 10 H.7. 11. b. 27 H.8. 14. Lib. 11. 40. 17 E. 3. 2. 11 Eliz. Dyer 286.

(g) More, it is said commonly, that the day of Nisi prius, and the day in bank is all one day, that is to be understood as to pleading, but not to other purposes.

(g) 21 H. 6. 10. 20. 4 H.6. 9. 40 E.3. 31.

There are dies juridici (which (h) Britton calleth temps covenables) and dies non juridici: dies juridici (except it be in Assises) are only in the Tearm. (i) And there be also in the Tearm dies non juridici As in all the four Tearms, the Sabbath day is not dies juridicus, for that ought to be consecrated to Divine Service. Also in Michaelmasse Tearm, the Feasts of All Saints and of All Souls; in Hillary Tearm, the Purification of the blessed Virgin Mary; and in Easter Tearm, the feast of the Ascension, are not dies juridici, but set apart by the ancient Judges and Sages of the Law for Divine Service. For Trinity Tearm (which sometime had seven days of return, and) was as long as Michaelmasse Tearm is now: but for avoiding of infection in that hot time of the year, and that men might not be letted to gather in Harvest, three returns (since Littleton wrote) viz. Crastino Sancti Johannis Baptistæ, Octabis Sancti Johannis Baptistæ, and 15 Sancti Johannis Baptistæ, are by the Statute of 32 H.8. cut off and become dies non juridici; And in those days the Feast of S. John the Baptist was not dies juridicus. And the said Statute called Dies Communis in Banco, is in divers points, since Littleton wrote, altered, as by the said Statute appeareth. And in ancient time respect and reverence was had by Law to certain times, as it appeareth (k) by the Statute of W. 1. c. 5. which hath a short, but an excellent preamble: viz. Et pur ceo que grand charitie serra de faire droit a touts in tout temps, ou mestier serron: purvieu est per assentment des prelates, que Assises de novel disseisin, mort-dancester, & darreine presentment fuissent prises en le advent en Septuagesime, & en Quaresme, auxi-bien come (le dome) prent lenquestes, & ceo pria le Roy, as Evesques.

(i) 7 Ass. p. 7. 14 Ass. 5. F. N. B. 177. &c. Britton fol. 134. b.

(k) W. 1. cap. ultimo.

(l) This Statute is expounded in Books: which I have only added, to the end, the studious Reader might understand the Books that darkly speak of this matter, and be ignorant of nothing that belongs to the understanding of any part of the Law. Now Advent is a moneth before the Feast of the Nativity of our Saviour Christ, so called De adventu Domini in carne. Septuagesima beginneth ever on the Sabbath day, and is the third Sabbath before Shrovesunday, so called, because it is the 70 day before the Feast of Easter. Sexagesima is the second Sabbath before Shrovesunday, so named, because it is the 60. day before Easter, and so of Quinquagesima and Quadragesima, (m) whereof you shall read in Acts of Parliament, and ancient Authors. Now as there be dies juridici, so there be horæ convenientes, whereof the Mirror saith, (n) Abusion que len tient pleas per dimenches (id est, Sabbaths) ou per auters jours defendus, ou devant le soliel leuy, ou nocantre, ou en d shonest luy.

(m) W. 1. c. 51. fait. ann. 3 E. 1. Fritton. fol. 134. cap. 53.

(n) Mirror, lib. 5. sect. 1.

(o) Furthermore there are (as ancient Authors term them) Dies solaris & dies lunaris secundum quod Deus devisit lumen à tenebris. ex quibus duobus diebus efficitur unus dies qui dicitur artificialis, ex die præcedente & nocte subsequente, qui constat ex 12 horis.

(o) Bract. lib. 4. fol. 264. Britton fol. 209.

But we at this day retaining the same method do differ in the words. For we say, Dierum alii sunt naturales, alii artificiales; dies naturalis constat ex 24. horis, & continet diem Solarem & noctem, and therefore in Indictments of Burglary, and the like, we say, in nocte ejusdem diei. Iste dies naturalis est spatium in quo Sol progreditur ab Oriente in Occidentem, & ab Occidente iterū in Orientem. Dies artificialis sive Solaris incipit in ortu Solis, & definit in occasu: And of this day the Law of England takes hold in many cases. Now divers Nations begin the day at divers times; the Jews, the Chaldæans, and Babylonians begin the day at the rising of the Sun, the Athenians at the Fall, the Umbri in Italy begin at mid-day, the Ægyptians and Romans from mid-night, and so doth the Law of England in many cases. Of all which you shall read plentifull matter in our Books, and in my Reports, which by this short instruction you shall the better understand.

Gen. cap. 1. ver. 4, 5.

(p) There is also Annus minor and major. The lesser year consisteth of 365. dayes, and six hours, whereby in every fourth year there is dies excrescens, which makes that year to

(p) Bract. lib. 5. fol. 349. Britton fol. 209. a.

(q) 17 Eliz. Dyer 345.

(r) 21 H. 3. ſtat. de anno biſſextili.

(ſ) Lib. 6. fol. 62. Cateſbyes caſe.

habe in rei veritate 366 dayes, and that is called annus major. (q) A quarter of a year containeth by legal computation 91 dayes, and half a year containeth 182 dayes, for the odde hours in legal computation are rejected, and by (r) the Statute de anno biſſextili, it is provided. Quod computentur, dies ille excreſcens, & dies proxime præcedens, pro unico die, ſo as in computation that day excreſcent is not accounted. A moneth, menſis, is regularly accounted in Law 28 dayes, and not according to the Solar moneth, nor according to the Kalendar (ſ) unleſſe it be for the account of the laps in a Quare Impedit. There is menſis Solaris, and menſis Lunaris. Solaris eſt 12 pars anni, viz. ſpatium 30 dierum, horarum 10 & minutorum 30; & Lunaris eſt ſpatium 28 dierum.

¶ *Reſommods ou re-attachment.* These are Writs that the Demandant or Plaintiff after he hath obtained his Letters of abſolution, may ſue out to bring the Tenant or Defendant again into Court to have day, to make anſwer unto him. (t) And theſe Writs do lye in all caſes when the plea is diſcontinued, or put without day either in this caſe, or in caſe when the Demandant or Tenant hath his age, or for the non venue of the Juſtices, or in caſe of a Protection or Eſſoine de ſervice le Roy, &c. Of theſe Writs there be two ſorts, viz. general and ſpecial, whereof you may ſee preſidents, and read more at large in the caſe of diſcontinuance of Proceſſe in my Reports, and need not here to be inſerted.

(t) Bract. lib. 5. 425. Brit. c. 74. lib. 7. fol. 29, 30.

¶ *Sur ſon originall.* This is intended of his original Writs, or of that which is in ſtead of an originall Writ. But note, that in the other five caſes the Writ ſhall abate, and in the caſe of Excommengement the Writ ſhall not abate; but the plea to be put without day, untill the Plaintiff purchaſe his letters of Abſolution, and ſue out his reſummons, or reattachment.

But in the caſe of outlawry the writ ſhall abate, if he obtain not his patdon. 44 E. 3. 27.

In ancient times more perſons ſeemed to be diſabled, then theſe ſix recited by Littleton. As firſt, he that was a Leper, and by the Writ De leproſo amovendo was propter contagionem morbi præd', (as the Writ ſaith) & propter corporis deformitatem (as others ſay) to be removed from the ſociety of men to ſome ſolitary place, and therupon (u) it is ſaid, Datur etiam exceptio tenenti, ex perſona petentis peremptoria, propter morbum petentis incurabilem & corporis deformitatem, ut ſi petens leproſus fuerit, & tam deformis quod aſpectus ejus ſuſtineri non poſſit, & ita quod à communione gentium ſit ſeparatus, talis quidem placitare non poteſt, nec hæreditatem petere. (x) And herewith Britton agreeth, treating of diſabled men, as men outlawed, abjured the Realm, attainted of felony, &c. addeth, ne meſel, ouſte de common gents.

(u) Bract. lib. 5. fol. 421.

(x) Brit. fol. 39. & 88.

(y) Fleta lib. 6. cap. 39. 22 E. 3. in dorſ. clau. 20. part nu. 14. F. N. B. 234. Regiſter.

(y) And Fleta ſaith, Comperit etiam ei exceptio propter lepram manifeſtam, ut ſi petens leproſus fuerit, & tam deformis quod à communione gentium merito debet ſeparari, talis enim morbus petentem repellit ab agendo.

And if theſe ancient writers be underſtood of an appearance in perſon; I think their opinions are good Law, for they ought not to ſue nor defend in proper perſon, but by Attorney, for they are ſeparated à communione gentium propter contagionem morbi, & deformitatem corporis.

Before the Conqueſt this diſeaſe was not known in England: For Maſter Camden writing of Burton Lazers in Leiceſterſhire, ſaith, (a) Primis Normannorum temporibus collecta per Angliam ſtipe noſocomium hoc conſtruum ferunt, quo tempore lepra (quæ à nonnullis Elephantiaſis) graviſſimè vi contagionis per Angliam ſerpſit. And it is called Morbus Elephantiaſis, becauſe the ſkins of Lepers are like to Elephants. (b) And the Law of England for the removing of the Lepers from the ſociety of men to ſome ſolitary place, is grounded upon Gods Law.

(a) Camden in Leiceſterſhire, verbo Burton.

(b) Levit cap. 13. ver. 44, 45, 46. Numb. cap. 5. ver. 1, 2, 4. Regum ca. 15.

(c) Bract. lib. 5. 420, 421. Britton fol. 32. Fleta lib. 6. cap. 39.

(d) 33 H. 6. 18. F. N. B. 27 G.

(e) 27 H. 8. 11. 40 E. 3. 16. 20 E. 4. 2. F. N. B. 27 H.

(c) Alſo there was a time when Idots, Madmen, and ſuch as were deaf and dumb naturally were diſabled to ſue, becauſe they wanted reaſon and underſtanding, (tales enim non multum diſtant à brutis) but at this day they all may ſue, for the ſuit muſt be in their name, but it ſhall be followed by others. (d) And note, that when an Idcot doth ſue or defend, he ſhall not appear by Gardian or Prochein Amy, or Attorney, but he muſt be ever in perſon, (e) but an Infant or a Minor ſhall ſue by Prochein Amy, and defend by Gardian: but now let us hear what Littleton will ſay unto us.

## *Sect.* 202.

(a) Mirr. cap. 2. ſect. 18. Doct. & Stud. fol. 141. 4 E. 4. 25. per Danby. 27 Aſſ. Pl. 49.

¶ *Chaplein (a) ſeculer*, Is he that is Infra ſacros ordines, but he is not regular, (that is) liveth not under certaine Rules,

¶ Item ſi un villein eſt fait un chapleine ſeculer, uncore ſon ſeignior poit luy

Alſo if a Villeine be made a ſecular Chaplaine, yet his Lord may ſeiſe him as

ſeiſer

ſeiſer cõe ſon villein, & ſeiſie les biens, &c. Mes il ſemble que ſi le villeine ẽter ẽ Religion, & eſt profeſſe, que le Sñr ne poit luy prender ne ſeiſer, pur ceo que il eſt mort en Ley, nient plus q̃ ſi un frank hõe prent un neife a ſa feme, le Seignior ne poit prender ne ſeiſer la feme de le baron. Mes ſon remedy eſt daver un action enders le baron, pur ceo que il prift ſa niefe a feme ſans ſon licence & volunt, &c. Et iſſint poit le Sñr aver action enders le ſoveraign del meaſon qui prift & admittaſt ſon villein deſtre profeſſe en meſme le meaſon ſans licence & la volunt le Seignior, & recovera ſes damages a la value de le villein. Car celuy q̃ eſt profeſſe Noigne ſerra un Noigne, & come un Noigne ſerra pris pur terme de ſa vie natural, ſinon que il ſoit deraigne per la ley de ſant Egliſe. Et il eſt tenus per ſon Religion de gard ſon cloyſter, &c. Et ſi le Sñr luy puiſſoit prender hors de ſa meaſon, donques his villeine, and ſeiſe his goods, &c. But it ſeemeth, that if the Villein enter into Religion, and is profeſſed, that the Lord may not take nor ſeiſe him, becauſe hee is dead in Law; no more than if a free man taketh a Neiſe to his wife, the Lord cannot take nor ſeiſe the wife of the husband, but his remedy is to have an Action againſt the husband, for that hee took his Neiſe to wife without his licence and will, &c. And ſo may the Lord have an action againſt the ſoveraign of the houſe which taketh and admitteth his villeine to bee profeſſed in the ſame houſe, without the licence and leave of the Lord, and hee ſhall recover his damages to the value of the villeine. For he which is profeſſed a Monke ſhall be a Monk, and as a Monk ſhall be taken for terme of his natural life, unleſſe he be deraigned by the Law of holy Church. And hee is bound by his Religion to keep his Cloyſter, &c. And if the Lord might take him out of his houſe, nor hath bowed thoſe three things above ſpecified.

¶ (b) *Enter en Religion & eſt profeſſe.* That is intended, (as hath bin ſaid) when he is regular and profeſt under certain rules, as to become one of the four orders of Freers (that is to ſay) Freres minors, Auguſtines, Preachers, or Carmelites, or become a Monk, Canon, or Nunn, &c. Qui ad vivendum regulariter ſe aſtringunt, ſive ſunt Monachi, ſive Canonici regulares, ſive ſanctimoniales. For all theſe are regular and Votaries, & are dead perſons in Law, but ſo are not the ſecular perſons, as Prebends, Parſons, Vicars, &c.

And therefore it is holden in our Books, (c) that if a ſecular Prieſt taketh a Wife, and hath iſſue and dyeth, the iſſue is lawfull and ſhall inherit as heire to his Father, &c. for, as it was then holden, the marriage was not voyd, but voydable by divorce, and after the death of either party no divorce can be had.

But if a man marrieth a Nunne, or a Monk marrieth, theſe marriages were holden void, and the iſſues baſtards, becauſe, as it was then holden, the marriage was utterly voyd, for that the Nun and the Monk (as Littleton here ſaith) were dead perſons in Law. And that is the reaſon yielded by Littleton, wherefore a Villein being profeſſed in Religion cannot be ſeiſed by the Lord, becauſe he is dead in Law, and yet his blood or bondage is not thereby altered, but his perſon in reſpect of his profeſſion only priviledged. (d) In decretalibus ſtatutũ eſt quod nullus Epiſcopus ſpurios aut ſervos donec à Dominis ſuis fuerint manumiſſi ad ſacros ordines promovere præſumat. But notwithſtanding his perſon is priviledged till he be diſgraded. And ſo it is holden in our old books. (e) If a villein

b) Britton c. 31. f. 79. Doctor & Stud. f. 341.

4 H. 4. cap. 24.

c) 21 H. 7. 29. 19 H. 7. tit. baſtardy 33. 3 E. 2. til. Nonability 26. 47 E. 3. Calv. alio.

d) Glanv. lib. 5. cap. 5. Britton fol. 79. & 82.

e) Fleta lib. 2. cap. 44. Britton ubi ſupra.

leing be made a Knight, for the honour of his degree his person is privileged, and the Lord cannot seize him, until he be disgraded. Nullam vilem personam natione spurium, vel servilis conditionis ad militiæ strenuitatis ordinem promoveri licebit, sed cum à Dominis suis degradatis, statim ad judicium procedatur.

il ne viveroit cõe un mort person, ne solonq̃ son Religion, le quel serroit inconvenient, &c.

then he should not live as a dead person, nor according to his religion, which should be inconvenient, &c.

percantur ut nativi, ipsis primo

f) F.N.B.78.b. 30 E.1. tit. Villein 46. 33 E.3.ib. 21. 18 E.2. ib. 30. 46 E.3.6 4 E.4.25.1 H.4.6.13 E.1. Villein 36. 18 Ass. 10. Doct. & Stud. 141. Mirr. cap. 2. sect. 18. acc.

¶ *Si unfrank home prentun niefe.* (f) Some have holden, that by this marriage the wife shall be free for ever: but the better opinion of our books is, that she shall be privileged during the coverture only, unlesse the Lord himself marrieth his Niefe, and then some hold, that she shall be free for ever.

If a niefe be regardant unto a Mannor, and she taketh a free man to husband by licence of the Lord: and the Lord maketh a feoffment in fee of the Mannor, the husband dyeth, the Feoffee shall not have the niefe, but the Feoffor, for that during the marriage she was severed from the Mannor. And so is the Book 29 Ass. (which is falsly printed) to be understood.

g) 16 H.3. Nuper obiit 17. 8 H.3. breve 789.

(g) If two Coparceners be of a Villein, and one of them taketh him to husband, she and her husband shall not have a Nuper obiit against her Coparcener, but after the decease of her husband she shall.

h) Vide Britton fol. 82. 2 Fortesc. c. 43. 46 E.3.6.a.

¶ (h) *Mes son remedie est dáver un action vers le Baron, &c.* Albeit marriage is lawfull, yet when it worketh a prejudice to a third person, an action in this Case lyeth against the husband to the value of his lois. And albeit he did not know her to be a Niefe, yet the action lyeth against him, for he must take notice thereof at his perill, (i) unless she be out of the service of the Lord, and vagrant, and then if one not knowing her to be a Niefe marrieth her, some say that in ẏ case no action lyeth against the husband. (k) And likewise the Lord shall have an action against those that were the means to make the Villein a Knight.

i) 7 H.2. tit. barr. 240.

k) Britton fol. 82. b.

31 H.6. cap. 5. 12 H.7. c. 7. 21 H.4. 5. b.

¶ *Soveraigne*, Præcipuus, Chiefe, as here, Soveraigne del meason is the chief of the house.

31 H.8. cap. 29.

¶ *Si non que il soit deraigne.* This word (deraigné) cometh of the French word derayer, or deraigner, that is to say, to displace, or to turn one out of his order, and hereof cometh deraignment, a displacing or turning out of his order. So when a Monk is deraigned, he is degraded and turned out of his order of Religion, and become a Lay-man.

40 Ass. 27, per Finchden.

¶ *Le quel serra inconvenient.* Ab inconvenienti is a good argument in Law. as Littleton often observeth. And here Littleton concludeth that the Lord cannot take a Monk out of his house, for that it should be inconvenient, which Littleton here sheweth, for divers reasons, and therefore unlawfull. And the inconvenience is, that where a man of Religion should live according to his profession in Religion, by the taking of him out he should not.

¶ *Si le Seignior luy puisſoit prender, &c.* By this it appeareth, that if a man detaineth a Villein in his house, the Lord of the Villein may take him out of the house; for here the impediment wherefore the Lord could not take him out of the house, was, for that the Villein was a Monk professed. And so in case of the Wardship here next following.

## *Sect.* 203.

¶ *Briefe de Ravishment de garde.* This Writ is given by the Statute of W. 2. cap. 35. in verbis conceptis, the words of which Writ be, that the defendant, Talem hæredem cujus maritagium ad ipsum A.

¶ EN meisme le maner est, si soit gardeine en chivalrie de corps & de fre dun enfant deins age, si lenfant quant

IN the same manner it is, if there bee a Gardian in Chivalrie of the body and land of an Infant within age, if the Infant

il

il vient al age de 14. ans entra en Religion, & eſt profeſſe, le gardein nad auter remedy (quant a le garde de le corps) forſque brefe de Raviſhment de garde envers le ſoveraign de le meaſon. Et ſi aſcun eſteãt de plein age, que eſt coſin & heire del enfãt enter en le terre, le gardein nad aſcun remedie quant al garde de la terre pur ceo que lẽtrie del heire lenfant eſt congeable en tiel caſe.

when he comes to the age of 14. yeares, entreth into Religion and is profeſt, the Gardian hath no other Remedy (as to the wardſhip of the body) but a Writ of Ravithment *de garde* againſt the Soveraign of the houſe. And if any being of full age, who is couſin and heir of the Infant, entreth into the land, the Gardian hath no remedy as to the wardſhip of the land, for that the entry of the heir of the infant is lawful in ſuch caſe.

pertiner, &c. rapuit & abduxit, &c. contra pacem. Now Rapere ſignifieth properly to take away by violence and force. And when the Soveraign took and admitted the Ward into his houſe to be profeſſed, this in judgment of Law is a Ravithment of the Ward, and as it appeareth in our books before the ſaid Statute, there lay a general action of treſpaſs in that caſe. Lib. 9. Doctor Huſſeyes caſe, fol. 72.

¶ *Apres lage de* 14. *ans, &c.* Our Author mentioneth this age, becauſe it is prohibited by the ſtatute of 4 H. 4. that no child ſhall be received into any houſe of Religion before that age, without conſent of his parents and gardians, &c. 4 H. 4. cap. 17.

¶ *Le gardeine nad aſcun remedie, &c.* Here it appeareth that by the profeſſion of the Ward, the Lord loſeth the Wardſhip of the land, becauſe he is Civiliter mortuus, a dead man in Law, and cannot hold any inheritance, neither can the gardian continue the Wardſhip of the land, becauſe by the civil death of the Ward, the inheritance is deſcended to another, who is either to be in Ward, or pay Reliefe. So as in this caſe the gardian hath Damnum, but it is abſque injuria, becauſe he loſeth the Wardſhip of the land by act of Law, viz. the deſcent thereof to another, and therefore the Law giveth to him no remedy in this caſe, neither by any formed Writ, nor by Action upon his caſe; for Littletons words are general, (he hath not any remedy.)

## *Sect.* 204.

¶ Item en mults & divers caſes le Sñr poit faire manumiſſion & enfranchiſement a ſon Villeine. Manumiſſion eſt properment, quãt le Sñr fait un fait a ſon Villein de luy enfranchiſer, per hoc verbũ (Manumittere) quod idem eſt quod extra manum, vel extra poteſtatẽ alterius ponere. Et pur ẽ q̃ per tiel fait le villein

Alſo in many and divers caſes, the Lord may make manumiſſion and enfranchiſement to his villeine. Manumiſſion is properly, when the Lord makes a Deed to his Villeine to enfranchiſe him by this word (*Manumittere*) which is the ſame as to put him out of the hands and power of another. And for that, that by ſuch Deed

¶ *Manumiſſion.* (l) Manumittere, quod idem eſt, quod extra manum vel poteſtatem ponere. (l) Glanvil lib. 5. cap. 5. Brit. fo. 78, &c. 82. 97. 116 Fleta lib. 1, cap. 13, & lib. cap. 44.

Quia quamdiu quis in ſervitute eſt, ſub manu & poteſtate Domini ſui eſt.

Qui in poteſtate Domini ſui eſt, in manu domini ſui eſſe dicitur, ſed poſtquam manumiſſus eſt, ab illo liberabitur, ergo dicitur quaſi extra manum, id eſt, extra poteſtatem Domini ſui miſſus. And here is to be noted (as in many other places is obſerved) what regard Littleton hath to the true Etymologies of words.

¶ (m) *Enfranchiſement.* (Hereby Littleton explaineth Manumiſſion) and is (m) Mirror ca. 1. ſect. 18.

is derived from the French word Franchise; that is Liberty; and in the Common Law it hath divers significations: Sometimes the incorporating of a man to be free of a Company or Body Politique, as a free man of a City, or Burgess of a Burrough, &c. sometimes to make an Alien a Denison, and here to manumise a villein or bondman. So as this word (Enfranchisement) is more general than Manumission, for that is properly applyed to a villein, and therefore every Manumission is an Infranchisement, but every Infranchisement is not a Manumission. (n) There be two kinds of Manumissions, one expresse, and the other implyed. Expresse, when the villein by deed, in expresse words, is manumised and made free: the other implyed, by doing some act that maketh in judgment of Law the villein free, albeit there be no expresse words of Manumission or Infranchisement. (o) If a villein be manumised, albeit he become ingrateful to the Lord in the highest degree, yet the Manumission remains good: and herein the Common Law differeth from the Civil Law, for, Libertinum ingratum leges civiles in pristinam redigunt servitutem, sed leges Angliæ semel manumissum semper liberum judicant, gratum & ingratum.

est mis hors de la maine & de la poir son Seignior il est appel' Manumission. Et issint chescũ maner de enfranchisement fait a ũ villein post est dit Manumission.

the villeine is put out of the hands and out of the power of his Lord, it is called Manumission. And so every manner of infranchisement made to a villein, may be said to be a Manumission.

(n) Mirror cap. 2. sect. 18.

(o) Fortesc. cap. 46.

There be also some cases where the villein shall be privileged from the seisure of the Lord, albeit he be not absolutely manumised or infranchised. Sometimes Ratione loci, (p) as if a villein remain in the ancient demean of the King a year and a day without claim or seisure of the Lord, the Lord cannot have a Writ of Nativo habendo, or seise him so long as he remains and continues there: and the reason of this was, in respect of the service he did to the King, in plowing and tillage of the demeanes and other labours of husbandry for the Kings benefit. And herewith agree old books (q) which say, that this immunity was sometime granted by common consent to the King for his profit, and for the help or ease of his villeins. (r) If a villein be a Priest of the Kings Chappel, the Lord cannot seise him in the presence of the King, for the Kings presence is a priviledg and protection for him. Sometime Ratione professionis, (s) as if a villein be professed a Monke, or a nieve a Nun, as hath been said. (t) Sometime (as some have said) ratione Dignitatis, as if the Villein be made a Knight, &c. Sometime Ratione matrimonii, as if a nieve marry a free man, she is privileged during ẽ marriage, but not absolutely enfranchised, for if her husband dye, she is nieve again, unlesse the Lord himself marrieth the nieve, and then she is enfranchised for ever, as hath been said before. And it shall not be amisse to observe the wisdom of our Ancients, with what solemnity (for more surety thereof) Manumissions were made: Qui servum suum liberat, in Ecclesia, vel mercato, vel comitatu, vel hundredo, coram testibus & palam faciat, & liberas ei vias, & portas conscribit apertas, & lanceam, & gladium, vel quæ liberorum arma in manibus ei ponat. Our Author having spoken of an expresse Manumission, here follows infranchisements in Law.

(p) 39 E. 3. 6. b. F.N.B. 79. a.

(q) Glanvil lib. 5. ca. 5. Fleta lib. 2. cap. 44. Brit. f. 79. Mir. c. 2. sect. 18

(r) 27 Ass. p. 49.

(s) Glanvil lib. 5. cap. 5.

(t) Britton ubi supra.

Lib. Rub. cap. 78.

## *Sect.* 205.

FOr when the Lord enableth the Villein to have an action against him, as for debt or annuity, &c. or giveth to the villein a certain and fixed estate in Lands, Tenements, or Hereditaments, as a Lease for years, this amounteth to an infranchisement, not only during the years, but for ever; (u) and albeit the lease be made to the Villein without Deed, yet it is an infranchisement for ever.

(u) 50 E. 3. tit. vil. 25. 11 H. 7. 13.

CAr̃y ſi le Sr̃ fait a ſon villein ũ Obligation ď certaine ſomme dar̃gent, ou grant a luy per ſon fait un ãnuitie, ou leſſa a luy per ſon fait terres ou tenements pur terme des ans, le villein eſt enfranchiſe.

ALſo if the Lord maketh to his Villein an Obligation of a certain ſumme of money, or granteth to him by his Deed an annuity, or lets to him by his Deed, lands or tenements for term of years, the villein is enfranchiſed.

*Sect.*

## *Sect.* 206.

¶ AUry ſi le Sñr fait un feoffment a ſon villein dalcun terres ou tenemñts per fait, ou ſans fait, en Fee ſimple, Fee taile, ou pur terme de vie, ou ans, & a luy livera ſeiſin, ceo eſt un enfranchiſement.

ALſo if the Lord maketh a feoffment to his Villein of any Lands or Tenements by Deed, or without Deed, in Fee ſimple, Fee taile, or for term of life or years, and delivereth to him Seiſin, this is an infranchiſement.

This is evident, and agreeth with our Books. Vide 24 E. 3. 32. 12 H. 3. tit. Vill. 42.

## *Sect.* 207.

¶ MEs ſi le Sñr fait a luy un leaſe des terres ou tenemẽts, a tener a voluntle Sñr, per fait, ou ſans fait, ceo neſt aſcun enfranchiſemẽt, pur ceo q̃ il nad aſcun maner ď certaintie ne ſuertie de ſon eſtate, mes le Sñr luy poit ouſter quãt il voilet.

BUt if the Lord maketh to him a Leaſe of lands or tenements, to hold at will of the Lord, by deed or without deed, this is no enfranchiſement, for that that he hath no manner of certainty or ſurety of his eſtate, but the Lord may ouſt him when he will.

¶ *Per fait.* So as a Deed made to a Villein by the Lord, is no infranchiſement, when the Deed transferreth no certaine or fixed eſtate, but revocable at the Lords will. If the Lord releaſe to his Villeine all his right in black acre, and the villein is not thereof ſeiſed, this is no infranchiſement, becauſe it is voyd, and can give no cauſe of action. If the Lord attorneth to his Villeine, this is no infranchiſement. 11 H. 7.

## *Sect.* 208.

¶ AUry ſi le Sñr ſuiſt envers ſon villeine un Præcipe quod reddat, ſil recover, ou ſoit nonſue apres appearance, ceſt un manumiſſion, pur ceo q̃ il puiſſoit loyalment enter en la terre ſans tiel ſuit. En meſm le manner eſt, ſil ſuiſt envers ſon villein un action ď debt, ou dacount, ou ď covenant,

ALſo if the Lord ſueth againſt his villeine a *Præcipe quod reddat*, if hee recover or bee nonſuit after appearance, this is a manumiſſion, for that hee might lawfully have entred into the land without ſuit. In the ſame manner it is if he ſue againſt his villeine an action of debt, or account, or of covenant, or of

¶ *SI Seignior ſuiſt envers ſon villeine un* Præcipe quod reddat, *&c. ceo eſt un manumiſſion.* And the principall reaſon hereof is, for that by this ſuit he enableth the villeine to be a perſon able to render him the land by courſe of Law, where the Lord without any ſuch ſuit might have entred. (a) But if the tenant in tayle be of a Manor whereunto a Villein is regardant and infeoffeth the Villeine of the Manor and dyeth, the iſſue ſhall have a Formedon againſt the Villein, and after the Recovery of the Manor, he ſhall ſeize the villein. And

(a) 24 E. 3. Diſcont. 164. Vide Britton 78. & 126.

the reaſon is, for that he could not ſeiſe the Villein, till he had recovered the Mannor which was the principall, and at the time of the Writ brought, he was no Villein.

The Tenant infeoffs the Villein of the Lord, and an eſtranger upon colluſion, in this caſe although the Lord may enter upon the Villein for the moity, yet may he have a Writ of Ward againſt them both without infranchiſement of the Villein; for if the Lord ſhould enter upon the Villein, then ſhould his ſeignory be ſuſpended, and then could not he have a Writ of Ward againſt the other.

The Lord upon a Writ of Covenant brought by the Villeine, levies a fine to his Villein, of Land which is ancient Demeſne, the Lord of whom the Land is holden reverſeth the fine in a Writ of deceit, albeit the authority and juriſdiction of the Court is diſproved, and that the Lord of the Villeine ſhall be reſtored to the Land given by the fine; yet it is an enfranchiſement, for that he anſwered to the Writ of Covenant, and the fine was voidable, and not void, and therefore being once an enfranchiſement, it cannot be avoided by the reverſing of the fine.

¶ *Soit non ſue* (*id eſt*) *non eſt proſecutus breve ſuum.* For by the Law, the Plaintiff is firſt Agent at every continuance; and therefore the Record ſaith, Quod petens ſeu querens (naming them) obtulit ſe, who if he be called, and make default, then he is ſaid to be Nonſuit, id eſt, non eſt proſecutus, &c.

By Littleton here it appeareth, that there is a Nonſuit before appearance, at the return of the Writ, or after appearance at ſome day of continuance. (x) The difference between a Nonſuit and a Retraxit on the part of the Demandant or Plaintiff is this, A Nonſuit is ever upon a demand made when the Demandant or Plaintiff ſhould appear, and he makes default. A Retraxit is ever when the Demandant or Plaintiff is preſent in Court (as

(x) Lib.8. fol.58,62. Bechers caſe. 3 H.6.13. Brook tit. Nonſuit 1. 8 H.6,7. 50 E.3,12.

ou de Treſpaſſe, ou de hujuſmodi, ceo eſt un enfranchiſement, pur ceo que il puiſſoit empriſon le villein, & prender ſes biens ſans tiel ſuit. Mes ſi le Seignior ſuiſt ſon villeine per appeale de felony, ou il fuit endict de ceo devant, ceo ne enfranchiſera pas le villeine comẽt que le matter de lappelle ſoit trove encounter le Seignior, pur ceo que le Seignior ne puiſſoit aver le villeine deſtre pendue ſãs tiel ſuit. Mes ſi le Villeine ne fuit endict de meſme le felony, devant lappeale ſue enꝰs luy, & puis eſt acquite de ceſt felony, iſſint que il recovera dammages envers ſon ſeignior pur le faux appeale, donques le villeine eſt enfranchiſe, pur la cauſe de le judgement de dammages a luy deſtre don envers ſon ſeignior. Et pluſors auks caſes & matters y ſont, per queux un villeine poit eſtre enfranchiſe envers ſon Seignior, &c. Sed de illis quære.

Treſpaſſe, or of ſuch like, this is an infranchiſement, for that he might impriſon the Villeine, and take his goods without ſuch ſuit. But if the Lord ſue his Villeine by Appeale of Felony, where he was indited of the ſame before, this ſhall not enfranchiſe the Villeine, albeit that the matter of appeale bee found againſt the Lord, for that the Lord could not have the Villeine to be hanged without ſuch ſuit. But if the Villeine were not indited of the ſame Felony before the appeal ſued againſt him, and afterward is acquitted of his Felony, ſo as he recover dammages againſt his Lord for the falſe appeale, then the villeine is infranchiſed, becauſe of the judgement of dammages to be given unto him againſt his Lord. And many other caſes and matters there be by which a Villeine may be infranchiſed againſt his Lord, &c. *But enquire of them.*

(as regularly he is ever by intendment of Law untill a day be given over, unleſſe it be when a verdict is to be given, for then he is demandable.) And this is in two ſorts, one Privative, and the other Poſitive; Privative, as upon demand made, that he make default and depart in deſpite of the Court, and then the entry is, (y) Et poſtea eodem die devenit ad barram prædict. tenens, & præd' petens tunc ſolenniter exactus non venit, ſed à ſecta ſua predicta in contemptum Curiæ ſe retraxit, ideo conſideratum eſt, &c. Poſitive, as when the entry is, Et ſuper hoc idem querens picit, quod ipſe non vult ulterius placitum ſuum prædictum proſequi, ſed inde omnino ſe retraxit, &c. ideo, &c. Another form thereof is, quod idem querens fatetur ſe (ſeu cognovit ſe) ulterius nolle proſequi verſus prædict. defend. &c. de placito præd'. (z) A departer in deſpight of the Court, is on the part of the Tenant, & is when the Tenant or Defendant after appearance, and being preſent in Court upon demand makes departure in deſpight of the Court, and then the entry is, Et prædict' tenens ſeu defendens licet ſolenniter exactus non revenit ſed in contemptum Curiæ receſſit & defaltam fecit, ideo, &c. It is called a Retraxit, becauſe that word is the effectuall word uſed in the entry, as before it appeareth, and it is ever on the part of the Demandant or Plaintiff. (a) Another difference between a Retraxit, and a Nonſuit is, that a Retraxit is a bar of all other Actions of like or inferiour nature: Qui ſemel actionem renunciavit, amplius repetere non poteſt. But regularly a Nonſuit is not ſo, but that he may commence an action of like nature, &c. again. For it may be, that he hath miſtaken ſomewhat in that action, or was not provided of his proofs, or miſtaking the day, or the like. But yet for ſome ſpecial reaſons, Nonſuit in ſome actions is peremptory.

(y) Tr. 5 H.6. Rot. 320. In Com. Banco.

(z) F.N.B. 78.f. & 108.d. 19 E. 2. Villein. 31.

(a) Lib. 8, ubi ſuprà.

In a Quare impedit, if the Plaintiff be Nonſuit after appearance, the Defendant ſhall make a title, and have a writ to the Biſhop; (b) and this is peremptory to the Plaintiff and is a good bar in another Quare impedit, and the reaſon is, for that the Defendant had by judgment of the Court a writ to the Biſhop, and the Incumbent that commeth in by that Writ ſhall never be removed, which is a flat bar as to that preſentation, and of this opinion is Littleton in our books. And the ſame Law, and for the ſame reaſon it is in the caſe upon a diſcontinuance.

(b) 5 E. 3. 35. 2 H. 5. 31 H. 6. 15. 22 H. 6. 449 45. 33 H. 6. 1. 55. 19 E. 4. 9. 21 E. 4. 2. b. & c. F.N.B. 38. k. Lib. 7. fol. 27. b. Sir Hugh Portmans caſe.

(c) In a Writ De Nativo habendo, Nonſuit after appearance is peremptory, for thereby the Villein is franchiſed. And ſo it is if two be Plaintiffs in a Nativo habendo, if one be nonſuit, this is the nonſuit of both, and no ſummons and ſeverance doth lye in that caſe, albeit it be a real action: And this is in favorum libertatis, for in a Libertate probanda, Nonſuit after appearance is not peremptory, neither is the nonſuit of the one, the nonſuit of both.

(c) 6 E. 2. Vill. 16. 12 E. 2. ibid. 28. 19 E. 2 ibid. 31. F.N.B. 78. c. 4 E. 2. Nonſuit, 29.

(d) Nonſuit in an appeal of Murder, Rape, Robbery, &c. after appearance is peremptory, and this is in favorem vitæ; for if the Defendant be acquited, and take out proceſſe upon the Statute of W. 2. againſt the Abbettors; or if he purchaſe his original writ, for that cauſe he may be nonſuit.

(d) 9 H. 4. 1. 12. Stanf. Pl. Com. 148. a. & 171. c. 22 Aſſ. 97. Fitz. Cor. 184. 22 E. 3. 6. 47 E. 3. 16. 7 H. 7. 5. 40 E. 3. Dam. 77. 17 E. 2. Coron. 386. 3 E. 2. Action ſur Lettab. 28.

(e) If the Plaintiff in an appeal of Mayhem be Nonſuit after appearance, it is peremptory, for the Writ ſaith, Felonice maihemavit, and therefore the nonſuit is peremptory.

(e) 43 Aſſ. 39. 40 Aſſ. 1.

(f) In an Attaint if the Plaintiff after appearance be nonſuit, it is peremptory, and the reaſon is for the faith that the Law gives to the verdict, and for the terrible and fearful judgment ſhould be given againſt the firſt Jury if they ſhould be convicted, and therefore upon the Nonſuit, the Plaintiff ſhall be impriſoned, and his pledges amerced. But if the proceſs in an Attaint be diſcontinued, the Plaintiff may have another writ of Attaint, becauſe upon the Nonſuit there is a judgment given, but not upon the diſcontinuance. Note, it is truly ſaid, Exceptio probat regulam, for theſe caſes excepted ſtand upon their ſpecial and particular reaſons, and fall not within the general reaſon of the rule. It is a general rule, that Nonſuit before appearance is not peremptory in any caſe, for a ſtranger may purchaſe a Writ in the name of him that hath cauſe of action, as ſhall be ſaid hereafter in this ſection.

(f) 32 Aſſ. 13. 19 Aſſ. 14. 20 E. 3. attaint, 42. 22 E. 3, 7. F.N.B. 108. d.

(g) In reall or mixt actions the nonſuit of one Demandant is not the nonſuit of both, but he that makes default ſhall be ſummoned and ſevered: but regularly in perſonal actions, the nonſuit of the one is the nonſuit of both; unleſs it be in certain particular caſes.

(g) 11 H. 6. 23. 35. F.N.B. 39. b. 19 E. 3. tit. Sever. 14 E. 2. Nonſu. 18. 19 E. 3. Sev. 16. 12 E. 3. ib. 38 E. 3. 9. 29 H. 6. 45. 38 E. 3. 35. 41 E. 3. Nonſuit 10, 45 E. 3. 10. 2 H. 4. 2.

(h) In perſonall actions brought by Executors there ſhall be Summons and ſeverance, becauſe the beſt ſhall be taken for the benefit of the dead. And ſo it is in an action of Treſpaſs as Executor for goods taken out of their own poſſeſſion. Like Law in account as Executors by the receit of their own hands.

(h) 42 E. 3. 13. 48 E. 3. 14. 28 H. 6. 3. 11 E. 2. Sev. 26. 13 E. 3. ibid. 15. 18 E. 3, ibid. 28. 5 E. 3. ibid. 20. 7 E. 3. 12.

(i) In an Audita querela concerning the perſonalty, the nonſuit of the one is not the nonſuit of the other, becauſe it goeth by way of diſcharge and freeing of themſelves, and therefore the default of the one ſhall not hurt the other.

(i) 15 E. 3. Sev. 13. lib. 6. fo. 25. Ruddocks caſe.

(k) In a Quid juris clamat, the nonſuit of the one is the nonſuit of both, becauſe the Tenant cannot attorn according to the grant.

(k) 20 E. 3. Severance 17.

(l) Some actions follow the nature of thoſe actions whereupon they are grounded as the Writs of Error, Attaint, Scire facias, and the like. If a reall action be brought by ſeverall Præcipes againſt two or more, if the Demandant be Nonſuit againſt one, he is Nonſuit

(l) 47 E. 3. 6. b. 47 Aſſ. 3. 29 Aſſ. 34. 7 H. 4. 43. 34 H. 6. 31. 25 H. 6. 19. 29 E. 3. 37. li. 6. ubi ſupra. 22 H. 6. 42. 4 E. 4. 33. 19 E. 2. Nonſuit, 32. 18 E. 3. ibid. 31. 20 E. 3. ib. 26, 27. 19 E. 3. ib. 12. 2 E. 3. ibid. 17. E 8 E. 3. 9. 20 H. 6. 45. 44 E. 3. 16. 19 E. 3. Severance 16.

againſt all, for as to the Demandant it is but one Writt under one Teſte. Note, Severance is twofold, viz. by Summons ad ſequendum ſimul, and that is when one of the Demandants or Plaintiffs never appeared, and by award of the Court of Nonſuit without any ſummons, and that is after appearance.

(m) The Kings Majeſty cannot be Nonſuit, becauſe in judgment of Law, he is ever preſent in Court, but the Kings Attorney, Qui ſequitur pro Domino Rege, may enter an alterius non vult proſequi, which hath the effect of a Nonſuit; but in an Information by an Informer, qui tam, &c. the Informer may be nonſuited.

(m) 6 R. 2. Nonſuit 13. 25 H. 8. Nouſuit, Br. 68. 20 H. 7. 5.

(n) At the Common Law, upon every continuance or day given over before judgment, the Plaintiff might have been Nonſuited; and therefore before the Statute of 2 H. 4. after verdict given, if the Court gave a day to be adviſed, at the day the Plaintiff was demandable, and therefore might have been Nonſuit, which is now remedied by that Statute.

(n) 2 H. 4. cap. 7. 3 E. 3. 21. 47 E. 3. 132. 3 E. 4. fol. 11.

(o) But after Demurrer in Law joyned, if the Court doth give a day over, at that day the Demandant or Plaintiff is demandable; and therefore may be Nonſuit, for that is not holpen by any Statute.

(o) 2 H. 5. 5. 8 R. 2. Nonſuit, 35.

(p) And after an award to account, the Plaintiff may be Nonſuit, and ſo note a diverſity between an Interlocutory award of the Court, and a final judgment.

(p) 9 H. 7. 1. 21 E. 3. 32. Lit. 11, f. 39. 41. Metcalfes caſe.

By theſe few inſtructions you ſhall the more eaſily underſtand the books of Learms and Years, and other Authorities of Law. And here (to return to Littleton) it is to be noted, that albeit the Lord be Nonſuit, yet the infranchiſement of the Villein doth remain, for that grew by the appearance to the Writ, and cannot be taken away by the Nonſuit ſubſequent. So it is if the Writ do abate, yet the infranchiſement remains.

¶ (q) *Apres appearance*, For otherwiſe a ſtranger may purchaſe a Writt in his name, and therefore Littleton materially added theſe words, after appearance.

(q) 7 H. 4. 8. 11 H. 4. 13. 9 E. 4. 23. 7 H. 4. 8. 8. 7 H. 7. 6. b. 5 H. 7. 15.

¶ *Præcipe*. There be three kinds of Præcipes. 1. A Præcipe quod reddat, whereof Littleton here ſpeaketh, 2. A Præcipe quod permittat, and 3. A Præcipe quod faciat, whereof you may read plentifully in the Regiſter, and Fitzherberts Natura Brevium, and belongs not properly to this Treatiſe.

¶ *Account*. Of this ſufficient hath been ſaid before.

Vid. Sect. 748. lib. 4. f. 80. Nokes caſe, F. N. B. 145.

¶ *Covenant*. Conventio. Hereof there be two kinds, viz. a Covenant perſonal, and a Covenant real: and a Covenant in Deed, and a Covenant in Law.

¶ *Ou il fuit endite de ceo*. (r) For if the Villein be not firſt indicted of it, then upon the acquitall of the Villein, the Villein ſhall recover dammages againſt the Lord by the Statute of W. 2. quia multi per malitiam, &c. and conſequently ſhall be enfranchiſed. But if the Villein be formerly endicted of the Felony, then though the Villein be acquited upon the Appeal, he ſhall recover no damages againſt the Lord. For wherefoever the Lord giveth to the Villein, a juſt cauſe of action, he is enfranchiſed. (ſ) And therefore if the Lord kill his Villein, his ſon and heir ſhall have an Appeal, and thereby his heir ſhall be enfranchiſed, becauſe the offence of the Lord gave to the heir a juſt cauſe of action againſt the Lord.

(r) W. 2. cap. 12. 22 Aſſ. p. 39. 33 H. 6. 2. 14 H. 7. 2. 40 Aſſ. 18. 40 E. 3. 42.

(ſ) Kelway, 134.

## *Sect.* 209.

¶ *Que il ad eſtre Cuſtome, &c.*

Here ſome may object, that ſuch a cuſtome may have a lawful beginning, for Littleton in the beginning of this Chapter, Sect. 174. alloweth that (a) a freeman may take lands of the Lord to be holden of him, that is, to pay a fine for the marriage of his Sonne or Daughter, and therefore (b) ſome have thought that ſuch a cuſtome generally within the Mannor ſhould be good. But the

¶ Item ſi Seignior dun manor voile preſcriber, que il ad eſtre cuſtome deins ſon manor de temps dont memory ne curt, que chelcun Tenant deins meſme le mannor q̃ maria ſa file a aſcun home ſans licence de le ſeignior del man-

ALſo if the Lord of a Mannor will preſcribe, that there hath been a Cuſtome within his Mannour, time out of minde of man, that every Tenant within the ſame Mannor, who marrieth his Daughter to any man without licence of the Lord of the

(a) 20 E. 3. 33. Roger de Vales caſe, 15 E. 3. Aid. 33.

(b) 34 H. 6. 15. a. per Litt.

nor

noꝛ, ferra fine, & ont faire fine al Seignior del mannoꝛ de le temps eſteant, ceſt preſcription eſt void. Car nul doit faire tiels fines forſq; tantſolemẽt villeins. Car chelcun franke home poit frankement marier ſa file a que pleiſt a luy & ſa file. Et pur ceo que ceſt preſcriptiõ eſt encounter reaſon, tiel preſcription eſt voyd.

Mannour, ſhall make fine, and have made fine to the Lord of the Mannor for the time being, this preſcription is void: For none ought to make ſuch fine but only Villeins. For every free man may freely marry his daughter to whom it pleaſeth him, and his daughter; and for that this preſcription is againſt reaſon, ſuch preſcription is void.

anſwer is, that though it may be ſo in a particular caſe upon ſuch a ſpecial reſervation of ſuch a fine upon a gift of land, yet to claime ſuch a fine by a general cuſtome within the Mannoꝛ, is againſt the freedome of a freeman that is not bound thereunto by particular Tenure. But a cuſtome may be alledged within a Mannoꝛ, (b) That every Tenant (albeit his perſon be free) that holdeth in bondage, oꝛ by native tenure, the freehold being in the Lord, ſhall pay to the Lord foꝛ the marriage of his daughter without licence, a Fine: and it is called Marcher, as it were a Chete oꝛ Fine foꝛ marriage. And here Littleton ſaith, That none ought to pay ſuch fines but villeins, (that is) either villeins of blood, oꝛ

b) 43 E. 3. 5. 14 H. 6. 15.

freemen holding in villenage oꝛ baſe Tenure. So note a diverſity between a freeholder and a freeman holding in Villenage: Villeins uſe to pay to their Lords in acknowledgment of their bondage foꝛ their ſeveral heads, and thereupon it is called Chevage, Chevagium, of the French woꝛd Chiefe, as it were the ſervice of the head. Of whiſh Bracton ſaith, (c) Chivagium dicitur recognitio in ſignum ſubjectionis & dominii de capite ſuo. And ſometimes it is written Chivage, but moꝛe pꝛoperly Chiefage. (d) Chevagium ſignifieth alſo a great Miſpriſion foꝛ any ſubject to take ſums of mony, oꝛ other gifts yearly in name of Chevage, becauſe they take upon them to be their chief heads oꝛ Leaders.

c) Bract. lib. 1. cap. 10. Britton fol. 79. b.
d) 27 Aſſ. 44.

¶ *Pur ceo que ceſt preſcription eſt encounter reaſon ceo eſt voyd.* This contains one of the Maxims of the Common Law, viz. That all cuſtomes and preſcriptions that be againſt reaſon, are void.

## *Sect.* 210.

¶ MEs en l'Coũty de Kent, ou tres & tenements ſont tenus en Gavelkind, la ou per le cuſtome & uſe de temps dont memoꝛy ne curt, les fits males doient ovelment enheriter, ceo cuſtõe eſt allowable, pur ceo que il eſtoit ove aſcun reaſon, pur ceo que chelcun fits eſt aury graund gentlehome come leigne fits eſt,

But in the County of *Kent*, where Lands and Tenements are holden in Gavelkind, there where by the cuſtome and uſe out of mind of man the Iſſues male ought equally to inherite, this cuſtome is allowable, becauſe it ſtandeth with ſome reaſon, for every ſonne is as great a gentleman as the eldeſt ſonne is, and perchance will grow

¶ *FN* (e) *le County de Kent.* Foꝛ that in no County of England, Lands (f) at this day be of the nature of Gabelkind of common right, ſaving in Kent onely. But yet in divers parts of England, within divers Mannoꝛs and Seignioꝛies, the like cuſtome is in foꝛce.

e) Vide Leſtatute de Conſuetudinibus Cancie ann. 21 E. 1. 2 E. 3. 12. 3 E. 3. 21. 38. 23 Aſſ pl. 12 8 E. 3. 42. b.
f) Vide Mirror cap. 1. ſect. 3.

¶ *En Gavelkinde.* That is, Gave all kind: foꝛ this cuſtome giveth to all the ſons alike.

¶ *Les fitz Males inheriter.* And this is the generall cuſtome extending to ſonnes. But yet (g) by cuſtome when one brother dyeth without iſſue, all the other

g) 23 Aſſ. pl. 21.

other brethren may inherit.

¶ *Chescun fitz eſt auxy grande gentlehome come leigne fitz eſt.* By this it appeareth that Gentry and Arms is of the nature of Gavelkind, for they deſcend to all the ſons, every ſon being a Gentleman alike. Which Gentry and Arms do not deſcend to all the brethren alone, but to all their poſterity: but yet Jure primogenituræ, the eldeſt ſhall bear as a badg of his birthright, his fathers Arms without any difference, for that as Littleton ſaith Sectione he is more worthy of blood, but all the younger brethren ſhall give ſeveral differences, & additio probat minoritatem, and (h) hæreditas inter maſculos jure civili eſt dividenda.

& per caſe a pluis grande honor & valour creſſera ſil avoit rien p ſes anceſters, ou auterment peradventure il ne puiſſoit tielment creſſer, &c.

to greater honour and valour, if hee hath any thing by his Anceſtors, or otherwiſe peradventure he would not encreaſe ſo much, &c.

h) Forteſc. cap. 40.

¶ *Ou auterment peradventure il ne puiſſoit tielment creſſer.* The reaſon of this is rendred by the Poet:

Horace.

Haud facilè emergunt quorum virtutibus obſtat
Res anguſta domi.——

31 H. 8. c. 3. V. 18 H. 6. c. 1.

But now by the ſtatute of 31 H. 8. a great part of Kent is made deſcendable to the eldeſt ſon, according to the courſe of the Common Law, for that by the means of that cuſtom, divers ancient and great Families after a few deſcents came to very little or nothing.

In plures quoties rivos deducitur amnis,
Fit minor, ac unâd deficiente perit.

## *Sect.* 211.

Vide ſect. 165.

¶ *Per cuſtome appel' Burgh Engliſh.* Of this cuſtome Littleton hath ſpoken before in 5 chapter of Burgage. And in our Books there is a ſpeciall kind of Borough Engliſh, (i) as, it ſhall deſcend to the younger ſon, if he be not of the half-blood; and if he be, then to the eldeſt ſon.

i) 32 E. 3. tit. Age 81.

(k) Within the Mannor of B. in the County of Berke, there is ſuch a cuſtome, That if a man have divers daughters, and no ſon, and dyeth, the eldeſt daughter ſhall only inherit; and if he have no daughters, but ſiſters, the eldeſt ſiſter by the cuſtome ſhall inherit, and ſometimes the youngeſt. And divers other cuſtomes there be in like caſes. And herewith agreeth Britton, who ſaith, (l) De terres des ancientes demeynes ſoit uſe ſolonque le ancient uſage del lieu, deunt en aſcun lieu le tient lieu per uſage: que le heritage ſoit departable entre touts les enfants freres & ſores, & en aſcun lieu que le eigne avera tout, & ex aſcun lieu que le puiſne frere avera tout.

k) Mic. 10 Ja. Eliots caſe. in briefe de Faux judgment.

l) Brit. 188. b.

¶ *Item, ſou per cuſtome appel Burgh Engliſh en aſcun Burgh, le fits puiſn̄ inherita touts les tenements, &c. cē cuſtome eſtoit ove aſt certaine reaſon, pur ceo que le fits puiſne (ſil fault pere & mere) per cauſe de ſon juventute poit le pluis meins de touts ſes ferres luy meſme aider, &c.*

ALſo where by the Cuſtome called Burrough Engliſh, in ſome Burrough the youngeſt ſon ſhall inherit all the Tenemēts, &c. this cuſtome alſo ſtands with ſome certain reaſon, becauſe that the younger ſon (if he lack father and mother) becauſe of his young age, may leaſt of all his brethren help himſelf, &c.

¶ *Pur cauſe de ſon juventute poet le pluis meins de touts ſes freres luy meſme aider, &c.* Here by (&c.) are implyed thoſe cauſes wherefore a youth is leſs able to ayde himſelf, &c. which the Poet briefly and pithily expreſſeth thus:

Imberbis

Imberbis Juvenis tandem Cuſtode remoto,
Gaudet Equis, Canibuſque, & aprici gramine Campi:
Cereus in vitium flecti, Monitoribus aſper,
Utilium tardus proviſor, prodigus æris,
Sublimis, cupiduſque, & amata relinquere pernix. Horace.

And again, no living creature more infirm than Man:

Nil homine infirmum tellus animalia nutrit
Inter cuncta magis——— Homer.

## *Sect.* 212.

¶ MEs ſi home voile preſcriber, que ſi aſcuns aſis fueront ſur les demeſnes de ſon manor la dammage ſeaſants, que le Seignior del manor pur le temps eſtant, ad uſe eux de diſtreyner, & le diſtreſſe retaine tanque fine fuit fait a luy pur l'dammage a ſa volunt, ceſt preſcription eſt void, pur ceo que il eſt encounter reaſon, que ſi tort ſoit fait a un home, que il de ceo ſerr̄ ſon Judge demeſne: Car per tiel voy ſil avoit dammages forſque al value dun mail, il puiſſoit aſſeſſer & av̄ pur ceo C. l. que ſeroit encounter reaſon. Et iſſint tiel preſcription, ou aſcun aut̄ preſcription uſe (ſi ceo ſoit encounter reaſon) ceo ne doit eſtre allow devant Judges: Quia malus uſus abolendus eſt.

But if a man will preſcribe, That if any Cattell were upon the demeanes of the Mannor, their doing damage, that the Lord of the Mannor for the time being hath uſed to diſtrein them, and the diſtreſſe to retaine till fine were made to him for the damages at his will, this preſcription is void: becauſe it is againſt reaſon, that if wrong be done any man, that he thereof ſhould bee his own Judge: for by ſuch way, if he had damages but to the value of an half-penny, he might aſſeſſe and have therefore C. li. which ſhould be againſt reaſon. And ſo ſuch preſcription, or any other preſcription uſed, if it be againſt reaſon, this ought not, nor will not bee allowed before Judges: *Quia malus uſus abolendus eſt.*

¶ *Eſt encounter reaſon que ſi tout ſoit fait a un home, que il de ceo ſerra ſon judge demeſne.* For it is a Maxime in Law, Aliquis non debet eſſe judex in propria cauſa. † And therefore a fine levyed before the Bayliffs of Salop, was reverſed, becauſe one of the Bayliffs was party to the fine, quia non poteſt eſſe judex & pars. 10 E. 3. 23. 4 E. 3. 54. 7 E. 3. 24. 38 E. 3. 18. 2 H. 3. 4. 3 H. 4. 8 H. 6. 19. 5 H. 7. 9. b. † Hil. 4 H. 4. Coram Rege Salop.

¶ Malus uſus abolendus eſt: And every uſe is evill, that is (as our author ſaith) againſt reaſon, Quia in conſuetudinibus non diuturnitas temporis, ſed ſoliditas rationis eſt conſideranda.

And by this rule cited by our Author, at the Parliament holden at Kilkenny in Ireland, Lionel Duke of Clarence being then Lieutenant of that Realm, the Iriſh cuſtomes, called there the Brehon Law, (for that the Iriſh call their Judges Brehons,) was wholly abolished, for that (as the Parliament ſaid) it was no Law, but a lewd Cuſtome, & malus uſus abolendus eſt. An. 40 E. 3. at Kilkenny. The Brehon Law. Vide Sect. 265.

But our Student muſt know, That King John in the twelfth yeare of his Reign went into Ireland, and there by the advice of grave and learned men in the Laws whom he carryed with him, by Parliament, de communi omnium de Hybernia conſenſu ordained and eſtabliſhed, that Ireland ſhould be governed by the

the Laws of England, which of many of the Irish men, according to their own desire, was joyfully accepted and obeyed, and of many the same was soon after absolutely refused, preferring their Brehon Law before the just and honourable Laws of England. Rex, &c. Baronibus, militibus, & omnibus libere tenentibus L. Salutatem, Satis ut credimus vestra audivit discretio, quod quando bonæ memoriæ Johannes quondam Rex Angliæ pater noster venit in Hyberniam, ipse duxit secum viros discretos & leges peritos, quorum communi consilio, & ad instantiam Hybernensium statuit, & præcepit leges Anglicanas in Hybernia, ita quod leges easdem in Scripturas redactas reliquit sub sigillo suo ad Scaccarium Dublin.

Rot. Pat. 11 H. 3. Lib. 7. fol. 22. b. Calvins case.

Rex Comitibus, Baronibus, militibus, & liberis hominibus, & omnibus aliis de terra Hyberniæ salutem. Quia manifestè esse dinoscitur contra coronam, & dignitatem nostram, & consuetudines, & leges regni nostri Angliæ, quas bonæ memoriæ Dominus Johannes Rex pater noster, de communi omnium de Hyberna consensu, teneri statuit in terra illa, quod placita teneantur in curia Christianitatis de advocationibus Ecclesiarum & Capellarum vel de laico feodo vel de catallis quæ non sunt testamento vel matrimonio. Vobis mandamus prohibentes quatenus hujusmodi placita in curia Christianitatis nullatenus sequi præsumaris in manifestum dignitatis & Coronæ nostræ præjudicium, sciturí pro certo, quod si feceritis, dedimus in mandatis Justiciario nostro Hyberniæ, Statuta curiæ nostræ in Anglia contra transgressiones hujus mandati nostri cum Justitia procedat, & quod nostrum exequatur. In cujus, &c. Teste Rege apud Winchcomb, 28 die Octobris, anno Regni nostri 18. Et mandatum est Justiciario Hyberniæ per literas clausas, quod prædictas literas patentes publicè legi & teneri faciat.

Rot. Patent. 18 H. 3. M. 17. N. 21.

Rex, &c. pro communi utilitate terræ Hyberniæ, & pro unitate terrarum, provisum est, quod omnes leges & consuetudines quæ in regno Angliæ tenentur, in Hybernia teneantur, & eadem terra eisdem legibus subjacear, ac per easdem regatur, sicut Johannes Rex cum illic esset, statuit & firmiter mandavit. Ideo volumus, quod omnia brevia de communi jure quæ currunt in Anglia similiter currant in Hybernia sub novo sigillo Regis: In cujus, &c. Teste meipso apud Woodstock. Wherein it is to be observed, That union of Laws is the best means for the unity of Countries.

Rot. Patent. 30 H. 3.

† Tri. 13 E. 1. Coram Rege in Thesaur. in longo placito.

(r) Una & eadem lex esse debet tam in Regno Angliæ quam Hyberniæ. (m) Terra Hyberniæ inter se habet Parliamentum & omnimodas curias prout in Anglia, & per idem Parliamentum facit leges, & mutat leges, & illi de eadem terra non obligantur per statuta in Anglia, quia non habent milites Parliamenti.

(m) 2 R. 3. 12. In camera stellata. 3 H. 7. 3.

By an Act of Parliament (called Poynings Law) holden in Ireland in the tenth year of Henry the seventh, it is enacted, That all Statutes made in this Realm of England, before that time, should be of force, and be put in ure within the Realm of Ireland, which (though it be by way of digression) is not unnecessary for our Student to know. But now let us hear our Author.

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# CHAP. 12. Of Rents. Sect. 213.

SOme have divided rents into four kinds, viz. rent service, rent charge, rent distreinable of common right (whereof somewhat shall be said in this Chapter) and rent secke.

¶ *Rent.* In Latine Redditus, (a) by some Dicitur à redeundo, quia retro it, & quotannis redit. † And others say it is derived of reddere, for that the Rent is reserved out of the profits of the land, and is not due till the tenant or Lessee take the profits, for reddendo inde or solvendo, or reservando inde, or the like, (b) is as much to

Flet. lib. 3. cap. 14. Britton cap. 41. Mirror cap. 2. Sect. 16. Pl. Com. 132. b. † Lib. 10. 128. Cluns case.

(b) Pl. Com. 138, 139, &c. In Brownings and Beltons case. 35 H. 6. 34.

¶ TRoys maners de Rents y sont, cestal cavoir, Rent service, Rent charge, & Rent secke: Rent service est lou le tenant tient sa terre de son Seignior pur fealty, & certain Rent, ou per homage, fealty, & certain Rent, ou y autre services & certaine Rent: & si rent service

THree manner of Rents there bee, that is to say, Rent service, Rent charge, and Rent secke. Rent service is, where the Tenant holdeth his Land of his Lord by fealtie, and certaine rent, or by homage, fealtie, and certaine rent, or by other services and certaine rent, and if rent service at any day that

soit

ſoit a aſcun jour (que doit eſtre pay) aver-rere, le Sñr poit diſtrainer pur ceo de common droit.

it ought to be payed, be behind, the Lord may diſtraine for that of common right.

ſay as the Tenant or Leſſe ſhall pay ſo much out of the profits of the lands; for Reddere nihil aliud eſt quam acceptum aut aliquam partem ejuſdem reſtituere. Seu reddere eſt quaſi retro dare, and hereof cometh Redditus for a Rent.

Here note for the better underſtanding of ancient Records, Statutes, Charters, &c. Gabel, or Gavel, Gablum, Gabellum, Gabellettum, Galbellettum, and Gavillettum, do ſignify a Rent, Cuſtome, Duty, or Service, yielded or done to the King or any other Lord, as Wallingford continet 276. Hagas, i. domos reddentes 9. libros de glabo, i. de redditu. And Oxford, hæc urbs reddebat pro theolonio & Gablo regi 20. l'. & Sextarios mellis, comiti Alpharo 10 libras. And this is the legall ſignification thereof. Domeſday, Statutum de Gavilletis, anno 10 E. 2.

¶ *Rent ſervice.* It is called a Rent ſervice, becauſe it hath ſome corporall ſervice incident unto it which at the leaſt is fealty, as here it appeareth.

¶ *Sa terre.* (c) A Rent ſervice cannot be reſerved out of any inheritance, but ſuch as is manurable, whereinto the Lord may enter & take a diſtreſs, as in Lands & Tenements, Reverſions, Remainders, & as ſome have ſaid out of the herbage of lands, & regularly not out of any inheritances incorporeal, or that is in grant. (d) By act of Law one rent or ſervice may iſſue out of another, as if A. before the ſtatute of Quia emptores terrarum, had given lands to B. to hold to him by fealty, and ten ſhillings rent, and B. had made a feoffment in fee to C. &c. whereby there was a Meſnalty created, in this caſe C. ſhould hold of B. either by the ſame ſervices the Law created, or ſuch as he ſpecially reſerved, & B. did by operation of Law hold thoſe ſervices of A. by fealty and ten ſhillings rent, that is to ſay, rent and ſervice out of rent and ſervice, and if the rent be behind, the Lord paramount may diſtrain upon the land for his rent, for both Meſnalty and Seigniory do iſſue out of the land, the Meſnalty immediatly, and the Seigniory mediately, which is worthy of due conſideration and obſervation. Vide Sect. 218. (c) 44 E. 3. 45. lib. 5. fo. 6. Seignior Mountjoys caſe. 9 Aſſ. 24. 30 Aſſ. 5. 17 E. 3. 75. lib. 7. fol. 23. Buts caſe, Pl. Com. 139. (d) 3 H. 6. 21. 5 H. 7. 36. 21 H. 7. 39. 1 H. 4. 8. 10 H. 6. 12. 19 E. 3. tit. Gard. 46. 21 H. 6. 31.

¶ *Certaine rent.* (e) For the rent muſt be certain, or which may be reduced to a certainty, for id certum eſt, quod certum reddi poteſt. (f) Continetur carta reddendo inde annuatim ad tales terminos vel faciendo inde talia ſervitia, vel tales conſuetudines, quæ omnia debent eſſe certa & in carta expreſſa, &c. But of this I have ſpoken Sect. 136. And the rent may as well be in delivery of Hens, Capons, Roſes, Spurs, Bows, Shafts, Horſes, Hawks, Pepper, Comine, Wheat, or other profit that lieth in render, office, attendance, and ſuch like: as in payment of mony. (g) But a man upon his feoffment or conveyance cannot reſerve to him parcel of the Annual profits themſelves, as to reſerve the veſture or herbage of the land, or the like, for that ſhould be repugnant to the grant, Non debet enim eſſe reſervatio de proficuis ipſis, quia ea conceduntur, ſed de redditu novo extra proficua. (e) Britton fol. 100. a. (f) Flet. lib. 2. cap. 14. (g) 38 H. 6. 18. a.

¶ *Poet diſtreine pur ceo.* For where there is fealty, &c. incident to the rent, there is a diſtreſs incident alſo thereunto. (h) But it is to be underſtood, that for a rent or ſervice, the Lord cannot diſtrain in the night, but in the day time, and ſo it is of a rent charge: but for damage feaſant one may diſtrein in the night, otherwiſe it may be the beaſts will be gone before he can take them. (h) Mirr. cap. 2. ſect. 16. 10 E. 3. Avowry 137. 11 H. 7. 5.

¶ *De common droit.* Of common right, (i) that is, by the Common Law; ſo called, becauſe the Common Law is the beſt and moſt common birth-right that the ſubject hath for ſafeguard and defence not only of Goods, Lands, and Revenues, but of his wife and children, his body, fame, and life alſo. So as the meaning of Littleton in this particular caſe is, that the Lord may diſtrein for his rent of common Right, that is, by the common Law without any particular reſervation or proviſion of the party. And it is to be obſerved, that the common Law of England ſometime is called Right, ſometime Common Right, and ſometime Communis Juſtitia. In the grand Charter, the common Law is called Right, Rectum. Nulli vendemus, nulli negabimus aut differemus Juſtitiam vel Rectum. In the Statute of W. 1. c. 1. it is called Common droit. En primes voet le Roy, & commande que le peace de S. Egliſe & de la terre ſoit bien garde & maintaine en touts points, & que common droit ſoit faits a touts auxiſten aux pours, come aux riches ſauns regard de nulluy; which agreeth with the ancient Law in the time of King Edgar, Porro autem has populo quas ſervet proponimus leges, primum publici juris beneficio quiſquam fruit', idque ex æquo & bono, ſive is dives, ſive inops fuerit jus reddit'. And Fleta ſaith, Item quod pax Eccleſiæ & terræ inviolabiliter obſerver' & quod communis juſtitia ſingulis pariter exhibeatur. And all the Commiſſions and Charters for execution of Juſtice, are Facturi quod ad juſtitiam pertinet ſecundum legem & conſuetudinem Angliæ. So as in truth Juſtice is the daughter of the Law, for the Law bringeth her forth. And in this ſenſe being (i) W. 1. ca. 1. 2 H. 4. c. 1. 7 H. 4. c. 1. 4 H. 3. cap. 8. Lamb. fol. 78. Inter Leges Regis Edgar. Fleta lib. 1. cap. 29.

being largely taken, as well the ſtatutes and cuſtoms of the Realm, as which is properly the Common Law, is included within Common droit. Littleton in this his Treatiſe nameth Common droit ſix times.

Vide Sect. 214, 216, 226, 252, 331.

## Sect. 214.

35 H. 6. 34.

¶ *Sauns fait.* For it is a rule in Law, that a rent ſervice may be reſerved without deed.

Vide Sect. 131, 132.

¶ *En meſme le manner ſi leaſe ſoit fait, &c.* For theſe be rents ſervices, becauſe fealty is incident to theſe Rents, for (as it hath bin ſaid before) a leſſee for life or years ſhall do fealty. And if a man make a Leaſe at will, reſerving a Rent, the Leſſee ſhall not do fealty, and yet the Leſſor ſhall diſtraine for the rent of common right.

¶ *Rendant*, cometh of the word Reddo, i. rem pro re dare, and ſignifieth yielding or repaying: but of this I habe ſpoken before in this Chapter, Sect. 213.

¶ Et ſi home voyloit doner terres ou tenements a un auter en taile, rendant a luy certain Rent p an, il de common droit poit diſtreiñ pur le rẽt aderere, coment que tiel done fuit fait ſauns fait, pur ceo quẽ tiel Rent eſt Rent ſervice. En mñ le manner eſt, ſi leas ſoit fait a un hõe pur terme de vie, ou dauter vie, rendant al leſſor certain Rent, ou pur terme de ans rendant certaine Rent.

AND if a man will give Lands or Tenements to another in the tayl, yielding to him certain Rent by the year, he of common right may diſtrain for the Rent behind, though that ſuch gift was made without deed, becauſe that ſuch Rent is Rent Service. In the ſame manner it is, if a Leaſe be made to a man for life, or the life of another, rendring to the Leſſor certain Rent, for term of years rendring Rent.

## Sect. 215.

¶ *Reverſion.* Reverſio cometh of the Latine word Revertor, and ſignifieth a returning againe, and therefore Reverſio terræ eſt tanquam terra revertens in poſſeſſione donatori ſive hæredibus ſuis poſt donum finitum, &c. as in the caſes that Littleton here hath put.

¶ *Il covient que le reverſion, &c. ſoit en le donor ou leſſor, &c.* This is not to be underſtood only of a reverſion immediately expectant upon the gift or Leaſe; For if a man maketh a gift in Tail, the Remainder in Tail reſerving a rent, and keep the reverſion in himſelf, this is a Rent ſervice.

¶ *Reſervant.* Reſerver commeth of the Latine

¶ Mes en tiel cas ou home ſur tiel done ou Leaſe voille reſerver a luy rent ſervice, il covient que le reverſion de les terres & tenemñts ſoit en le donor ou leſſor, car ſi home voile fait feoffement en fee, ou voile donor terres en taile, le remaindre ouſtre en fee ſimple ſaus fait, reſervant a luy certaine rent, tiel reſervant eſt void, pur ceo que nul reverſion remaine en le donor & tiel tenant

BUT in ſuch caſe, where a man upon ſuch a gift or Leaſe will reſerve to him a Rent ſervice, it behoveth that the reverſion of the Lands and Tenements be in the Donor or Leſſor. For if a man will make a feoffment in fee, or will give Lands in tail, the remainder over in fee-ſimple without deed, reſerving to him a certain rent, this reſervation is void, for that no reverſion remaines in the Donor, and ſuch

tient

tient la terre immediatm̃ de le Seignior de que son donor tenoit, &c.

Tenant holds his land immediately of the Lord of whom his Donor held, &c.

word Reservo, that is, to provide for store. As when a man departeth with his land, he reserveth or provideth for himself a Rent for his own livelihood. And sometime it hath the force of saving or excepting: So as (k) sometime it serveth to reserve a new thing, viz. a Rent and (l) sometime to except part of the thing in esse that is granted.

(k) 8 E. 4. 4 8. 26 Ass. pl. 66.
(l) 35 H. 6. 34.

And it is to be understood, that in the case of the gift in tail, lease for life or years, the fealty is an incident inseparable to the reversion, so as the Donor or the Lessor cannot grant the reversion over, and save to himself the fealty, or such like service; but the Rent he may except, because the Rent, although it be incident to the reversion, yet it is not inseparably incident. If a man maketh a gift in tail, without any reservation, the donee shall hold of the donor by the same services that he held over. (m) But otherwise it is of an estate for life or years, for there if he reserveth nothing, he shall have fealty only, which is an incident inseparable to the reversion, as hath been said.

(m) Litt. fol. 4. Old tenures 5. 38 E. 3. 7. 33 H. 6. 7.

¶ *Le remaindre oustre en fee simple sans fait.* Here it appeareth, that if a man maketh a gift in tail, the remainder in fee without deed, (n) the remainder is good, and passeth out of the donor by the livery of seisin, and so it is of a lease for life or years, the remainder over in fee for the particular estate, and the remainder to many intents and purposes, make but one estate in judgment of Law. Vide Sect. 60.

(n) 40 E. 3. 10. 10 E. 4. 1. 12 E. 4. 10. 15 E. 4. 18. 18 E. 4. 12. 18 H. 4. 8. 3 H. 7. 13. F. N. B. 219. 11 H. 4. 39. 38 E. 3. 36. 44 E. 3. 8.

¶ *Remainder.* In legal Latine is Remanere, comming of the Latine word remaneo, for that (o) it is a remainder or remnant of an estate in Lands or Tenements expectant upon a particular estate created together with the same at one time, as in the cases here of Littleton appeareth.

(o) Lib. 2. fol. 51. Cholmley's case.

## Sect. 216.

¶ ET ceo est per force de lestatute de Quia emptores terrarum, car devaunt le dit estatute si hõe feisoit un feoffement en fee simple, per fait ou sans fait, rendant a luy & a ses heires certaine rent, ceo fuit rent service, & pur ceo il pussoit distreine de common droit, & sil fuit nul reservation dascun rent ne d ascũ service, uncore le feoffee tenust del feoffor per autiel service que le feoffor tenust oustre de son Seignior pracheine paramount.

AND this is by force of the Statute of *Quia emptores terrarum*, for before the Statute, if a man had made a Feoffment in fee simple by deed or without deed, yeelding to him and to his heires a certaine rent, this was a rent service, and for this he might have distrained of common right. And if there were no reservation of any Rent, nor of any Service, yet the Feoffee held of the Feoffor by the same Service as the Feoffor did hold over of his Lord next paramount.

¶ Quia emptores terrarum.

Hereof is spoken before in the Chapter of Frankalmoigne, Sect. 140.

¶ *Per fait ou sans fait, &c.* For all rent services may be reserved without deed (as hath been said) and as appeareth here.

And at the Common Law, if a man had made a scoffment in fee by parol, he might upon that scoffment have reserved a Rent to him and his heirs, because it was a rent service, and a tenure thereby created.

¶ *Et sil fuit nul reservation, &c. le feoffee tenust del feoffor per autiels services, &c.* This is evident, and agreeth with our books, (†) that in this case the Law created the tenure; wherein it is to be observed, how the Law regardeth equity and equality, without any prohibition or reservation of the party.

(†) Britton. fol. 100. 2 E. 3. 33. 25 E. 3. gard 21 49 E. 3. 10. 22 Ass. pl. 53. 7 H. 4. 14. 23 E. 3. avowry 255. 4 H. 6. Litt. cap. taile, Sect.

Ipsæ etenim leges cupiunt ut jure regantur.

Sect.

## *Sect.* 217.

¶ *Per fait indent.* It cannot be by a Deed indented, unleſſe it be actually indented; for albeit the words of the Deed be, Hæc indentura, &c. yet if it be not indented indeed, it is no Indenture; but if the Deed be indented, albeit the words of the Deed be not, Hæc indentura, yet it is an Indenture.

Britton fol. 100. Fleta Lib 3. cap. 14. Vide Sect. 370.

(p) And it is holden, that if a feoffment in fee be made by deed poll reſerving a Rent, this reſervation is good, for when the Feoffee accepts the Deed and Livery of the land, he agreeth to the Rent, and the Rent is reſerved by the words of the Feoffor, and not by the grant of the Feoffee: but of this more hereafter. In the mean time it is to be noted, that of ancient time a Deed indented was called Charta chirographata, or Charta communis, becauſe each party had a part. And a Deed poll was called, Charta de una parte(q). Chartæ autem de pura donatione de ſimplici penes donatoritum & ejus hæredes debent remanere, communes vero duplicari debent, ita quod quilibet habet partem ſuam. Vel ſi una ſit tantum, tunc in æqua manu communis amici utriuſque ponatur ſalvo cuſtodiend' dum cuilibet partium neceſſe fuerit exhibendum.

(p) 8 E. 4. 8. 11 H. 7. 22. 35 H. 6. 34. 20 E. 4. 13. 17 E. 3. 12 H. 4. 17.

Fleta lib 3 cap. 14. Britton fol. 100.

¶ *Reſervant a luy.* (r) Note, it is a maxim in law, That the rent muſt be reſerved to him from whom the ſtate of the land moveth, and not to a ſtranger. (ſ) But ſome do hold, that otherwiſe it is in the caſe of the King.

(r) 12 E. 2. Feoffments 8. 18 E. 2. Aſſ. 381.

(ſ) 35 H. 6. 36.

¶ *Et tiel rent eſt rent charge.* It is called a Rent charge, becauſe the Land for payment thereof is charged with a diſtreſſe. If it be to the whole value of the land, or to the fourth part of the value, then the Rent is called a ſeé farme.

Old tenures. Britton cap. 66. 164. F. N. B. 210. Brac. 86

¶ *Mes ſi home per fait endent a cel jour, fait tiel done en fee taile, l' remainder ouſter ẽ fee, ou leaſe a terme de vie, le remainder ouſter en fee, ou un feoffment en fee & per ñ lendenture il reſerve a luy, & a ſes heires un certaine rent, & que ſi le rent ſoit aderere, q̃ bien lirroit a luy & a ſes heirs a diſtreiner, &c. tiel rent eſt rent charge, pur ceo que tielz terrez ou tenements ſont charges ove tiel diſtreſſe per force de le ſcripture tantſolement, & nemy de common droit. Et ſi tiel home ſur fait endent reſerva a luy, & a ſes heires certain rent ſans alcun tiel clauſe miſe en le fait, que il poit diſtreine, donque tiel rent eſt rent ſecke, pur ceo que il ne poit bener de aver le rẽt, ſi ceo ſoit deny per meane de diſtreſſe, & ſil ne fuit unques en ceſt cas ſeiſie de la rent, il eſt ſans remedie, come ſerra dit apres.*

But if a man by Deed indented at this day, maketh ſuch a gift in fee taile, the remainder over in fee, or a Leaſe for life, the remainder over in fee, or a feoffment in fee, and by the ſame Indenture he reſerveth to him and to his heires a certain rent, and that if the rent be behind, that it ſhall be lawfull for him and his heires to diſtreine, &c. ſuch a rent is a rẽt charge, becauſe ſuch Lands or Tenements are charged with ſuch diſtreſſe by force of the writing onely, and not of common right. And if ſuch a man upon a deed indented reſerve to him and to his heires a certaine rent, without any ſuch clauſe put in the deed, that he may diſtreine, then ſuch rent is rent ſeck, for that he cannot come to have the rent, if it be denyed, by way of diſtreſſe. And if in this caſe he were never ſeiſed of the rent, he is without remedy, as ſhall be ſaid hereafter.

Here Littleton putteth his caſe, and ſo did he in the

the next Section before, of a clause of distress generally granted. (t) A man granted a rent out of certain land, pro consilio impenso & impendendo, To have and to hold to him and to his Assigns for Term of his life, payable at four Feasts in the year, and for default of payment upon demand, it should be lawfull for him to distrein; the Grantee granted the Rent over: the Assigne after one of the dayes demanded the Rent, and distreyned, and the distress adjudged lawfull, for he needs not make a demand at any of the dayes, as in the case of remer duty.

(t) L. 7. f. 28. b. Maunds case. H. 4. 3 El. in Com. Banco Rot. 1108. inter Maund and Gregory. M. 40 & 41 El. in Com. Banco inter Stanly and Read. 18 El. Dyer, 348.

¶ *Distreyne, &c.* Here by (&c.) is implyed what things are distreynable, which else-where is expressed at large. Also where the distress is to be taken in the same land, and in some other, which with many differences is set down in his proper place.

Vide sect. 221.

¶ *Il serra sans remedie.* Note that upon a reservation of a Rent upon a Feoffment in Fee by deed indented, (w) the Feoffor shall not have a Writ of Annuity, because the words of Reservation, as reddendo, solvendo, faciendo, tenendo, reservando, &c. are the words of the Feoffor and not of the Feoffee, albeit the Feoffee by acceptance of the state, is bound thereby.

(w) 33 E. 3. Annuity. 52. 1 H. 2. 495. 6 Ass. Pl. 66. 21 E. 4.

And where Littleton putteth his case, when a Reservation is made upon an estate that passeth by Livery, the same Law it is, if a man at this day do bargain and sell his Land by deed indented and inrolled according to the Statute, a Rent may be reserved thereupon: for albeit an use had only passed by the Common Law, yet now by the statute of 27 H. 8. cap. 10, the use and possession pass together, and so it was adjudged. † And so it is of a grant of a reversion or remainder, and any other conveyance of Lands or Tenements, whereby any estate doth pass.

† Mich. 39 & 40 El. in Com. Banco inter Wick and Tillard.

## *Sect.* 218.

¶ Auxy si home seisie de certain terre graunt per un fait polle, ou per indenture un annual rent issuant hors de mesme la terre a un auter en fee ou en fee taile, ou per terme de vie, &c. oveskz clause de distresse, &c. donques ceo en rent charge & si le grant soit sans clause d' distresse; donques il est Rent seck. Et nota; que Rent seck idem est quod redditus siccus, pur ceo que nul distresse est incident a ceo.

Also if a man seised of certaine Land, grant by a Deed poll, or by Indenture, a yearly Rent to be issuing out of the same Land, to another in fee or in fee taile, or for term of life, &c. with a clause of distress, &c. then this is a Rent charge, and if the Grant be without clause of distresse, then it is a Rent secke. And note, That Rent secke *idem est quod redditus siccus*: For that no distresse is incident unto it.

¶ *Seisie de Terre.* (x) Note, that a Rent cannot be granted out of a Pischary, a Common, an Advowson, or such like incorporeal inheritances, but out of Lands or Tenements whereunto the Grantee may have recourse to distrein, or which may be put in view to the recognizors of an Assise, as hath been said before in this Chapter. And though it be out of lands or Tenements, (z) yet it must be out of an estate that passeth by the conveyance, (as by all Littletons examples appeareth) & not out of a right: as if the Disseisee release to the Disseisor of land, reserving a rent, the reservation is void, Et sic de similibus.

(x) 32 E. 3. tit. Scire fac. 10. 40 E. 3. Pl. Com. 139.

Vide sect. 213.

(z) 10 E. 4. 3. b. 33 H. 6. 5. 50 E. 3. 8 E. 4. 8. 5 E. 3. Fines 1. 9 H. 3. 17. 46 E. 3. 27. 21 H. 6. 8. Temps E. 1. Ass. 42.

¶ *Grant per fait.* † Also a man may have a rent by prescription.

† E. 3. Title 33.

¶ *Rent secke* idem est quod redditus siccus. This needs no explanation, for Littleton expounds it himself.

Sect.

## *Sect.* 219.

¶ *RENT Charge.* Here it appeareth by Littleton, that this Prima facie is a Rent charge, whereof in this Chapter shall be spoken more at large.

And so it is of a Rent Seeke.

¶ *Home grant.* But case that A. be seised of lands in Fee, and he and B. grant a Rent charge to one in Fee, this Prima facie is the grant of A. and the confirmation of B. but yet the Grantee may have a Writ of annuity against both. Two men (a) grant an annuity of twenty pounds per annum to another, although the persons be several, yet he shall have but one Annuity: but if the grant be, Obligamus nos, & utrumque nostrum: the Grantee may have a Writ of annuity against either of them, but he shall have but one satisfaction.

a) 16 E. 2. tit. Annuity 47. Vide sect. 314.

¶ *Briefe de annuitie* is a Writ for the Recovery of an annuity. (b) An annuity is a yearly payment of a certain sum of money, granted to another, in fee for life or years, charging the person of the Grantor only. (c) But not only the Grantee, but his heir and his and their Grantee also shall have a writ of Annuity. (d) But if a Rent charge be granted to a man and his heirs, he shall not have a Writ of annuity against the heir of the Grantor, albeit he hath Assets, unless the grant be for him and his heirs.

b) Doct. & Stud. cap. 3. 17 El. Dyer 344. b. 45 E. 3. Executor 70.

c) 3 E. 9. Dyer 65. And Sergeant Bendloes reporteth, That so was the opinion of the Court.

d) 2 H. 4. 13. Dyer, 17 Eliz. 344. b.

¶ *Item, si home granta per son fait un rent charge a un auter, & le rent est arere, le grantee poet eslier sil voet suer un briefe de Annuity de ceo envers l'grantor ou distreiner pur le rent arere, & l'distresse retaine tanq; il soit de ceo pay, mes il ne poit faire ne aver ambideux ensemble, &c. Car sil recover per briefe Dannuity, donques la terre est discharge de le distresse, &c. Et sil ne suist Briefe de Annuitie, mes distreine pur les arrerages, & le Tenant suist son Replegiare, & donques le grantee avowa le prisel de le distresse en la Terre en Court de record, donques est la terre charge, & la person del grantor discharge d Action d Annuity.*

ALso, if a man grant by his Deed a Rent charge to another, and the Rent is behind, the Grantee may chuse whether he will sue a writ of Annuity for this against the Grantor, or distrein for the Rent behind, and the distresse detain untill he be paid, but he cannot do or have both together, &c. For if he recovers by a Writ of Annuity, then the Land is discharged of the distress, &c. And if he doth not sue a Writ of Annuity, but distrein for the arrearages, and the Tenant sueth his Replevin, and then the Grantee avow the taking of the distress in the Land in a Court of Record, then is the land charged, and the person of the Grantor discharged of the Action of Annuity.

¶ *Poet eslier.* The Grantee hath election to bring a Writ of Annuity, and charging the person only to make it personall, or to distraine upon the Land, and to make it reall.

But if a man grant a Rent charge to a man and his heirs, and dieth, and his wife bring a Writ of Dower against the heir; the heir in barre of her Dower, claims the same to be an Annuity, and no Rent charge, yet the wife shall recover her Dower, for he cannot determine his election by claim, but by suing of a Writ of annuity (as Littleton saith) neither can the heir have after the endowment an annuity for the two parts, for that should not be according to the deed of Grant, for either the whole must be a Rent charge, or the whole an annuity. But Littleton is to be understood with some limitation: (e) for of a Rent granted for owelty of partition, a Writ of annuity doth not lye, because it is of the nature of the land descended.

e) 29 Ass. p. 23.

ſcended. Alſo of ſuch a Rent as may be granted without deed a Writ of annuity doth not lye, though it be granted by Deed.

(f) And here is to be noted, That here is no election given of two ſeveral things: as if the grant were of an annuity, or a Robe yearly &c. for there the Grantor had election at the day to deliver which he would. But here is two remedies given for one yearly ſum, and conſequently th: Grantee ſhall at any time have election to take which of the remedies he will, for in all caſes where ſeveral remedies be given, the party to whom the Law giveth the remedies, it giveth him withall election to take which of the remedies he will.

(f) Sir Rowland Heywards caſe. li. 2. fol. 361. 28 E. 3. 98. 41 E. 3. 10. 2 H. 4. 12. 6 H. 4. 10. 36 H. 6. 10. 9 E. 4. 46. 21 E. 4. 55. b. 1 E. 5. 1. F. N. B. 121.

¶ *Mes il ne poet faire ou aver ambideux enſemble.* For then he ſhould recover one thing twice, which ſhould be a double charge to the Grantor.

Lib 2. fol. 36 37. in Sir Rowland Heywards caſe.

Note, as to elections, theſe diverſities following:

Firſt, When nothing paſſeth to the feoffee or grantee before election to have the one thing or the other, there the election ought to be made in the life of the parties, and the heir or executor cannot make election. But when an eſtate or intereſt paſſes immediately to the Feoffee, Donee, or Grantee there election may be made by them, or by their Heirs or Executors.

Secondly, when one and the ſame thing paſſeth to the Donee or Grantee, and the Donee or Grantee hath election in what manner or degree he will take this, there the intereſt paſſeth immediately, and the party, his heirs, or Executors, may make election when they will.

Thirdly, when election is given to ſeveral perſons, there the firſt election made by any of the perſons ſhall ſtand.

Fourthly, In caſe an election be given of two ſeverall things, always he which is the firſt agent, and which ought to do the firſt act ſhall have the election. As if a man granteth a rent of 20. ſhillings, or a robe, to one and to his heirs, the Grantor ſhall have the election; for he is the firſt agent by payment of the one, or delivery of the other. So if a man maketh a leaſe, rendring a Rent or a Robe, the leſſee ſhall have the election cauſa quæ ſupra, & with this agree the books in the † margent. (g) But if I give unto you one of my horſes in my ſtable, there you ſhall have the election, for you ſhall be the firſt agent by taking or ſeiſure of one of them. And if one grant to another 20. loads of Hazill, or 20. loads of Maple to be taken in his wood of D. there the Grantee ſhall have election, for he ought to do the firſt act, s. to fell and take the ſame.

† 9 E. 4. 36. b. 13 E. 4. 4. b. 1. 5 E. 4. 6. b. 11 E. 3. annu. 27. 11 Aſſ. p. 8. 29 Aſſ. 55. 3 E. 3. tit. Aſſ. 175. 42 E. 3. tit. Barre 194.

(g) 2 H. 7. 21. a.

Fifthly, When the thing granted is of things annual, and are to have continuance, there the election remaineth to the Grantor, (in caſe where the Law giveth to him election) as well after the day, as before, otherwiſe it is when the things are to be performed unica vice: And therefore if I grant to another for life, an Annuity or a Robe at the feaſt of Eaſter, and both are behind, the Grantee ought to bring his writ of annuity in the diſjunctive, for if he bring his writ of Annuity for the one only, and recover, this judgment ſhall determine his election for ever, for he ſhall never have a writ of Annuity afterwards, but a Scire facias upon the ſaid judgment. Which reaſon Fitzherbert in his Natura Brevium not obſerving, held an opinion to the contrary. But if I contract with you to pay unto you 20 ſhillings, or a robe at the feaſt of Eaſter, after the feaſt you may bring an Action of debt for the one or for the other.

9 E. 4. 36. 13 E. 4 4 & the other above ſaid Book.

Sixthly, The Feoffee by his act and wrong may loſe his election, and give the ſame to the Feoffor: As if one infeoff another of two acres, To have and to hold the one for life, and the other in tayle, and he before election maketh a feoffment of both, in this caſe the Feoffor ſhall enter into which of them he will, for the act and wrong of the feoffee.

¶ *Sic recover en Briefe de Annuitie donques eſt la terre diſcharge de diſtreſſ.* Here is to be obſerved, That this determination of the election of the Grantee muſt be by action or ſuit in Court of Record, (h) for albeit the Grantee diſtreyn for the Rent, yet he may bring a Writ of Annuity and diſcharge the land. And Littleton putteth his caſe here ſurely upon a Recovery in a Writ of Annuity. (i) But if the Grantee doth bring a Writ of Annuity, and at the return thereof appear and count, this is a determination of his election in Court of Record, albeit he never proceedeth any further. (k) As if a wife be endowed ex aſſenſu patris, and the husband dyeth, the wife hath election either to have her Dower at the Common Law, or ex aſſenſu patris: if ſhe bring a writ of Dower at the Common Law, and count, albeit ſhe recover not, yet ſhall ſhe never after claim her Dower ex aſſenſu patris.

(h) 17 El. Dyer. 344 l.

(i) F. N. B. 152. a. 5 H. 7. 33. b.

(k) 12 E. 2. Dower 158.

(l) So if the Grantee bring an Aſſiſe for the Rent, and make his plaint, he ſhall never after bring a Writ of Annuity. But the purchaſing of a writ of Annuity, and entry of it in Court of Record, or of an aſſiſe, is no determination of the election, becauſe an ſtranger may purchaſe a writ in the name of the Grantee, and enter it of record, but if the Grantee appear thereunto &c. then this doth amount to a determination of his election as hath been ſaid.

(l) 10 E. 4. 17.

¶ *Son Replegiare.* Littleton ſpake immediately before of an briefe dannuity, but here he ſaith, Son Replegiare, becauſe goods may be replevied two manner of ways, viz. by Writ, and that is by the Common Law, or by the pleint, and that is by the Statutes; for the more ſpeedy having again of their cattell and goods. ¶ Replegiare lyeth, as Littleton here teacheth us, where goods are diſtrained and impounded, the owner of the goods may have a writ De Replegiari facias, whereby the Sheriff is commanded, taking ſureties in that behalf, to redeliver the goods diſtreined to the owner; or upon complaint made to the Sheriff, he ought to make a Replevy in the County. Replegiare is compounded of Re and plegiare, as much as to ſay, as to redeliver upon pledges or ſureties; and in the Statute of Marlebridge, Deliberare is uſed for Replegiare. (m) And the Sheriff ought to take two kind of pledges, one by the Common Law, and they be Plegii de proſequendo, and another by the ſtatute, viz. Plegii de retorno habendo. Vide Sect. 58. what things may lawfully be diſtreined, whereupon a Replegiare may be ſued. The forms of the writ you ſhall read in the Regiſter and F.N.B.

Glanvil lib. 12. cap. 12. Marlbr. cap. 21. W. 1. cap. 16. 17. W. 2. cap. 39. Fleta lib. 2. c. 40.

Marlbr. cap. 21. 21 H. 6. Return de Vic. 17.

(m) W. 2. cap. 2. 4. Fleta lib. 4. cap. 5. 4 H. 6. 15.

† Regiſt. F. N. B. 68.

(n) It is a general rule, that the Plaintiff muſt have the property of the goods in him at the time of the taking. (o) But yet if the goods of a villein be diſtreined, the Lord of the villein ſhall have a Replevy, becauſe the bringing of the Replevy amounts to a claim in Law, and veſts the property in the Plaintiff. But in that caſe, if the goods of the villein be taken by a treſpaſſe, the Lord ſhall have no replevy, becauſe the villein had but a right.

(n) 3 E. 3. 74. 6 H. 4. 2. & 39. 9 H. 6. 39. 20 H. 6. 19.

(o) 33 E. 3. Replev. 43. 42 E. 3. 18. 9 H. 6. 25. F.N.B. 69. F. 6 H. 7. 9. 19 E. 3. Replev. 32.

(p) But there is two kind of properties, a general property, which every abſolute owner hath; and a ſpecial property, as goods pledged or taken to manure his lands, or the like, and of both theſe a Replegiare doth lye.

(p) 42 E. 3. 18. 11 H. 4. 17. 23. 47 E. 3. 12. 48 E. 3. 20. 7 H. 4. 17.

And albeit it be provided by the Statute of Marlebridge, cap. 22. quod vicecomes poſt querimoniam inde ſibi factam ea fine impedimento vel contradictione ejus qui dicta averia ceperit deliberare poſſit, &c. (q) Yet where the Defendant claims property, the Sheriff cannot proceed; for it is a rule in Law, that property ought to be tryed by writ. And therefore in that caſe where the tryal is by pleint, the Plaintiff may have a writ De proprietate probanda, directed to the Sheriff to try the property; and if thereupon it be found for the Plaintiff, then the Sheriff to make deliverance; (for ſo be the words of the Writ) and if for the Defendant, he can no further proceed, but that is but an enqueſt of office: and therefore if thereby it be found againſt the Plaintiff, yet he may have a writ of replevy to the Sheriff, and if he return the claim of property, &c. yet ſhall it proceed in the Court of Common Pleas, where the property ſhall be put in iſſue, and finally tryed. And the Sheriff may take a pleint upon the ſaid act out of the County, and make replevin preſently, for it ſhould be inconvenient for the owner to forbear his cattell till the County day.

Marlbr. cap. 22.

(q) 30 E. 3. 22, 31 E. 3. Replev. 35. & 4. 7 H. 4. 26. 28. 31 H. 6. Prop. prob. 5. 1 E. 4. 9. 21 H. 4. 64. 2 Eliz. Dyer 193. 21 E. 4. 66.

(r) It is to be noted, that a man cannot claim property by his Bayliff or ſervant, and the reaſon is, for that if the claim fall out to be falſe, he ſhall be fined for his contempt, which the Lord cannot be, unleſſe he maketh claim himſelf, for Nemo punitur pro alieno delicto.

(r) 5 E. 3. 38, 11 H. 4. 4. 17 E. 2. Prop. prob. 6.

In a ſpecial caſe a man may have a Replevin of goods not diſtreined, as if the Meſne put in his cattell in lieu of the cattel of the Tenant paravail, that he is bound to acquite; he ſhall have a replevin of thoſe cattel that never were diſtreined.

34 H. 6. 47.

If a man by his Deed grant a Rent with clauſe of diſtreſſe, and grant further, that he ſhall keep the goods diſtreined againſt gages and pledges, untill the Rent be paid; yet ſhall the Sheriff replevy the goods diſtreined: for it is againſt the nature of ſuch a diſtreſſe to be irreplevisable, and by ſuch an intention the currant of replevins ſhould be overthrown, to the hindrance of the Commonwealth; and therefore it was diſallowed by the whole Court, and awarded that the Defendant ſhould gage deliverance, or elſe go to priſon. And Bracton is of the ſame opinion, for he ſaith, Eodem modo de via obſtructa, per breve quod juſticiet propter communem utilitatem, ne tranſeuntes ire diu impediantur, quia hoc eſſet commune damnum, & in hos vicecomes & Juſticiarii faciant ſicut ſuper detentionem averiorum contra vadium plegii, propter communem utilitatem, ne animalia diu incluſa pereant, which in mine opinion is an excellent point of learning.

31 E. 3. Gage deliver 5.

Bracton lib. 4. fol. 233. a. & b.

If the beaſts of divers ſeveral men be taken, they cannot joyn in a Repleg. But every one muſt have a ſeveral replevin: And ſo in a Replevin it is good plea to ſay, that the property is to the Plaintiff and to a ſtranger, and where there be two Plaintiffs, that the property is to one of them.

28 E. 3. 92. 3 H. 4. 12. 34 H. 6. 37. 2 E. 4. 25.

There is alſo a writ De homine replegiando. But Littleton is ready to give you further inſtruction, therefore hear him.

Regiſt. fol. 133. Bract. fol. 121. & 154. W. 2. ca. 11. Fleta lib. 2. cap. 2. F.N.B. 66. b.

¶ *Et avowa le priſe, &c. en court de record.* Here it appeareth, an avowry in Court of Record, which is in nature of an action, is a determination of his election before any judgment given. And this is a good proof of that which hath been formerly ſaid of the writs of Annuity and Aſſiſe.

Electio

Electio ſemel facta & placitum teſtatum non patitur regreſſum. 21 H.6.24. per Newton
Quod ſemel placuit, in electionibus amplius diſplicere non poteſt. 27 H.6.4.

If a Rent charge be granted to A. and B. and their heirs, A. diſtreyneth the beaſts of the Grantor, and he ſueth a Replevin, A. avoweth for himſelf, and maketh conuſance for B: A. dyeth and B. ſurvyveth, B. ſhall not have a Writ of Annuity, for in that caſe the election and avowry for the Rent of A. barreth B. of any election to make it an Annuity, albeit he aſſented not to the avowry.

But here is another diverſity to be obſerved betwéen the caſe aforeſaid of the grant of the Rent, where he (as hath bén ſaid) may make it either reall or perſonall, and when a man may have election to have ſeveral remedies for a thing that is merly perſonal or merly real from the beginning. As if a man may have an action of account or an action of debt at his pleaſure, and he bringeth an action of account and appear to it, and after is Nonſuit, yet may he have an action of debt afterwards, becauſe both actions charge the perſon. The like Law is of an Aſſiſe and of a Writ of entry in the nature of an Aſſiſe, and the like. 28 E.3.98. b. 27 E.3.89. b.

## *Sect.* 220.

¶ Item, ſi home voile q̄ un' auter averoit un Rent charge iſſuant hors de ſa terre, mes il ne voile q̄ ſa perſon ſoit charge en aſcun maner p̄ briefe dannuitie, donques il poit aver tiel clauſe en la fine de ſon fait. Proviſo ſemper, Quod præſens ſcriptum, nec aliquid in eo ſpecificatum, non aliqualiter ſe extendat ad onerandum perſonam meam, per breve, vel actionem de annuitate, ſed tantummodo ad onerandum terras, & tenementa mea de annuali redditu prædict, &c. Donques la terre eſt charge, & le perſon del grantor diſcharge.

Alſo if a man would that another ſhould have a Rent charge iſſuing out of his Land, but would not that his perſon be charged in any manner by a Writ of Annuity, Then hee may have ſuch a clauſe in the end of his deed: Provided alwayes, that this preſent Writing nor any thing therein ſpecified, ſhall any way extend to charge my perſon by a Writ or an action of Annuity, but onely to charge my Lands and Tenements with the yearly Rent aforeſaid, &c. Then the Land is charged, and the perſon of the Grantor diſcharged.

¶ By this Section it appeareth, that when in a generall grant, the Law doth give two remedies, that the Grantor may provide, that the Grantee ſhall not uſe one of them, and leave the party to the other. But where the Grantee hath but one remedy, there that remedy cannot be barred by any proviſo, for ſuch a proviſo ſhould be repugnant to the Grant. 28 H.8. Dier 9.b.

¶ *De annuali reddit u, &c.* Here by (&c.) and the conſequent of this Section, be implyed divers excellent points of learning, viz. If a man by his Deed granteth a Rent charge out of the Mannour of Dale, (wherein the Grantor hath nothing) with ſuch a proviſo, that it ſhall not charge his perſon, albeit the repugnancie doth not appeare in the Deed, yet the proviſo taketh away the whole effect of the Grant, and therefore is in judgement of Law repugnant: for upon the matter it is but a grant of an Annuity, provided, that it ſhall not charge his perſon, for which cauſe our Author putteth his caſe of a Rent charge iſſuing truly out of Land. But if a man by his Deed grant a Rent charge out of Land, provided that it ſhall not charge the Land, albeit the Grantee hath a double remedy, (as hath bén ſaid) yet the Proviſo is repugnant, becauſe the Land is expreſſly charged with the Rent, but the Writ of Annuity is but implyed in the Grant, and therefore that may be reſtrained without any repugnancy; and ſufficient Remedy left for the Grantee, for which cauſe our Author putteth his caſe of the reſtraint of bringing a Writ of Annuity. And yet in ſome caſe where there is a Proviſo So it was reſolved by the Juſtices in 11 H.8. as Juſtice Spilman reporteth. 9 H.6.53.

6 Eliz. Dier 227.

in the deed that the Grantee ſhall not in any ſort charge the perſon of the Grantor generally notwithſtanding the perſon of the Grantor ſhall be charged: As if a man grant a rent charge out of certain lands to another for life with ſuch a Proviſo, the Rent is behind, the Grantee dyeth, the Executors of the Grantee ſhall have an action of Debt againſt the Grantor, and charge his perſon for the arrerages in the life of the Grantee, becauſe the executors have no other remedy againſt the grantor for the arrerages, for diſtrein they cannot, becauſe the eſtate in the Rent is determined, and the Proviſo cannot leave the Executors without remedy, as appeareth by ỹ which hath been ſaid. And therefore our Author putteth his caſe of a Rent charge continuing. And here it is to be obſerved, that this word (Proviſo) hath divers operations, ſometime it worketh a qualification or limitation, and ſo it is taken here, and often in our Books: Sometime a Condition, and ſometime a Covenant, whereof you ſhall read more hereafter, Sect. 320.

32 Aſſ. p. 1. Vide ſect. 384.

¶ *En le fine de ſon fait.* Here Littleton putteth his caſe of one Deed, but though the Grant be generall, and want ſuch a Proviſo, yet may the Grantee by another Deed by way of Defeaſance grant that he ſhall not charge the perſon of the Grantor, and that if he bring a writ of Annuity, that the Rent ſhall ceaſe.

¶ *Nec aliquid in eo ſpecificatum non aliqualiter ſe extendat, &c.* Here is to be obſerved a double negative, Nec and Non, which in Grammatical conſtruction amounteth to an affirmative, for Negatio deſtruit negationem, & ambo faciunt affirmativum, yet the Law that principally reſpecteth ſubſtance, doth judge the Proviſo to be a negative, according to ỹ intent of the parties, and not according to Grammatical conſtruction, to the end the Proviſo

† Lib. 3. cap. de condic. ſect. 362.

may take effect, and the like you ſhall find hereafter in Littleton, † Mala Grammatica non vitiat cartam. Here our Author putteth his caſe of one Grantor: put then the caſe, that A. and B. being jointenants of lands in fee by their Deed grant a Rent charge out of thoſe lands, provided that the Grantee ſhall not charge the perſon of A. In this caſe, if the Grantee bringeth a Writ of Annuity, he muſt charge the perſon of B. only.

## Sect. 221.

¶ Que ſi A. de B. Here wanteth words to precede theſe, viz. que il grant al A. de B. &c. que ſi A. de B. &c. as it appeareth in the originall, and ſo it appeareth in the cloſe of this Section, viz. Mes grants tantſolement que il poet diſtreyner. And without ſuch a grant the clauſe ſhould be imperfect.

¶ *Pur ceo que le mannor eſt charge ove le rent per voy de diſtreſſe.* And yet no Rent is expreſſly granted out of the Mannor. But by the Grant that he ſhall diſtreyn for ſuch a yearly ſum of money in judgment of Law, the Mannor is charged with the Rent, but the perſon of the Grantor cannot be charged, becauſe he expreſſly granteth no Rent, for that would charge his perſon, but that the Grantee ſhould diſtreine, &c. which onely chargeth the Land.

¶ Item, ſi home fait tiel fait en tiel manner, q̃ ſi A. de B. ne ſoit añuelment pay al feaſt de Noel pur terme de ſa vie xx s. de loyal mony, que adonques bien lirroit a m̃ ceſtuy A. de B. a diſtreiner pur ceo en le mannor de F. &c. ceo eſt bone rent charge, pur ceo q̃ l'mãnor eſt charge ove le rent per voy de diſtreſſe, & uncore la perſon d̃ celuy que fait tiel fait, eſt diſcharge en tiel caſe de action dannuitie p̃ ceo que il ne granta per ſon fait aſcun

ALſo, if one make a Deed in this manner, That if *A.* of *B.* be not yearly payed at the Feaſt of Chriſtmaſſe for terme of his life xx. s. of lawfull money, that then it ſhall be lawfull for the ſaid *A.* of *B.* to diſtreyne for this in the Mannor of *F.* &c. this is a good Rent charge, becauſe the Mannor is charged with the rent by way of diſtreſſe, and yet the perſon of him which makes ſuch deed, is diſcharged in this caſe of an action of Annuity, becauſe hee doth

Annuitie

Annuitie a l'dit A. ꝺ B. mes granta tãt ſolement, q̃ il poit diſtrainer ꝑ tiel Annuitie, &c.

not grant by his Deed any Annuity to the ſaid *A.* of *B.* but grãteth only that he may diſtrein for ſuch Annuity, &c.

¶ *Que il poit diſtrein pur tiel Annuity, &c.*

Here, by (&c.) many points worthy of obſervation are imꝑplyed, viz. if a man ſeiſed of Lands in *Fée* bindeth his goods and Lands to the payment of a yearly Rent to A. de B. this is a good Rent charge with power to diſtrein, albeit there be no expreſs words of charge, nor to diſtrein. Or in theſe words, Obligo Manerium meum de C. & omnia bona in dicto Manerio exiſtent' A. de B. in annuo reditu de xx.s. ad diſtringuend' pur Ballivũ Domini Regis pro reddditu prædicto. By this grant a rent charge iſſueth out of the Mannor, and where the words be, ad diſtringendum per Ballivum Domini Regis, this is for the advantage of the Grantee. And therefore the Kings Baily ſhould be but his Miniſter to diſtrein for his Rent, and that which he may do by his ſervant, he may do by himſelf, or by any other of his ſervants.

19 Aſſ. p. 1. 18 E. 3. 3 Aſſ. 7. 3 E. 3. 12. 10 Aſſ. 24. 31 Aſſ. p. 17. 38 Aſſ. Annuity 52. 16 E. 3. grant. 64.

If a man by Deed grant a Rent of forty ſhillings to another out of his Mannor of Dale, to have and to perceive to him and to his heirs, and grant over by the ſame Deed, ꝙ if the Rent be behind, that the Grantee ſhall diſtrein in the Mannor of Sale (be the Mannor of Sale in the ſame County or in another County, and be this grant by one Deed or divers Deeds) the Rent is only iſſuing out of the Mannor of D. and it is but a pain, ꝙ he ſhall diſtrein in the Mannor of S. but both the Mannors are charged, the one with the Rent, and the other with a diſtreſs for the Rent, the one iſſuing out of the land, and the other to be taken upon the land. And whereas our Author puts his caſe of a grant for life. So it is, if I grant to you, ꝙ you and your heirs, or the heirs of your body ſhall diſtrein for a Rent of forty ſhillings within my Mannor of S. this by conſtruction in Law ſhall amount to a grant of a Rent out of my Mannor of S. in *Fée* ſimple or *Fée* tail; for if this ſhall not amount to a grant of a Rent, ꝙ grant ſhall be of little force or effect, if the Grantee ſhall have but a bare diſtreſs and no Rent in him. For then he ſhall never have an Aſſiſe of this, &c. And this is the reaſon that it is ſo often ruled and reſolved (†) that this amount to a grant of a Rent per conſtruction of law, ut res magis valeat, and all this is neceſſarily imployed in the (&c.) and in this caſe ꝙ Grantee ſhall not have a Writ of Annuity, as our Author ſaith: And whereas our Author putteth his caſe where the diſtreſs is to be taken in the ſame land out of which the Rent by conſtruction of Law is iſſuing, hereby is implied that if a Rent be granted out of the Mannor of D. and ꝙ Grantor grant over, ꝙ if the Rent be behind, the Grantee ſhall diſtrein for the ſame Rent in the Mannor of S. this is but a penalty in the Mannor of S. for three cauſes.

Lib. 7. fol. 23, 24. in Butts his caſe.

(†) 3 E. 3. 12. 7 Aſſ. p. 7. 14 Aſſ. p. 14. 16 E. 3. tit. Grants 64. 18 E. 3. 32. 16 Aſſ. 38. 30 Aſſ. 12. 46 E. 3. 18. 32, 8 H. 4. 19. 9 H. 6. 9. 22 H. 6. 11.

Firſt, The Law needs not to make conſtruction ꝙ this ſhall amount to a grant of a Rent, for here is a rent expreſly granted to be iſſuing out of the Mannor of D. and the parties have expreſly limited out of what land the Rent ſhall iſſue, and upon what land the diſtreſs ſhal be taken, and the Law will not make an expoſition againſt the expreſs words and intention of the parties, when this way ſtands with the rule of the Law. Quoties in verbis nulla eſt ambiguitas, ibi nulla expoſitio contra verba expreſſa fienda eſt.

Secondly, If in this caſe this ſhall amount to a grant of a Rent out of ꝙ Mannor of S. then the Grantor ſhall be twice charged. For if the Grantee bringeth a writ of Annuity, this ſhall extend only to the Mannor of D. For upon the grant of a diſtreſs in the Mannor of S. no Writ of Annuity lyeth, becauſe the Mannor of S. is only charged, and not the perſon of the Grantor as to this; and for this cauſe the bringing of the Writ of Annuity cannot diſcharge the Mannor of S. of any Rent: and ſo ꝙ Law by conſtruction againſt the words and the intention of the parties ſhall do injury to the Grantor to charge him twice.

Thirdly, If in ſuch caſe the Mannor of S. in which the diſtreſs is only limited, ſhall be in another County; then it hath been often adjudged, ꝙ the Rent ſhall not iſſue out of the ſame, but the diſtreſs ſhall be as a mean and remedy to compell the Tenant of the Land to pay the Rent, And it was ſaid that there was no diverſity in reaſon, ꝙ the Law in conſtruction ſhall make the Rent to be iſſuing out of this, when it lyeth in ꝙ ſame County, and not when it lyeth in ſeverall Counties, for ꝙ words in both caſes are all one, and there is no reaſon to ſay ꝙ he ſhall fail of a recovery by Aſſiſe. And the Books in 1 Aſſ. p. 10. and 1 E. 3. 21. and other Books do not ſay ꝙ the Rent iſſueth in this caſe out of both, but ꝙ the land in which the diſtreſs ſhall be taken is charged: and this is true for it is charged with the diſtreſs. And inaſmuch as it was charged with the diſtreſs, their opinion was ꝙ ꝙ Tenants of both of them ſhall be named in ꝙ Aſſiſe. And ꝙ opinion of Finchden, in 41 E. 3. 13. was affirmed to be good Law, That if ꝙ Mannor of D. out of which ꝙ Rent is granted be recovered by anelder Title, ꝙ all ꝙ Rent is extinct, but if ꝙ Mannor of S. in which ꝙ diſtreſs is limited, be evicted, yet all ꝙ Rent remains. † So if ꝙ Grantee purchaſe parcell of ꝙ Mannor of S. ꝙ Rent is not extinct, for that the Rent iſſueth onely out of the Mannor

Vide Bulwars caſe. Lib. 7. fol. 3. 1 Aſſ. p. 10. 1 E. 3. 21. Vide 9 E. 3. 13. 31 Aſſ. 27. 17 E. 4. 6. 17 Aſſ. 4. 10 E. 3. 18. 2 E. 2. Aſſ. 360. 1 Aſſ. 10. 3 Aſſ. 7. 32 H. 6. 27 22 Aſſ. 66. 31 Aſſ. 27. 29 E. 3. Aſſiſe 366. 41 E. 3. 13. per Finchden.

† Vide 17 E. 4. 6. ſemblable caſe. Vide ſect. proſequent.

nor of D. And it is said ꝯ if a man grant a Rent out of three acres, and grant over, ꝯ if the Rent be behind, that he shall distrein for the rent in one of the acres, this rent is entire, and cannot be a Rent seek out of two Acres, and a Rent charge out of ꝯ third Acre, and therefore it is a Rent seek for the whole, and yet he shall distrein for this in the third Acre. So if a Rent be granted to two and to their heirs, out of an Acre of Land, and ꝯ it shall be lawfull for one of them and his heirs to distrein for this in the same Acre, this is a Rent seek; for insomuch as they stand joyntly seised of one entire rent, it cannot be as to the one a rent seek, and as to the other a rent charge, and this distress is as appurtenant to the Rent: and therefore if he which hath the Rent dyeth, the survivor shall distrein, & if both grant over the rent to another, he shall distrein for this. But if a man grant a rent out of Black acre to one and to his heirs, and grant to him ꝯ he may distrein for this in the same acre for term of his life, this is a rent charge for his life, and a rent seek after, diversis temporibus. Otherwise it is if the distress be limited for certain years in the same Land, there this remains a Rent seek entirely, for that the fee and the freehold is seek in such case.

22 H.6.10. b. If a man seised of Lands in fee, and possessed of a term for many years, grant a rent out of both for life, in tail or in fee, with clause of distress out of both, this Rent being a freehold doth issue onely out of the freehold, and the lands in lease are onely charged with a distress. But if he had granted the rent only out of the lands in lease for term of the life of the Grantee, this had issued out of the term, and the land had been charged during the term if the Grantee lived so long.

If a man be seised of 20. acres of land, and grant a rent of 20. shillings percipiend' de qualibet acra terræ meæ, (ꝯ is) out of every one acre of my land, this is a several grant out of every several Acre, and the Grantee shall have 20. pounds in all.

A. Doth bargain and sell land to B. by Indenture, and before inrollment they both grant a Rent charge by Deed to C. and after the Indenture is inrolled, some have said, ꝯ this Rent charge is avoided, for, say they, it was the grant of A. and by the inrolment it hath relation to the delivery, which (say they) shall avoid the grant, notwithstanding the confirmation of the other which had nothing in the land at ꝯ time. But the grant is good, and after the inrolment by the operation of the Statute, it shall be the grant of B. and the confirmation of A. But if the Deed had not been inrolled, it had been the grant of A. and the confirmation of B, and so quacunque via data the grant is good.

## Sect. 222.

EXtinct, Cometh of the Verb Extinguere, to destroy or put out, and a Rent is said to be extinguished when it is destroyed and put out.

*Apportion.* This commeth of the word Portio, quasi Partio, which signifieth a part of the whole, and Apportion signifieth a Division or partition of a Rent common, &c. or a making of it into parts.

(a) Doct. & Stud. lib.2. cap.16. 21 H.7.24 21 E.3.58.

(a) The reason of this extinguishment is, because the Rent is entire, and against common right, and issuing out of every part of the Land, and therefore by purchase of part it is extinct in the whole, and cannot be (b) apportioned, but by act in Law it may, as hereafter shall be said. (c) If the Grantee of a Rent charge purchase parcell of the Land, and the Grantor by his Deed

(b) 30 Ass. 12. 9 Ass. 22.

(c) 46 E.3.32. 14 Ass. p. 24. 26 Ass. 38.

ITem, si home ad un rent charge a luy & a ses heires issuant hors de certein terr, sil purchase alcun parcel de cel a luy, & a ses heires, tout a Rent charge est extinct, & lannuitie auxy, pur ceo que Rent charge ne poit per tiel maner estre apportion. Mes si home que aver Rent service, purchase parcel de la terre dont le Rent est issuant, ceo nextiendra tout, mes pur le parcel, car rent service en tiel cas

ALso if a man hath a Rent charge to him and to his heires issuing out of certain Land, if he purchase any parcell of this to him and to his heires, all the Rent charge is extinct, and the Annuity also, because the Rent charge cannot by such manner bee apportioned. But if a man which hath a Rent Service, purchase parcell of the Land out of which the Rent is issuing, this shall not extinguish all, but for the parcel. For poit

poit eſtre apportion ſolonque le value de la terre. Mes ſi un tient la terre de ſon Seignior per le ſervice de render a ſon Seignior annuelmt a tiel feaſt ũ chival, ou un reſperondor, ou un Clove, Gyloſer, & hujuſmodi, ũ en tiel cas l' Seignior purchaſe parcel de la terre, tiel ſervice eſt ale, pur ceo que tiel ſervice ne poit eſtre ſever, ne apportion.

a Rent Service in ſuch caſe may be apportioned according to the value of the land. But if one holdeth his land of his Lord by the ſervice to render to his Lord yearly at ſuch a feaſt a Horſe, a golden Spear, or a Clove, Gilli-flower, and ſuch like, if in this caſe the Lord purchaſe parcel of the Land, ſuch ſervice is taken away, becauſe ſuch ſervice cannot be ſevered nor apportioned.

reciting the ſaid purchaſe of part, granteth that he may diſtreyn for the ſame Rent in the reſidue of the land, this amounteth to a new grant, and the ſame Rent ſhall be taken for the like Rent, or the ſame in quantity. And ſo it is (d) if a man by Deed granteth a Rent charge out of his land to a man for life, and granteth further by the ſame Deed that he and his heirs may diſtreyn in the land for the ſame Rent; this amounteth to a new grant of a Rent in fee ſimple.

(d) 8 H. 4. 19.

But yet a Rent charge by the act of the party may in ſome caſe be apportioned. As if a man hath a Rent charge of 20 ſhillings, he may releaſe to the Tenant of the Land 10 ſhillings, or more or leſſe, and reſerve part, for the Grantee dealeth onely with that which is his own, viz. the Rent, and dealeth not with the Land as in caſe of purchaſe of part. And ſo was it holden in the Common place, Hill. 14 Eliz. which I my ſelf heard and obſerved. So (e) if the Grantee of an Annuity or Rent charge of 20 pound, grant 10 pound parcel of the ſame Annuity or Rent charge, and the Tenant attorn, hereby the Annuity or Rent charge is divided.

Hill. 14 Eliz.

(e) 9 H.6. 12. 53. F.N.B. 152. D. E.

And (f) when the rent charge is extinguiſhed by his purchaſe of part of the land, he ſhall never have a Writ of Annuity, becauſe it was by the grant a rent charge, and he hath diſcharged the land of the rent charge by his own act, by purchaſe of part. And therefore he cannot by writ of annuity diſcharge the land of the diſtreſſe, as Littleton hath before ſaid. But if the rent charge be determined by the act of God or of the Law, yet the Grantee may have a writ of Annuity. As if tenant for another mans life by his Deed grant a Rent charge to one for 21 years, Ceſty que vie dieth, the rent charge is determined, and yet the Grantee may have during the years a Writ of Annuity for the arrerages incurred after the death of Ceſty que vie, becauſe the rent charge did determine by the act of God, and by the courſe of law, Actus legis nuNi facit injuriam. The like Law is if the land out of which the Rent charge is granted be recovered by an elder title, and thereby the Rent charge is voyded, yet the Grantee ſhall have a writ of Annuity, for that the Rent charge is avoyded by the courſe of Law, and ſo it was holden in Wards Caſe above remembred againſt an opinion obiter in 9 H.6.42.a.

(f) 14 E.4.4. 22 E.4. Le darrein caſe 51.7 H.6.9 H.6.1.5 H.7. 33. Wards caſe cited in l. 2. In Heywards caſe fo. 36.

9 H.6.42.a.

¶ *Car rent ſervice en tiel caſe poet eſte apportion.* Whether this apportion was at the Common Law, or by the force of the ſtatute of Quia emptores terrarum, hath ben a queſtion in our books. † And it appeareth by Littleton that it was ſo at the Common Law, for when he citeth any any thing provided by any ſtatute, he citeth the ſtatute, as he hath done this very act before. 2. Littleton ſpeaketh here indefinitely of Rent ſervice, and there be divers kinds of Rent ſervices which are not within that ſtatute, and yet ſuch Rent ſervices are apportionable by the Common Law, as if a man maketh a leaſe for life or years reſerving a Rent, and the Leſſee ſurrender part to the Leſſor, the Rent ſhall be apportioned. So if the Leſſor recovereth part of the land in an action of waſte, or entreth for a forfeiture in part, the Rent ſhall be apportioned.

† Brook tit. apportionment 28. 18 E.3.49. 22 Aſſ.52. 3 Aſſ.18. 18 E.2. Avowrie 218. Vide lib.6.fol.1.2. in Bruertons caſe. Vid.lib.8.fol.105,106. in Talbots caſe.

(g) So likewiſe if the Leſſor grant part of the reverſion to a ſtranger, the Rent ſhall be apportioned, for the Rent is incident to the reverſion. (h) So it is if Tenant by Knights ſervice by his laſt will and teſtament in writing deviſeth the Reverſion of two parts of the lands, the deviſee ſhall have two parts of the Rent.

(g) 14 H. 8. 12. Vid. li. 8. fol. 79. in Wildes caſe. Patch. 39 Eliz. Rot. 233. So it was adjudged inter Collins and Harding.

(h) Tr. 43 Eliz. Rot. 243. inter Weſt & Laſſels & Hill. 42 Eliz. Rot. 108. in Communi Banco inter Bwer & Moyle.

And theſe caſes are in mine opinion rightly adjudged againſt a ſudden opinion in Hill. 6. & 7 E.6. reported by Serjeant Bendloe to the contrary. Note what inconvenience ſhould follow if by the ſeverance of the reverſion the Rent ſhould be extinct.

¶ *Purchaſe parcell de la terre.* This is intended of a Fee ſimple, for if there

there be a Lord and Tenant of forty acres of Land by fealty, and twenty ſhillings Rent, (i) if the Tenant maketh a gift in tail, or a Leaſe for life or years, of parcel thereof to the Lord; in this caſe the Rent ſhall not be apportioned for any part, but the rent ſhall be ſuſpended for the whole: for a Rent ſervice (ſaith Littleton) may be extinct for part, and apportioned for the reſt: but a rent ſervice cannot be ſuſpended in part by the act of the party, and in eſſe for other part. So it is if the Leſſor enter upon the Leſſee for life or years into part, and thereof diſſeiſe or put out the Leſſee, the rent is ſuſpended in the whole, and ſhall not be apportioned for any part. And where our books (k) ſpeak of any apportionment in caſe where the Leſſor enters upon the Leſſee in part, they are to be underſtood where the Leſſor enters lawfully, as upon a ſurrender, forfeiture, or ſuch like; where the Rent is lawfully extinct in part. And yet by act in Law a Rent ſervice may be ſuſpended in part, and in eſſe for part. (l) As when the Gardian in Chivalry entreth into the Land of his Ward within age, now is the Seigniory ſuſpended: but if the wife of the Tenant be endowed of a third part of the Tenancy, now ſhall ſhe pay to the Lord the third part of the Rent. (m) And ſo it is if the tenant give a part of the Tenancy to the father of the Lord in Tail, & father dieth, and this deſcends to the Lord; in this caſe by act in Law the Seigniory is ſuſpended in part, and in eſſe for part, and the ſame Law is of a Rent charge.

(i) 12 H.8. tit. Extinguiſhment. Br. 48. 11 E. 3. Ceſſavit 21. 17 E. 3. 57. 2.

(k) 21 E. 4. 29. 9 E. 4. 1. 7 H. 6. 26. 4 H. 7. 6. b. 11 E. 3. Ceſſavit 21.

(l) 33 E. 3. Dower 138.

(m) 30 Aſſ. p. 12.

Likewiſe a Seigniory may be ſuſpended in part by the act of a ſtranger: (n) As if two Joyntenants or Coparceners be of a Seigniory, and one of them diſſeiſe the Tenant of the land, the other Joyntenant or Coparcener ſhall diſtreine for his or her moity.

(n) 27 E. 3. 88.

Concerning the apportionment of Rents, there is a difference between a grant of a Rent, and a reſervation of a Rent: for (o) if a man be ſeiſed of two acres of Land, of one in Fee-ſimple, and of another in tail, and by his Deed grant a Rent out of both in fee, in Tail, for life, &c. and dieth, the land intailed is diſcharged, and the land in fee ſimple remains charged with the whole Rent, for againſt his own grant he ſhall not take advantage of the weakneſs of his own eſtate in part (p) But if he make a gift in tail, a leaſe for life or for years of both acres, reſerving a Rent, the Donor or Leſſor dieth, the iſſue in tail avoydeth the gift or leaſe, the rent ſhall be apportioned; for ſeeing the rent is reſerved out of and for the whole land, it is reaſon that when part is evicted by an elder title, that the Donee or Leſſee ſhould not be charged with the whole Rent, but that it ſhould be apportioned ratably according to the value of the Land, as Littleton here ſaith.

(o) 12 H. 4. 12. 17 Ed. 3. Dower 164. 30 Aſſ. p. 12.

(p) 20 H. 6. 3. 9 E. 4. 1. 2. 35 H. 8. Dyer 56. 7 E. 6. Dyer 82. 29 E. 3. 6 H. 4. 17

(q) Doct. & Stud. l. 2. c. 29.

(q) If a man grant a rent charge out of two acres, and after the Grantee recovereth one of the acres againſt the Grantor by a title paramount, the whole rent ſhall iſſue out of the other acre: but if the recovery be by a faint title by Covine, then the Rent is extinct for the whole, becauſe he claimeth under the Grantor.

If a man infeoffeth B. of one acre in fee upon condition, & B. being ſeiſed of another acre in fee, granteth a rent out of both acres to the feoffor, who entreth into the one acre for the condition broken, the whole rent ſhall iſſue out of the other acre, becauſe his title is paramount the grant. But if a man maketh a leaſe for life of black acre and white acre, reſerving two ſhillings rent, upon condition that if the Leſſee doth ſuch an act, &c. that then he ſhall have fee in black acre: the Leſſee performs the condition, albeit now by relation he hath the fee ſimple ab initio; yet ſhall the rent be apportioned, for that the reverſion of one acre whereunto the rent was incident, is gone from the Leſſor, and ſo note a diverſity between a rent in groſſe, and a rent incident to a reverſion, concerning the apportionment thereof. And yet in ſome caſes a rent charge ſhall not be wholly extinct, where the Grantee claimeth from & under the Grantor. As if B. maketh a leaſe of one acre for life to A. & A. is ſeiſed of another acre in fee, A. granteth a rent charge to B. out of both acres, and doth waſte in the acre which he holdeth for life, B. recovereth in waſte, the whole rent is not extinct, but ſhall be apportioned, and yet B. claimeth the one acre under A. And ſo it is if A. had made a feoffment in fee, and B. had entred for the forfeiture, the rent is to be apportioned, and is not wholly extinct: and the reaſon hereof is, for that it is a Maxim of Law, That no man ſhall take advantage of his own wrong, Nullus commodum capere poteſt de injuria ſua propria: And therefore ſeeing the waſt and forfeiture were committed by the act and wrong of the Leſſee, he ſhall not take advantage thereof to extinguiſh the whole rent: and the whole rent cannot iſſue only out of the other acre, becauſe the Leſſor hath the one acre under the eſtate of the Leſſee, and therefore it ſhall be apportioned.

† Dyer Mich. 7 & 8 Eliz. Manuſcripts. The Earle of Huntingdons caſe. Vid. F. N. B. 214. b. Briefe de onerando pro parte.

† If the King give two acres of land of equal value to another in fee, fee tail, for life or years, reſerving a rent of two ſhillings, and the one acre is evicted by a title paramount, the rent ſhall be apportioned.

¶ *Mes ſi un home tient ſa terre, &c. per ſervice de render annuelment, &c. un Chival ou un Eſperon dor, & ſi en tiel caſe le Seignior purchaſe parcel del terre, tiel ſervice eſt ale.*

¶ *Chival.*

¶ *Chival.* Nota, In Latine Deſtrarius is a great horſe, or a horſe of Service; of the French word Deſtrier. Palfrides a horſe to travell on, of the French word Palfray: And Runcinus a Nagge (you ſhall often read of them in Record) it cometh of the Italian word Roncino. But admit that parcel of land holden by ſuch entire ſervice to come to the Lord by deſcent; whether ſhall the entire ſervice wholly remain, or be extinct? and it is holden, that in ſome caſe it ſhall be extinct for the whole, as Suit ſervice, and ſuch other intire annual Suit ſervices. But if the ſervice be, to render yearly at ſuch a feaſt a horſe, or the like, and the Tenant infeoffe the father of the Lord of part, which deſcends; yet the Feoffor ſhall hold by a horſe, becauſe the ſervice was multiplyed, and each of them, viz. the Feoffor and the Feoffee held by a horſe. Anno 6. R. 1 Rot. 5. War. Bruertons caſe li. 6. fo. 2. 34 Aſſ. 15. 35 H. 6. Exec. 21. Pl. Com. 72. 40 E 3. 40. 5 E. 2. tit. Avowry 205.

A. hath common paſture of ſauns nombre, in twenty acres of land, and ten of thoſe acres deſcend to A, the common ſauns nombre is entire and uncertaine, and cannot be apportioned, but ſhall remain. But if it had bin a Common certain, (as for ten beaſts) in that caſe the Common ſhould be apportioned. And ſo it is of Common of Eſtovers, of Turbary, of Piſcary, &c. and yet in none of theſe caſes, the deſcent which is an act in Law ſhall worke any wrong to the Terre-Tenant, for he ſhall have that which belongeth to him; for the act in Law ſhall worke no wrong.

If three Joyntenants hold by an entire yearly rent, as a horſe, or of a grain of wheat, and the Tenant ceſſe by two years, and the Lord recover two parts of the land againſt two of them, and the third ſaves his part by tendring of the rent, &c. and finding ſurety, albeit the Lord come to the two parts by lawful recovery, grounded upon the default and wrong of the two Joyntenants, yet ſhall the entire annual Rent be extinct. F. N. B. 209. 40 E. 3. 40.

If the Tenant holdeth by fealty and a buſhel of wheat, or a pound of Comyn, or of Pepper, or ſuch like, and the Lord purchaſeth part of the Land, there ſhall be an apportionment, as well as if the Rent were in mony: and yet if the Rent were by one grain wheat, or one ſeed of Comyn, or one Pepper corn, by the purchaſe of part, the whole ſhould be extinct. But if an entire ſervice be pro bono publico, as Knights ſervice, Caſtle-gard, Coynage, &c. for the defence of the Realm, or to repair a bridge or a way, to keep a Beacon, or to keep the Kings Records, or for advancement of juſtice and peace, as to ayd the Sheriff, or to be Conſtable of England, though the Lord purchaſe part, the ſervice remains. So it is if the tenure be pro opere devotionis ſive pietatis, as to find a Preacher, or to provide the ornaments of ſuch a Church: or pro opere charitatis, as to marry a poor Virgin, or to bind a poor boy Apprentice, or to feed a poor man. And ſo note a diverſity between theſe caſes, and entire ſervice for the private benefit of the Lord. Vide Litt. Cap. Tenant in Common 71. b. Lib. 6. fol. 1, 2. in Bruertons caſe. Litt. f. 49, 11 H. 7. 12. b. 24 H. 8. Tenures 5. Brooke, 35 H. 6. 6. 11 El. Dy. 285. 16 E. 3. Avowry 91.

## *Sect.* 223.

¶ Mes ſi un home tient ſa terre dun auter, per Homage, Fealtie, & Eſcuage, & per certaine rent, ſi le Sñr purchaſe parcell de la tr̃, &c. en tiel cas l'rent ſera apportion, come eſt avantdit, mes uncore en ceſt caſe l'homage & fealty ñmurront entier a le Sñr, car le Seignior avera le homage & fealtie de ſon tenant pur le remnant de les

But if a man hold his land of another by homage, fealty, and Eſcuage, and certain Rent, if the Lord purchaſe part of the land, &c. in this caſe the rent ſhall be apportioned, (as is aforeſaid) but yet in this caſe the Homage and Fealty abide entire to the Lord: For the Lord ſhall have the homage and fealty of his Tenant for the reſt of the Lands and Tenements

¶ *Purchaſe parcel del ter'. &c.* Here by this (&c.) is implyed, that the reaſons, wherefore homage and fealty remain and are not extinct in this caſe, are, firſt becauſe it can be no loſſe to the Tenant, as it might in the caſe of an horſe, or other entire ſervice; for there it may be, the remnant is ſufficient in value to pay it. Secondly, there is no land but it muſt be holden by ſome ſervice or other, and homage and fealty are the freeſt and leaſt chargeable ſervices to the Tenant. Bruertons caſe ubi ſuper. 5 E. 2. Avowry 206.

¶ *Pur ceo que tiel ſervices ne ſont paſſe annual ſervices, &c.* This is Ratio una, but not unica, as it appeareth by that which hath

hath bẽn ſaid. If there be Lord and Tenant by Fealty and Herriot ſervice, and the Lord purchaſe part of ꝫ land, the Herriot ſervice is extinct, (and yet it is not annual, but to be paid at the death of the Tenant) becauſe it is entire valuable.

Bruertons caſe lib. 6. Talbots caſe lib. 8. f. 104. 8 H. 7. 11.

¶ *Solonque lafferance & rate de la terre, &c.* Here is by this (&c.) implyed, That in ſome caſe where it is entire and valuable, and not annual, it ſhall not (as hath bẽn ſaid) be extinguiſhed by purchaſe of part, (†) as Knights ſervice which is to be performed by the body of a man, if the Lord purchaſe part, yet the Tenure by Knights ſervice remains for the reſidue, Quia pro bono publico, & pro defenſione regni, but the Eſcuage ſhall be apportioned, as here Littleton ſaith, becauſe that is for the benefit of the Lord, and yet it is caſual and not annual. And where our Author ſpeaketh of Herrices, it is implyed that a Herriot cuſtome, though it be entire, valuable, and not annual, by the purchaſe of part ſhall not be extinct. On the other part, when the Tenure is by an entire ſervice, and the Tenant alien part of the Tenancy, in what caſes the Rent ſhall be multiplied, (that is) where the Feoffee and the Alienee ſhall pay the entire Rent ſeverally, (for regularly it holdeth, that Quæ in partes dividi nequeunt, ſolida à ſingulis præſtantur) and where not, you may read at large in my † Reports.

terres & tenements tenus de luy, come il avoit advant, pur ceo que tiels ſervices ne ſont paſſe annuals ſervices, et ne poyent eſtre apportion, mes leſcuage poit, & ſerra apportion ſolonque lafferance et rate de la terre, &c.

holden of him, as he had before, becauſe that ſuch ſervices are no yearly ſervices, and cannot bee apportioned, but the Eſcuage may and ſhall be apportioned according to the quantity and rate of the land, &c.

(†) 7 E. 3. 29. Talbots caſe, l. 8. fol. 104.

(†) Bruertons caſe lib. 6. fol. 1, 2. Talbots caſe l. 8. fol. 104.

And by this (&c.) is alſo implyed, that the apportionment ſhall not be according to the quantity of the land, but according to the quality or value thereof, as by that which hath bẽn ſaid appeareth.

## Sect. 224.

5 E. 2. Avowrie 200. 21 E. 3. 58. b. 34 Aſſ. 15. Tit. Apportionment. b. 28 7 Aſſ. 22.

¶ NOte here a diverſity, when the Grantee, of a Rent charge commeth to a part of the Land charged by his own act, and when by the courſe of Law.

30 Aſſ. Pl. 12.

¶ *Purchaſe parcel de les Tenements charges en fee.* And ſo it is if the Tenant giveth to the father of the Grantee part of the land in Tail, and this deſcend to the Grantee, the Rent ſhall be apportioned, and ſo by act in Law a Rent charge may be ſuſpended for one part, and in eſſe for another.

34 H. 41. b.

And ſo it is if the father be Grantee of a Rent, and the ſon purchaſe part of the Land charged, & ꝫ father dieth, after whoſe death the Rent deſcends to the ſon, the rent ſhal be apportioned, and ſo it is if the Grantee grant the Rent to the Tenant of the Land, and to a ſtranger, ꝫ rent is extinct but for a moity.

¶ ITem, ſi home ad un rẽt charge & ſon pier purchaſe parcel de les Tenements charges en fee, & moruſt, & cel parcel deſcend a ſon fits, q̃ ad l'rẽt charge, ore cel charge ſr̃ apportion ſolonque le value de la r̃ come en avant dit d̃ Rent ſervice, pur ceo que tiel portion de la terre purchaſe per la piere, ne vient al fits per ſon fait demeſn, mes per diſcent & p courſe del Ley.

ALſo, if a man hath a rent charge, and his father purchaſe parcell of the Tenements charged in fee, and dyeth, and this parcell deſcends to his ſon, who hath the Rent charge, now this charge ſhall be apportioned according to the value of the Land, as is aforeſaid of rent ſervice, becauſe ſuch portion of the Land purchaſed by the Father, cometh not to the ſon by his own fact, but by deſcent, and by courſe of Law.

If a man hath iſſue two daughters, and grant a rent charge out of his land to one of them, and dieth, the Rent ſhall be appoꝛtioned, and if the Gꝛantee in this caſe infeoffeth another of her part of the land, yet the moity of the rent remaineth iſſuing out of her ſiſters part, becauſe the part of the Gꝛantee in the land by the deſcent was diſcharged of the Rent. But in all theſe caſes where the Rent charge is appoꝛtioned by act in Law, yet the writ of Annuity faileth; foꝛ if the Gꝛantee ſhould bꝛing a Writ of Annuity, he muſt gꝛound it upon the gꝛant by Deed, and then muſt he (as hath been ſaid) bꝛing it foꝛ the whole. 9 Aſſ. 22.

Annua nec debitum Judex non ſeparat ipſum. 5 R. 2. Annuity 21.

Alſo in reſpect of the realty the Rent is appoꝛtioned, but the perſonalty is indiviſible, and by act in Law ſhall not be divided. If Execution be ſued of body and lands upon a ſtatute Merchant oꝛ ſtaple, and after the inheꝛitance of part of thoſe lands deſcend to the Conuſee, all the execution is avoided, foꝛ the duty is perſonal, and cannot be divided by act in Law. Pl. Com. 72. 35 H. 6. tit. Execut. 21. 15 E. 4. 5.

¶ *Ne vient al fitz per ſon fait demeſne mes per diſcent & per courſe del ley.* If the father within age purchaſe part of the land charged, and alieneth within age and dyeth, the ſon recovereth in a writ of Dum fuit infra ætatem, oꝛ entereth: In this caſe the act of Law is mixt with the act of the party, and yet the Rent ſhall be appoꝛtioned, foꝛ after the recovery oꝛ entry the ſon hath the land by deſcent.

So it is in caſe the ſon recovereth part of the land upon an alienation by his father Dum non fuit compos mentis, the Rent ſhall be appoꝛtioned foꝛ the cauſe afoꝛeſaid.

A man ſeiſed of lands in fee taketh a wife, & maketh a Feoffment in fee, the Feoffee grants a Rent charge of x. pound out of the land to the Feoffoꝛ and his wife, and to the heiꝛs of the husband; the husband dyeth, the wife recovereth the moity foꝛ her Dower by the cuſtom, the Rent charge ſhall be appoꝛtioned, and ſhe may diſtrein foꝛ five pound which is the moity of the Rent. In which caſe two notable things are to be obſeꝛved. Firſt, albeit the Dower be by relation oꝛ fiction of Law above the rent, yet when the wife recovereth her Dower, ſhe ſhall not have her entire rent out of the reſidue: foꝛ a relation oꝛ fiction of Law ſhall never woꝛk a wꝛong oꝛ charge to a third perſon, but In fictione juris ſemper eſt æquitas. Secondly, that albeit her own act do concur with the act in Law, yet the rent ſhall be appoꝛtioned. 5 E. 2. Avowry 206. Lib. 3. fol. 29. in Butler and Bakers caſe.

## *Sect.* 225.

¶ Item, ſi ſoit ſñr & tenant, & le tenãt tient de ſ̃ Seigniоr per fealty & certaine rent, & le ſ̃r grant le rent p̃ ſ̃ fait a un auter, &c. reſervãt a luy le fealty, & le tenant attorna al grantee de l'rent, oꝛe tiel rent eſt rent ſeck a le grantee, pur ceo que les tenemẽts ne ſont tenus del grantoꝛ de le Rent, mes ſõt tenus del Seigniоr que reſerve a luy fealty.

Alſo if there be Lord and tenant, and the Tenant holds of his Lord by fealty and certain Rent, and the Lord grants the Rent by his deed to another reſerving the Fealty to himſelf, and the Tenant atturns to the Grantee of the Rent, now this rent is rent ſeck to the grantee, becauſe the tenements are not holden of the Grantor of the Rent, but are holden of the Lord who reſerved to him the fealty.

¶ *Et le Seigniоr grant a le Rent, &c.* So it is if the Lord releaſe the Rent to the Tenant ſaving the fealty, the Rent is extinct. But if there be Lord and Tenant by Fealty and Rent, and the Lord by his Deed reciting the Tenure releaſe all his right in the land ſaving his ſaid Rent, the Seigniоry remains, and he ſhall have the rent as a rent Service, and the fealty incident to it, foꝛ the ſaid rent is as much to ſay as the Rent Service whereunto fealty is incident. 11 E. 4. 11. 9 E. 3. 1. 40 E. 3. 22. b. 13 E. 3. tit. Releaſes 36.

And if the Lord hath iſſue two Daughters & dyeth, and upon partition the fealty is allotted to the one, and the rent to the other, ſhe ſhall have the rent as a rent ſeck. 17 E. 3. 71. b.

If there be Lord of a Manoꝛ and Tenant by Fealty, Suit of Court and Rent, the Lord grant the Fealty, ſaving to him the Suit of Court and Rent, the ſaving is good foꝛ the Rent, but not foꝛ the Suit to Court, becauſe the Gꝛantee 17 E. 3. 72. b.

te can keep no Court, and there is no tenure of the Grantor, and therefore the ſuit of Court is loſt and periſhed in that caſe.

If the Donee hold of the Donor by fealty and certain Rent, and the Donor grant the ſervices to another, and the Tenant atturn, ſome have ſaid the Rent ſhall not paſſe, becauſe the Rent cannot paſſe but as a Rent ſervice, being granted by the name of ſervices, and the fealty cannot paſſe, becauſe (as hath been ſaid) the fealty is an incident inſeparable to the reverſion. But it ſeemeth, that the Rent ſhall paſſe as a Rent ſeck, becauſe at the time of the grant it was a Rent ſervice in the Grantor; and therefore there be words ſufficient to paſſe it to the Grantee, and it is not of neceſſity that it ſhall be a Rent ſervice in the hands of the Grantee.

7 E. 3. 2. b. Fitz. Warrens caſe. If there be Lord and Tenant by fealty and certain Rent, and the Lord by deed grant the Rent in fee ſaving the fealty, and grant further by the ſame Deed, that the Grantee may diſtrein for the ſame Rent in the tenancy, albeit a Diſtreſſe were incident to the Rent in the hands of the Grantor; and although a Tenant attorn to the grant, yet cannot the Grantee diſtrein, for the Diſtreſs remains as an incident inſeparable to the Seigniory, for then the Tenant ſhould be ſubject to two ſeverall diſtreſſes of two ſeverall men. And ſo it is if the Lord in that caſe grant the Rent in tail or for life, ſaving the fealty, & further grant that the Grantee may diſtrein for it, albeit the Reverſion of the Rent be a Rent ſervice; yet the Donee or Grantee ſhall have it but as a Rent ſeck, and ſhall not diſtrein for it.

7 E. 3. 2. 3. Adjudged.

31 Aſſ. 31, 17 Aſſ. 10. 32 Aſſ. pl. 10. F. N. B. 178. D. 22 H. 6. 3. b. 4 E. 2. Aſſ. 599. 28 H. 8. Dier 31.

It is to be obſerved, that where a Rent ſervice is become a Rent ſeck by ſeverance of the ſame from the Seigniory, that now the nature of the Rent is changed. For if the Grantee purchaſe part of the land, the whole Rent ſhall be extinct. And whereas in an Aſſiſe for a Rent ſervice, all the Tenants of the land need not to be named, but ſuch as did the diſſeiſin: Yet in Aſſiſe for the Rent ſeck which ſometimes was a Rent ſervice, all the Tenants muſt be named as in a caſe of a rent charge, albeit he were diſſeiſed but by one ſole Tenant, † but if the Lord of a Mannor releaſe the fealty to his Tenant ſaving the Rent, or that a Meſnalty become a Rent by ſurpluſage, thoſe that are now Seck (and ſometimes were ſervice) are part of the Mannor, but a Rent charge cannot be part of a Mannor.

(†) 31 Aſſ. 23. 22 Aſſ. 53.

¶ *Attorne, &c.* Of Attornement ſhall be hereafter ſaid in his proper Chapter and place.

## Sect. 226.

¶ *Si le Seignior voet granter per ſon fait le homage, &c.* It is to be obſerved, that where the Seigniory is by homage, fealty and rent, (a) if the Lord grant away the Homage, the Fealty ſhall paſſe, for fealty is an incident inſeparable to homage (b) & cannot by any ſaving in any grant be ſeparated from it, for homage cannot be ſole or alone, but the rent (though it be not ſaved) ſhall not paſſe in that caſe, becauſe the Rent is not incident to homage: and ſo it is if there be Lord and Tenant by fealty and rent, and the Lord grant over the fealty without any ſavings, the Rent paſſeth not, but fealty hath an incident inſeparable belonging to it, which by no ſaving can be ſeparated, and that is a Diſtreſſe, for as Littleton ſaith here, a ſervice cannot be ſeeke (that is) without ſome

(a) 40 E. 3. 22. per Curiam.

(b) 44 E. 3. 19, 20. 39 H. 6. 25. 29 Aſſ. pl. 20. 26 Aſſ. p. 38.

EN meſm̃ le manner eſt lou home tient ſa terre per homage, fealtie, & certaine rent, ſi le Sñr grant la rent, ſavant a luy le homage, tiel rent apres tiel grant eſt rent ſecke. Mes la ou terres ſont tenus per homage, fealty, & certaine rẽt, ſi le Sñr voit granter per ſ̃ fait le homage de ſon tenãt a un auter ſavant a luy le remnant de les ſervices, & le tenant atturna a luy, ſolonꝯ le forme del graunt, en ceſt caſe le teuant

IN the ſame manner, where a man holds his land by homage, fealty, and certaine rent, if the Lord grant the rent, ſaving to him the homage, ſuch rent after ſuch grant is rent ſeck. But there where lands are holden by homage, fealty, and certaine rent, if the Lord will grant by his deed the homage of his Tenant to another, ſaving to him the remnant of his ſervices, and the Tenant atturn to him according to the forme of the grant, in this caſe

tiendra

tiendra sa terre del grantee, & le Sñr q̄ grantast le homage, navera forsq; le rent come rent seck, & ne unques distreynera pur le rent, pur ceo que homage ne fealtie, ne escuage, ne poit estre dit seck, car nul tiel service poit estre dit seck. Car celuy que ad ou doit aver homage, ou fealty, ou escuage de sa terre poit per common droit distreyner pur ceo sil soit adecrere, car homage, fealtie, & escuage sont services, per queux terres ou tenements sont tenus, &c. & sont tiels q̄ en nul maner poient estr̄ prises forsque cõe services, &c.

the Tenant shall hold his Land of the Grantee, and the Lord who granted the Homage shall have but the rent as a Rent seck, and shal never distraine for the rent, because that homage nor fealty, nor escuage cannot be said seck, for no such service may be said seck. For he which hath or ought to have Homage, fealty, or escuage of his Land, may by common right distrain for it, if it bee behind. For homage, Fealty, and Escuage, are Services by which Lands or Tenements are holden, &c. and are such services as in no manner can bee taken but as Services, &c.

distresse belonging to it, for then it were not a service, and so of Homage and Escuage.

¶ *Terres ou Tenements sont tenus, &c.* By this (&c.) and out of this Section it may bee collected, that if (c) there be Lord and Tenant by Fealty and Rent, the Annuall Rent which is a profitable Service, is of higher and more respect in law than the Fealty, and therefore by the grant of the Rent, the Fealty shall passe as an incident thereunto, but it is an incident separable, and therefore may be by a Saving, as Littleton hath said, separated from it. And so when the tenure is by Fealty and Rent, and the rent be recovered, the fealty shall includedly be recovered. (d) And where the tenure is by Homage, Fealty and Rent, by the recovery of the Rent with the appurtenances upon a former right, the homage and fealty also shall be restored by necessity and indulgence of the Law: for seeing the Law giveth no Præcipe for the homage and Fealty, but for the Rent only, reason would that by the recovery of the Rent, the whole entire Seigniory shall be includedly restored in that case.

(c) 44 E. 3. 19. 26 Ass. 38. 29 Ass. p. 20. 9 E. 3. 2. 39 H. 6. 24. 25. 27 H. 8. 20. 8 E. 4. 28.

(d) Temps H. 8. Br. tit. incidents 24. 44 E. 3. 19. 29 Ass. 20. 39 H. 6. 24. 25.

But if the recovery be without title, there the Rent is recovered as a Rent seck, for that worketh no more then a grant, (f) but by the recovery of a Mannor, whether it be by title or without title, homage, fealty, and all other Services parcel of the Mannor are recovered. And albeit Fealty cannot be divided from Homage by grant (as hath been said) yet by extinguishment it may: (e) as if there be Lord and Tenant by Homage, Fealty and Rent, and the Lord release the Seigniory and Services, or all his right in the Land saving the Fealty and Rent, or saving the said Rent, or if he by expresse words release the Homage saving the Fealty and Rent, there the Fealty and Rent remain, for the Homage is extinct. And so note a diversity between a Grant and a Release in that case. But so long as Homage continues, the Fealty cannot be divided from it.

(f) Vide Sect. 149.

(e) 9 E. 3. 1.

¶ *Forsque come services, &c.* Here is implyed a diversity between these corporeal services of Homage, Fealty, and Escuage, which cannot become seck or dry, but make tenure, whereunto Distresses, Escheats, and other profits be incident, and other corporal services, as to plough, repair, attend, and the like, and all Rents whatsoever, for they may become seck or dry, and make no tenure.

## *Sect.* 227.

¶ Mes auterment est d̄ rent que fuit un foits rent service pur ceo que quant

But otherwise it is of a Rent which was once Rent Service, because when it is severed

¶ Et *le Seignior ne poet grant tiel rent ove distress, come est dit.* (f) For the

(f) 7 E. 2. 2.

the diſtreſs is an incident inſeparable to the fealty as hath been ſaid (g) and therefore a Releaſe of diſtreſs is void.

(g) 7 E. 4. 11.

3 H. 7. 4, 5.

¶ *Incident.* Incidens, is a thing appertaining to, or following another as a more worthy or principal, whereof you ſee here, and in divers other places of Littleton's examples. And of incidents ſome be ſeparable, and ſome inſeparable, as hath been ſaid.

il eſt ſever per le grant le Seignior de les autres ſervices, il ne poit eſtre dit rent Service, pur ceo que il ne ad a ceo fealty, que eſt incident a chelcun manner de rent ſervice, & pur ceo eſt dit rent ſecke, ſi le Seignior ne poit grant tiel rent ove diſtreſſe, come eſt dit.

by the grant of the Lord from the other ſervices, it cannot be ſaid Rent ſervices, for that it hath not fealty unto it, which is incident to every manner of Rent Service, & therefore it is called Rent ſeck. And the Lord cannot grant ſuch a Rent with a diſtreſſe, as it is ſaid.

## Sect. 228.

¶ *Savant a luy reverſion, &c.* By this word (&c.) is to be obſerved (h) that this Rent reſerved is a Rent Service, and hath fealty incident to it, and both Rent and fealty are incident to the Reverſion, viz. (i) the rent incident to the Reverſion ſeparably, but the fealty incident to the Reverſion inſeparably, but by the grant of the Rent, the fealty in this caſe ſhall not paſs, becauſe the fealty is inſeparably incident to the Reverſion, but the Grantee ſhall have the rent as a Rent ſeck. Alſo by this (&c.) is implyed an attornment of the Tenant, for without that, although by the grant the Rent is turned to a Rent ſeck, ſo as the Tenant cannot be charged with any diſtreſs, yet to the paſſing thereof there muſt be an Attornment.

(h) 41 E. 3. 16.

(i) 12 E. 4. 3. 32 H. 8. tit. Patents, Br. 26 Aſſ. 66. 48 E. 3. 9. b. Bract. & Stud. l. 2. cap. 9.

¶ *Attorne, &c.* Here is implyed by this (&c.) an Attornment in the life of the Grantee: and other incidents to an attornment, whereof you ſhall read at large in the Chapter of Attornment.

¶ Item ſi hõe leſſa a un auter terr̃s pur terme de vie, reſervant a luy certain rent, ſil grant le rent a un auter p̃ ſon fait, ſavant a luy le reverſion de la terre iſſint leſſe, &c. tiel rent neſt forſque rent ſeck, pur ceo que l' grantee nad riens en le reverſion del terre, &c. Mes ſil grant le reverſion del terre a un auter pur terme de vie, & le tenant atturne, &c. donques ad le grantee le rent come rent ſervice, pur ceo que il ad le reverſion pur terme de vie.

ALſo if a man let to another, lands for term of life reſerving to him certain rent, if he grant the rent to another by his Deed, ſaving to him the reverſion of the land ſo letten, &c. ſuch rent is but a rent ſeck, becauſe that the grantee had nothing in the Reverſion of the land, &c. but if he grant the Reverſion of the land to another for terme of life, and the Tenant attorne, &c. then hath the Grantee the Rent as a Rent ſervice, for that he hath the reverſion for terme of life.

¶ *Donques ad le grantee le rent come rent ſervice pur ceo que il ad le reverſion pur terme de vie.* And the reaſon hereof is, becauſe the Rent is incident to the Reverſion, as hath been ſaid, and (as Littleton ſaith here) paſſeth away by the grant of the Reverſion, as with the Superior, without ſaying, Cum pertinentiis, &c. for the Reverſion cannot be ſeck: But by the grant of the Rent the Reverſion doth not paſs.

Sect.

## Sect. 229.

¶ ET iſſint eſt a entendue que ſi home dona terrez ou tenements en le taile, rendant a luy & a ſes heires certaine Rent, ou leſſa terre pur terme de vie, rendant certaine rent; ſil granta le reverſion a un auter, &c. & le tenant atturna, tout le rent & ſervice paſſe per ceſt parol (reverſion) pur ceo que tiel rent & ſervice en tiel cas ſont incidents a le reverſion, & paſſont per le grant de l'reverſion. Mes coment que il granta le rent a un auter, le reverſion ne paſſa my pur tiel grant, &c.

AND ſo it is to be intended, that if a man give Lands or Tenements in tail, yielding to him and to his heirs a certain rent, or letteth Land for term of life, rendring a certain rent, if he grant the Reverſion to another, &c. and the Tenant atturn, all the Rent and Service paſs by this word (Reverſion) becauſe that ſuch rent and Service in ſuch caſe are incident to the reverſion, and paſſe by the grant of the reverſion. But albeit that he granteth the Rent to another, the Reverſion doth not paſſe by ſuch Grant, &c.

¶ This needs no explication, but is evident by that which formerly hath been ſaid, ſaving by this (&c.) in the end is implyed the old rule, That the incident ſhall paſs by the grant of the principal, but not the principal by the grant of the incident, Acceſſorium non ducit, ſed ſequitur ſuum Principale.

## Sect. 230.

¶ ISſint nota le diverſitie. Et iſſint eſt tenus, P. 21. E. 4. Mes il eſt adjudge, An. 26. lib. Aſſiſarum, ou les ſervices del tenant en taile fueront grants, q̄ c̄ fuit bone grant, nient obſtant que le reverſion demurt. ¶

SO note the diverſity. And ſo it is holden, *P.* 21 *E.* 4. But it is adjudged 26. of the book of Aſſiſes, where the ſervices of Tenant in taile were granted, that this was a good grant, notwithſtanding that the Reverſion remain. ¶

¶ This is added to Littleton. And therefore as I have done heretofore, and ſhall do hereafter in like caſes, I paſs it over. And the caſe here cited in 26 Aſſ. p. 66. was contra opinionem multorum, & afterwards that Judgment was reverſed by writ of Error, for that the Services remained with the Reverſion as incidents inſeparable.

## Sect. 231.

¶ ITem ſi ſoit ſeignior, meſne, & tenant, & le tenant tient del meſm per ſervice de v.s. & le meſne tient ouſter per ſervice

ALſo if there bee Lord, Meſne and Tenant, and the tenant holdeth of the meſne by the ſervice of five ſhillings, and the meſne

¶ *Si ſoit Seignior, Meſne & Tenant. &c. Si le Seignior Paramont purchaſe Seigniorie en fee. &c.*

(k) Some have ſaid, that in

(k) 20 E. 3. avowry 126.

in this caſe it were reaſon, that by the purchaſe of the Lord paramount, his Seigniory ſhould be onely extinct, and that he ſhould become Tenant to the Meſne, and the Meſne to hold over as the Lord Paramount held. But that cannot be, for that one man cannot be both Lord and Tenant, nor one land immediately holden of divers Lords.

2 E. 2. tit. Exting. 6. 2. 6 H. 6. ibid. 7.

(l) If the Tenant infeoff the Lord paramount and his wife and their heirs, in this caſe the Meſnalty is but ſuſpended; for if the wife ſurvive, both Meſnalty and Seigniory are revived.

(l) 7 Aſſ. 2. 7 E. 3. 20.

It is ſaid, that if there be Lord, Meſne, and Tenant, each of them by Fealty and ſix pence, the Lord confirm the eſtate of the Tenant, to hold of him by Fealty and three pence, that the Meſnalty is extinct.

(m) And ſo in the ſame caſe, if the Tenant be an Abbot, & the Lord confirm his eſtate to hold of him in Frankalmoign, the Meſnalty is extinct. (n) So it is, if the Lord releaſe to the Tenant; for whether the Lord purchaſe the tenancy, or the Tenant the Seigniory, the Meſnalty is extinct. And albeit the Meſne grant the meſnalty for life, and then the Lord releaſe to the Tenant, both the reverſion and the eſtate for life are drowned. (o) So if there be Lord and Tenant, and the Tenant make a gift in tail, the remainder to the King, the Seigniory is extinct.

(m) 4 E. 3. 19. See for this hereafter in the chapter of Confirmation, Sect.

(n) 8 H. 6. 24.

(o) 4 & 5 P. & M. Dy. 15.

de xii. d. ſi le Seignior paramount purchaſe le tenancie en fee, donques le ſervice de le meſnaltie eſt extinct, pur ceo q̃ quant le Seignior paramount ad le tenancie, il tient de ſon Seignior procheine paramount a luy, & ſil doit tener ceo de luy que fuit meſne, donques il tiendra un meſne tenancie immediate de divers Seigniors, per divers ſervices, q̃ ſerroit inconvenient, & la ley voit plus toſt ſuffer un miſchiefe q̃ un inconvenience, & pur ceo le Seigniory del meſnaltie eſt extinct.

holdeth over by the ſervice of 12. pence, if the Lord Paramount purchaſe the tenancie in fee, then the ſervice of the meſnalty is extinct, becauſe that when the Lord Paramont hath the tenancy, he holdeth of his Lord next Paramount to him; and if he ſhould hold this of him which was Meſne, then he ſhould hold the ſame tenancie immediately of divers Lords by divers Services, which ſhould be inconvenient, and the Law will ſooner ſuffer a miſchief than an inconvenience, & therefore the Seigniory of the meſnalty is extinct.

Vide Sect. 138, 139.

¶ *Que ſerra inconvenient.* Here it appeareth, That Argumentum ab inconvenienti is forcible in Law, as hath been ſaid before, and ſhall be often obſerved hereafter.

(p) 13 H. 3. 4, 40 Aſſ. p. 27. 12 R. 2. Vouch. 81.

¶ (p) *Le ley voit pluis toſt ſuffer miſchife que inconveniencie.* Lex citius tolerare vult privatum damnum, quàm publicum malum. Here be two Maxims of the Common Law:

Firſt, That no man can hold one and the ſame land immediately of two ſeveral Lords.

Secondly, That one man cannot of the ſame land be both Lord and Tenant. And it is to be obſerved, that it is holden for an inconvenience, that any of the maxims of the law ſhould be broken, though a private man ſuffer loſſe: for that by infringing of a maxim, not only a general prejudice to many, but in the end a publike incertainty and confuſion to all would follow. And the rule of Law is regularly true, Res inter alios acta alteri nocere non debet. Et factum unius alteri nocere non debet, which are true with this exception, unleſſe an inconvenience ſhould follow, as our Author here teacheth us.

## Sect. 232.

¶ *IL avera le iiii. s. come rent Secke.*

¶ MEs entant q̃ le tenant te-

BUt in as much as the Tenant holds

nus

nuſt del meſne p v. ſ. & le meſn tenuſt forſque per xii. d. iſſint que il avoit pluis en advantage per iiii. ſ. que il payaſt a ſon Seignior, il avera les dits iiii. ſ. come Rent Secke annuelment de le Seignior que purchaſe le Tenancie.

of the Meſne by five ſhillings, & the Meſne hold but by twelve pence, ſo as he hath more in advantage by four ſhillings, than he payes to his Lord, he ſhall have the ſaid four ſhillings as a rent Secke yearly of the Lord which purchaſed the tenancie.

(k) And yet he ſhall diſtreyn for it, for ſeeing the fealty is extinct, the Law reſerves the diſtreſſe to the Rent; for, as it hath been ſaid in the like caſe, ſeeing the fealty is extinct, the diſtreſſe by act in Law may be preſerved, Quia quando lex aliquid alicui concedit, concedere videtur & id ſine quo res ipſa eſſe non poteſt. (r) And therefore if a man maketh a leaſe for life, reſerving a Rent, and binds himſelf in a ſtatute, and hath the Rent extended and deliuered to him, he ſhall diſtreine for the Rent, becauſe he cometh to it by courſe of Law.

(r) 13 H.4. Avowry 237

(f) But if a Rent ſervice be made a rent ſeck by the grant of the Lord, the Grantee ſhall not diſtrein for it, for that the diſtreſs remains with the fealty. (t) If there be Lord, Meſne, and Tenant, and the meſnalty is a Mannor having divers freholders and the Lord purchaſe one of the Tenancies, and there is a rent by ſurpluſage, this rent albeit it be changed into another nature, (as hath been ſaid) is parcel of the Mannor. But yet by purchaſe of part of the land, the whole rent is extinct, albeit the Law did preſerve it.

(f) 28 E. 3. 93.
(t) 31 Aſſ. 23. 22 Aſſ. 53. 2 H.6. 14.

## *Sect.* 233.

¶ Item ſi home q̄ ad Rent Secke eſt un foits ſeiſie daſcun parcel de le Rent & apres l'Tenant ne voit payer l'rent aderere, ceo eſt ſon remedie, il covient de aler per luy ou per autr̄, a les terres ou tenements dont l' rent eſt iſſuant, & la demaund̄ les arrerages d̄ rent, & ſi le Tenant denia ceo de payer, ceſt denier eſt un diſſeiſin d̄ le rent. Aury ſi le tenant ne ſoit adonc̄s prſt a payer ceo ē un denier que eſt un diſſeiſin de rent. Aury ſi l' Tenant ne nul auter home ſoit demurrant, ſur les terres

Alſo if a man which hath a Rent ſecke bee once ſeiſed of any parcell of the Rent, and after the Tenant will not pay the rent behind, this is his remedy, he ought to go by himſelfe or by others, to the Lands or Tenements, out of which the rent is iſſuing, and there demand the arrerages of the rent, & if the tenant deny to pay it, this denial is a diſſeiſin of the rent. Alſo if the tenant be not then ready to pay it, this is a denial, which is a diſſeiſin of the rent. Alſo if the Tenant nor any other man bee remai-

¶ *Seiſin*, or Seiſon, is common as well to the Engliſh as to the French, and ſignifies in the Common Law poſſeſſion, whereof ſeiſina, a Latine word is made, and ſeiſire a Verb.

¶ *Daſcun parcell.*

(u) A ſeiſin of parcell is a ſufficient ſeiſin in Law, to have an Aſſiſe of the whole Rent.

(u) 5 E. 4. 2.

Concerning the generall learning of ſeiſins, you may read, Lib. 4. Bevils caſe, fol. 8. li. 5. fol. 98. lib. 6. fol. 57. lib. 7. fol. 24. 29. lib. 9. fol. 33. and many authorities of Law there cited, but ſufficient is ſaid here to explaine Littleton.

T. 18 E 1. coram Rege Nott. in Theſaur.

¶ *A les Terres, &c.*

(w) For a demand of the tenant out of the land is not ſufficient: but if there be a houſe and land, a demand on the land is ſufficient, but for a condition broken, it ought to be at the houſe, as hath been ſaid before.

(w) 49 E. 3. 14. b. 14 E. 4. 4. Pl. Com. 71.

¶ *Arere.* This word Arere, is to be obſerved, for it is not neceſſary that the

the grantee of the Rent should demand it at the very time when it becommeth due, but at any time after it is sufficient; for this is not like a demand of a Rent upon a condition, because that is penal and oberthroweth the whole state, and (x) therefore the time of Demand must be certain, to the end the Lessee, Donee, or Feoffee may be there to pay the Rent: but a demand of a Rent seek or Rent charge is but only a formall mean to recover that which is due, (y) and therefore in that case it may be demanded after it is behind at any time, whether the Tenant be present or no, for remedies for rights are ever favourably extended.

(x) 29 Ass. 51. 8 H. 6. 11. Lib. de Entries 79. b.

(y) Mich 41 E. 3. coram Rege adjudge accordingly.

ou les tenements pur payer l' rent quaunt il demand les arrerages, ceo est un dnier en ley & un disseisin en fait, & de tiels disseisins il poit aver Assise de Novel disseisin envers l' tenant, & recovera l' seisin del rent, & ses arrerages & ses dammages, & les costages d' ẽ bṽ & de ẽ plee, &c. Et si apres tiel recovery & execution ewe le rent soyt auter foits a luy denie, donque il avera un redisseisin, & recovera ses double damages, &c.

ning upon the lands or tenements to pay the rent when he demandeth the arrerages, this is a denial in law, and a disseisin in deed, and of such disseisins he may have an Assise of *Novel disseisin* against the Tenant, and shall recover the Seisin of the rent, & his arrerages, and his dammages, & the costs of his writ & of his Plea, &c. And if after such recovery and execution had, the rent be again denied unto him, then he shall have a redisseisin, and shall recover his double damages, &c.

¶ *Ceo est un denier en ley.* For wheresoever there is a lawfull demand of a Rent, & the same is not paid, wether the Tenant be present or absent, yet this is a denial in Law, albeit there be no words of denial. It appeareth here that the Demand must be made upon the land, and albeit the Tenant or any for him be there, yet must the Grantee demand it, because without a demand there can be no denier in Deed, or in Law.

Vide Bract. lib 4. fo. 261. 262. 264. Britton c. 42, 43, &c. f. 83. 106. 114, 115, 118. Mirror c. 2. Sect. 1. † Fleta li. 4. ca. 1. Bra. ubi supra.

¶ *Disseisin.* (z) Disseisina, is a putting out of a man out of seisin, and ever implyeth a wrong. But dispossessing or ejectment, is a putting out of possession, and may be by right or by wrong. † Omnis disseisina est transgressio, sed non omnis transgressio est disseisina, si eo animo forte ingrediatur fundum alienum, non quod sibi usurpet tenementum, vel jura, non facit disseisinam, sed transgressionem, &c. quærendum est à judice quo animo hoc fecerit, &c. And of ancient time a Disseisin was defined thus, Disseisin est un personel trespasse de tortious ouster del seisin.

Mirr cap. 2. Sect. 15. Bracton lib. 4. cap. 4. Britton cap. 44. 45. &c. Flet. lib. 4. cap. 5 & 2 & 3.

Mirror cap. 2. Sect. 15.

¶ *Assise de novel disseisin.* Assisa novæ disseisinæ. Assisa properly cometh of the Latine word Assideo, which is to associate or sit together. So as properly Assise is an association or sitting together. And the Writ whereby certain persons are authorised and called together, is called Assisa novæ disseisinæ; so as Assisa is but Cessio, but because Cessio is but a general word, therefore in this sense Assisa is used in law for a particular Cession by force of the writ, de Assisa novæ disseisinæ, and accordingly it was anciently said, Assise in un case auter chose que cession des Justices, and it is called Assisa novæ disseisinæ, for that the Justices of Eire before whom these Assises were taken in their proper Counties did ride their Circuits from 7 years to 7 years; and no disseisin before the Eire, if it were not complained of in the Eire, could be questioned after the Eire, and therefore a disseisin committed before the last Eire was called an ancient disseisin, and a disseisin after the last Eire was called a new disseisin, or Nova disseisina. Assisa also signifieth a Jury, of their sitting together, and also a Cession of Parliament, as Littleton hereafter in this chapter sheweth.

¶ *Et recovera le seisin del Rent.* Here, and by the (&c.) in the end of this Section is implyed, that our Author intendeth his case where the Rent issueth out of lands in one County: for if a man be seised of two acres of land in two severall Counties, and maketh a lease of both of them reserving two shillings Rent, in this case, albeit several Liberties be made at severall times, yet it is but one entire Rent in respect of the necessity of the case, and he shall distrein in one County for the whole, and make one avowry for the whole. But he shall have severall Assises in confinio Comitatus, and in either County shall make

make his plaint of the whole Rent but there shall be but one Patent to the Justices. (a) And this Assise in-confinio comitatus, is given by the statute of 7 R.2.c.10. for no Assise lay in that case at the Common Law, but the party might distrain. (b) But for a Common of pasture, of Turbary, of Pischary, of Estovers, and the like in one County, appendant or appurtenant to land in another County an Assise in confinio comitatus, did lye at the Common Law, (c) and so it is of a Nusans done in one County, to lands lying in another County: the like Assise did lye at the Common Law.

(a) 10 Ass. pl. 4. 18 Ass. p. 1. & 18 E. 3. 32. 22 H. 6. 9, 10.
(b) F.N.B. 180. a.
(c) F.N.B. 183. k.

(d) And albeit the Counties do not adjoyn, but there be twenty Counties mean between them, yet the Assise in confinio comitatus doth lye, and the Justices shall sit between the said Counties. (e) And where it is said before of two Counties, the like law it is if the same extend into more Counties.

(d) 5 E. 3. 2.
(e) F.N.B. 180. a.

(f) If a man hold divers Mannors or lands in divers several Counties by one tenure, and the Lord is deforced of his services, he shall have several Writs of Customs and services; for every County one Writ returnable at one day in the Court of Common Pleas, and thereupon count according to his case by the Common Law.

(f) 30 E. 1. tit Droit, F.N.B. 151. m.

(g) But if the Tenant in that case do cease, the Lord shall not have several Writs of Cessavit ut supra, for the Writ of Cessavit is given by the Statute, † and the form and manner of the Writ therein prescribed; and thereupon it is holden in our Books, that in that case a Cessavit doth not lye.

(g) 18 Ass. pl. 1. † W. 2. cap. 21.

¶ (h) *Il avera un redisseisin & recovera ses double damages, &c.* Here by this (&c.) is also to be understood, that a Writ of Redisseisin is given by the Statute of Merton † (so called, because the Parliament was holden at Merton in Anno 20 H. 3.) the Letter whereof is, Item si quis fuerit disseisitus de libero tenemento, & coram Justiciariis itinerantibus seisinam suam recuperaverit per Assisam novæ disseisinæ, vel per recognition' eorum qui fecerint disseisinam, & ipse disseisitus, per vicecomitem seisinam suam habuerit, si iidem disseisitores postea post iter Justiciariorum vel infra de eodem tenemento iterum eundem conquerentem disseisiverint, & inde convicti fuerint, statim capiantur, &c. But the double dammages are given by the Statute of W. 2. cap. 26.

(h) Bracton fol. 216. Britton 133. 246. Fleta lib. 4. cap. 29. Merton cap. 2 Sect. 15. Regist. 206, 207.
† Mirror ca. 3. W. 2. 9. 46. Vide Sect. 234.
Vide Regist. 206. b.

And Littleton in few words hath made a good expositon of this statute: for where the Statute saith, Disseisitus de libero tenemento, Littleton expounds it (i) to extend to a Rent seeke or Rent charge, albeit as hath been said, they be against common right, yet a man hath a freehold in them. (k) And he that granteth Omnia tenementa sua, a Rent charge or a Rent seeke doth passe,

(i) 40 Ass. 23; 2c.
(k) 14 E. 4. 4. 11 H. 6. 22.

Coram Justiciariis itinerantibus, &c. saith the Statute. But Littleton speaketh generally, and so is the statute to be intended before any other Justices that have authority to take Assises, and Justices Itinerant are set down but for an example, which is worthy of the observation, (l) being a penal law.

(l) F.N.B. 189. b.

Recuperaverit per assisam, &c. saith the statute: here assisa is taken for the verdict of the Assise, as Littleton hereafter in this chapter expounds the same, Vel per recognitionem, &c. or by confession. Then the question is, what if the recovery were upon a demurrer, or by pleading of a Record and faiter of it, or by any other manner? And seeing Littleton speaketh generally, it must be understood of all manner of recoveries in an Assise of Novel disseisin, and so it is confirmed by the Statute of W. 2. cap. 26.

¶ *Recovery.* Recuperatio commeth of the verb Recuperare, i. ad rem per injuriam extortam sive detentam per sententiam Judicis restitutio. And Recuperatio in the Common Law, is all one with Evictio in the Civil Law, which is, alicujus rei in causam alterius adductæ per judicem acquisitio.

¶ *Et execution ewe,* Per vicecomitem seisinam habuerit, saith the Statute, but Littleton speaketh generally, (Et Execution ewe) And execution had, so as whether it be by the Sheriff or by the party, so as an execution or possession be had, it sufficeth.

¶ *Execution.* Execution. And signifieth in Law, the obtaining of actual possession of any thing acquired by judgment of Law, or by a fine executory levyed, whether it be by the Sheriff or by the entry of the party, whereof you shall read more hereafter.

Vide Sect. 504.

Note, it appeareth here by Littleton, That (m) the recovery in a former Writ must be in Assise of Novel disseisin, wherein these words (Tiel recovery) are to be observed. And therefore if in a Writ of Right close in ancient Demesne, the Demandant maketh his protestation, to sue in the nature of Assise of Novel disseisin, and after is re-disseised, he shall not have a Writ of Re-disseisin, because the first recovery was not by writ of Assise of Novel disseisin. (n) And so it is if the recovery were in Assise of Fresh force by Bill, according to the custom of some City or Borough, also in ancient Demesne there be no Coroners.

(m) 14 E. 2. tit. Rediss. 9. F.N.B. 189. g.
(n) 14 E. tit. Rediss. 8. Vid. the 2. part of the Institutes sta. de Merton cap. 2.
(o) 9 H. 5. 5. F.N.B. 189. c. 23 Ass. pl. 7.

Si iidem disseisitores, saith the Statute. (o) So as it must be the same Disseisors: but here iidem

lidem is taken for non alii. And therefore if the recovery in the Aſſiſe were againſt two Diſſeiſors, and one of them re-diſſeiſe him again, he ſhall have a re-diſſeiſin againſt him, for he is not alius. But if the recovery had bin againſt one, and he and another re-diſſeiſe the plaintiff, he ſhall not have a Re-diſſeiſin, for here is alius, and he cannot have a re-diſſeiſin againſt the former Diſſeiſor alone, becauſe he is Joyntenant with another. (p) For Joyntenancy in a Writ of re-diſſeiſin is a good plea, and a ſtranger ſhall not be ſubject to double impriſonment and double dammages.

(p) 13 E. 3 rediſſeiſin 7.

(q) 9 H. 5. F. N. B. 188. E.

(q) If a recovery be had againſt a woman in Aſſiſe of Novel Diſſeiſin, and the plaintiff recovereth and hath execution, the woman taketh husband, and both of them re-diſſeiſe the Plaintiff, he ſhall not have a Re-diſſeiſin, becauſe the husband is alius.

(r) F. N. B. 188. E. Regiſt. 9 H. 195.

(r) And yet if a Feme recover in an Aſſiſe, and after take Baron, and they are re-diſſeiſed, the husband and wife ſhall have a re-diſſeiſin, becauſe the husband joyneth for conformity, and it is in the right of his wife who was diſſeiſed before, ſo in effect it is, idem diſſeiſitus & idem conquerens.

If two Coparceners be diſſeiſed, and recover in an Aſſiſe, if after they make partition, & after they be ſeverally diſſeiſed, they ſhall have ſeveral re-diſſeiſins, and ſo it is of Joyntenants, for they be lidem conquerentes & non alii. Alſo a re-diſſeiſin doth ly againſt the Diſſeiſor, which doth re-diſſeiſe, and againſt another to whom he made feoffment after the ſecond diſſeiſin, for otherwiſe the Re-diſſeiſor might prevent the Plaintiff of his re-diſſeiſin. But in an Aſſiſe againſt A. and B. A. is found Diſſeiſor, and B. Tenant, and the Plaintiff doth recover, and after he which was found Tenant diſſeiſes the Plaintiff, he ſhall not have a re-diſſeiſin, becauſe he did diſſeiſe him but once.

F. N. B. 188, G.

De eodem tenemento, ſaith the Statute. If the Plaintiff be re-diſſeiſed of parcel of the tenement formerly recovered, he ſhall have a re-diſſeiſin.

If the Meſne recovereth a Rent when it is a Rent ſervice, and after the Rent becometh a Rent Seck by ſurpluſage, and doth re-diſſeiſe him of the Rent, he ſhall have a re-diſſeiſin, for the ſubſtance of the Rent remains, though the quality be altered.

(t) 26 H. 6. tit. Aid, 77.

(t) If tenant in ſpeciall taile recovereth in Aſſiſe and after becommeth Tenant in tail, after poſſibility of iſſue extinct, and then is re-diſſeiſed, he ſhall have a re-diſſeiſin. For albeit the ſtate of Inheritance be altered, yet the ſame freehold remaineth.

8 E. 3. tit. Rediſſeiſin 6. F. N. B. 189. F.

If a man recover Land in an Aſſiſe of Novel diſſeiſin, whereunto there is Common appendant or appurtenant, and after is re-diſſeiſed of the common, he ſhall have a re-diſſeiſin of the common, for it was tacitely recovered in the Aſſiſe.

## *Sect.* 234.

¶ *Æquivocum.* For the better underſtanding hereof, of theſe there be two kinds, viz. Æquivocum Æquivocans; and Æquivocum Æquivocatum.

Æquivocum Æquivocans eſt plurivocum; Polyſemus, a word of divers ſeverall ſignifications.

Æquivocum Æquivocatum eſt univocum, that is to ſay, reduced to a certain ſignification, as here in Littletons example, Aſſiſa eſt nomen æquivocum æquivocans; for ſometime it ſignifieth a Jury, ſometime the Writ of Aſſiſe, and ſometime an Ordinance or Statute.

Now Aſſiſe, Jurata is Æquivocum Æquivocatum, and ſo is Breve de Aſſiſa novæ diſſeiſinæ, and Aſſiſa panis, &c. even as Canis eſt nomen æ-

¶ ET memorandum, que ceſt noſme Aſſiſe, eſt nomen æquivocum, car aſcun foits eſt pyſe pur un Jurie, car le commencement de le Record de Aſſiſe de novel diſſeiſint iſſint commencera: Aſſiſa venit recognitura, &c. quod idem eſt quod Jurata venit recognitura, &c. Et la cauſe eſt, pur ceo que per le briefe de Aſſiſe, il eſt command a la Vicont, Quod faceret

AND *memorandum*, that this name Aſſiſe, is *nomen Equivocum*, for ſometimes it is taken for a Jury; for the beginning of the Record of an Aſſiſe of *Novel diſſeiſin* beginneth thus, *Aſſiſa venit recognitura, &c.* which is the ſame as *Jurata venit recognitura.* And the reaſon is, for that by the Writ of aſſiſe, it is commanded to the Sheriffe, *Quod faceret duodecim liberos & legales homi-*

duodecim

duodecim liberos & legales homines de vicineto, &c. videre tenementum illud, & nomina illorum imbreviare, & quod ſummoneat eos per bonos ſummonitores, quod ſint coram Juſticiariis, &c. parati inde facere recognitionem, &c. Et pur ceo que pur tiel original, un panel per force de meſme le brieſe devoit eſtre returne, &c. il eſt dit en l' commencement del Record en le Aſſiſe, Aſſiſa venit recognitura, &c. Jury en brieſe de droit il eſt communement dit, que le tenant luy poit mitter en Dieu & grand Aſſiſe, &c. Jury il y ad un brieſe en le Regiſter, que eſt appel brieſe de Magna Aſſiſa eligenda. Iſſint eſt ceo bien prove que ceſt noſme Aſſiſe, aliquando ponitur pro Jurat'. Et alcun foits il eſt priſe pur tout le brieſe daſſiſe, & ſolonque cel entent il eſt pluis properment, & pluis communement priſe, ſicome Aſſiſe de Novel Diſſeiſin eſt priſe pur tout l' breve de Aſſiſe de Novel diſſeiſin. Et en meſme le manner Aſſiſe de *nes de vicineto, &c. videre tenementum illud, & nomina illorum imbreviare, & quod ſummoneat eos per bonos ſummonitores, quod ſint coram Juſticiariis, &c. parati inde facere recognitionem, &c.* And becauſe that by ſuch an original, a Pannel by force of the ſame writ ought to be returned, &c. it is ſaid in the beginning of the Record in the Aſſiſe, *Aſſiſa venit recognitura, &c.* Alſo in a writ of Right it is commonly ſaid, That the Tenant may put himſelf on God and the great Aſſiſe. Alſo there is a Writ in the Regiſter which is called a Writ *De magna Aſſiſa eligenda*: So as this is well proved, that this name *Aſſiſa*, ſometimes is taken for a Jury, & ſometimes it is taken for the whole writ of Aſſiſe, and according to this purpoſe it is moſt properly and moſt commonly taken, as an Aſſiſe of *Novel diſſeiſin* is taken for the whole writ of Aſſiſe of *Novel diſſeiſin*. And in the ſame manner, an Aſſiſe of Common of Paſture is taken for the whole Writ of Aſſiſe quivocum, Canis latrabilis, Canis marinus, Canis Cœleſtis, ſunt æquiveca æquivocata.

¶ *Aſſiſe de Novel diſſeiſin.* Note (a) there be four Aſſiſes, viz. this writ, an Aſſiſe of Mortdanceſter, of Darreine præſentment, and of Utrum. (a) Bracton lib. 4. fo. 160. Britton c. 42. f. 105. 134. F. N. B. Fleta lib. 4. ca. 5. &c. Mirror c. 2. Sect. 13.

¶ *Vicount.* Vide Sect. 248. Verbo (*Shereve.*)

¶ *Quod faciat* 12. *liberos & legales homines de Vicineto, &c.* (b) Albeit the words of the Writ be duodecim, yet by ancient courſe the Sheriff muſt return 24. and this is for expedition of Juſtice, for if 12. ſhould onely be returned, no man ſhould have a full Jury appear, or be ſworn in reſpect of challenges, without a Tales, which ſhould be a great delay of tryals. So as in this caſe uſage & ancient courſe maketh Law. And it ſeemeth to me, that the Law in this caſe delighteth her ſelf in the number of 12. for there muſt not onely be 12. Jurors for the tryall of matters of fact, (c) but 12. Judges of ancient time for tryall of matters in Law, in the Exchequer Chamber. Alſo for matters of ſtate there were in ancient time twelve Counſellors of State. He that wageth his Law muſt have eleven others with him which think he ſayes true. And that number of twelve is much reſpected in Holy Writ, as, twelve Apoſtles, twelve Stones, twelve Tribes, &c. (b) 1 H. 7. 2. (c) Vid. Pl. Com. in proœmio. Joſ. 4. Gen. 49.

(d) He that is of a Jury, muſt be liber homo, that is, not only a free man, and not bond, but alſo one that hath ſuch freedome of mind as he ſtands indifferent as he ſtands unſworn. Secondly, he muſt be legalis. And by the Law every Juror that is returned for the tryall of any iſſue or cauſe, ought to have theſe properties. (d) 9 E. 4. 16.

(†) Firſt

(f) Artic. ſuper Cart. c. 9. Regiſt. 178. 8 E. 3. 30.

(f) **First,** he ought to be dwelling moſt near to the place where the queſtion is moved.

**Secondly,** he ought to be moſt ſufficient, both for underſtanding, and competency of eſtate.

**Thirdly,** he ought to be leaſt ſuſpicious, that is, to be indifferent as he ſtands unſworn, and then he is accounted in Law Liber & legalis homo; otherwiſe he may be challenged, and not ſuffered to be ſworn. The moſt uſual tryal of matters of fact is by 12 ſuch men, for ad quæſtionem facti non reſpondent Judices. And matters in Law, the Judges ought to decide and diſcuſſe; for Ad quæſtionem juris non reſpondent juratores.

Vide Sect. 102. 193.

9 H. 6. 37.

(e) Vid. Artic. ſup. Car. c. 9. Forteſc. c. 25. &c. 29.

(e) For the inſtitution and right uſe of this tryall by 12 men, and wherefore other Countries have them not, & how this tryal excell others, ſee Forteſcue at large, c. 25. &c. & 29. (f) And in antient time they were 12 Knights. This tryal of the fact Per duodecim libertos & legales homines is very ancient. For hear what the law was before the Conqueſt: (g) In ſingulis Centuriis comitia ſunto, atque liberæ conditionis viri duodeni, ætate ſuperiores, unà cum præpoſito ſacra tenentes juranto, &c. May the tryal in ſome caſes, Per medietatem linguæ, (as we ſpeak) was as ancient, (h) Viri duo deni jure conſulti, Angliæ ſex, Walliæ totidem, Anglis & Wallis jus dicunto, and of antient time it was called, duodecim-virale judicium.

(f) Glanvil lib. cap. 14. 15. Bracton li. 3. fo. 116. a.

(g) Lamb. verb. Centuria.

(h) Lamb. fol. 91. 31

Now ſeing we are juſtly occaſioned, and the rather for the (&c.) herein, to ſpeak of a challenge to Jurors: to make the ſtudious Reader capable of the underſtanding of the Books of Law concerning this matter, it ſhall be neceſſary to ſay ſomewhat of challenges; and firſt what a Challenge is.

A Challenge is a word common, as well to the Engliſh as to the French, and ſometime ſignifieth to claim, and the Latine word is vendicare, ſometime in reſpect of revenge to challenge into the field, & then it is called in Latine vindicare or provocare. Sometime in reſpect of partiality or inſufficiency, to challenge in Court perſons returned on a Jury. And ſeing there is no proper Latin word to ſignify this particular kind of challenge, they have framed a word anciently written (a) Chaluminare, and Columpniare, and Calumpniare, and now written Calumniare, and hath no affinity with the verb Calumnior, or Calumnia, which is derived of that, for that is of a quite other ſenſe, ſignifying a falſe accuſer, and in that ſenſe (b) Bracton uſeth Calumniator to be a falſe accuſer: but it is derived of the old word Caloir, or Chaloir, which in one ſignification is to care for, or forefee. And for that to challenge Jurors is the mean to care for, or forefee, that an indifferent trial be had, it is called Calumniare, to challenge, that is, to except againſt them that are returned to be Jurors, & this is his proper ſignification: (c) But ſometimes a Sommons, Summonitio, is ſaid (d) to be Calumniata, and a Count to be challenged,

(a) W. 2. cap. 32. Vide Stat. de 12 E. 2. de eſſoin. calumniandis. Fleta lib. 1. cap. 32. Britton fo. 6. a. 12. 118. & 134. 12 Aſſ. 10.

(b) Bract. lib. 3. fol. 137.

(c) Bract. lib. 4. fol. 257. Vet. N. B. fol. 76.

common de paſture eſt pris pur tout le briefe daſſiſe de common de paſture, & Aſſiſe de mortdanceſter eſt priſe pur tout le bre daſſiſe de Mortdanceſter & Aſſiſe de darraine preſentment eſt priſe per tout le breve daſſiſe de darraine preſentment. Mes il ſemble que le cauſe pur q̃ tiels briefes al commencemẽt fueront appels Aſſiſes fuit pur ceo que p chescun tiel briefe il eſt commande al viſcont, Qd' ſummoneat xii. le quel eſt a tant adir, que doit ſummoner un Jurie. Et aſcun foits aſſiſe eſt priſe pur un ordinãce, ſ. pur mitter certaine choſes en certaine rule & diſpoſition, ſi come ordenance q̃ eſt appel Aſſiſa panis & cerviſiæ.

of Common of Paſture. And Aſſiſe of *Mortdanceſter*, is taken for the whole Writ of Aſſiſe of *Mortdanceſter*, and Aſſiſe of *Darreine preſentment*, is taken for the whole Writ of *Darreine preſentment*. But it ſeems that the reaſon why ſuch writs at the beginning were called Aſſiſes, was, for that by every ſuch writ it is commanded to the Sheriff, *Quod ſummoneat* 12. which is as much to ſay, that he ought to ſummon a Jury. And ſometime Aſſiſe is taken for an ordinance, to wit, to put certaine things into a certaine rule and diſpoſition, as an Ordinance which is called *Aſſiſa panis & cerviſiæ.*

lenged, but this is improperly. And forasmuch as mens lives, fames, lands and goods are to be try'd by Jurors, it is most necessary that they be Omni exceptione majores, and therefore I will handle this matter the more largely.

A challenge to Jurors is two-fold, either to the Array, or to the Polls: to the Array of the principal pannel and to the array of the Tales. And herein you shall understand, that the Jurors names are ranked in the pannel one under another, which order or ranking the Jury is called the array, and the Verb, to array the Jury, and so we say in common speech, Battaile array, for the order of battail. And this array we call Arraiamentum, and, to make the array, Arraiare, derived of the French word arroier; so as, to challenge the array of the Pannel, is at once to challenge or except against all the persons so arrayed or impannelled, in respect of the partiality or default of the Sheriff, Coroner, or other Officer that made the return.

And it is to be known, that there is a principal cause of challenge to the Array, and a challenge to the favour: principal, in respect of partiality, as first, if the Sheriff or other Officers be of (a) a kindred or affinity to the Plaintiff or Defendant, if the affinity continue. (b) Secondly, If any one or more of the Jury be returned at the denomination of the party, Plaintiff or Defendant, the whole array shall be quashed. So it is if the Sheriff return any one, that he be more favourable to the one than to the other, all the array shall be quashed. (c) Thirdly, if the Plaintiff or Defendant have an action of battery against the Sheriff, or the Sheriff against either party, this is a good cause of challenge. So if the Plaintiff or Defendant have an action of debt against the Sheriff, (but otherwise it is, if the Sheriff have an action of debt against either party) or if the Sheriff have parcel of the land depending upon the same title, (d) or if the Sheriff or his Bayliff which returned the Jury, be under the distress of either party, or if the Sheriff or his Bayliff be either of Counsell, Attorney, Officer in fee, or of Robes, or servant of either party, Gossip or Arbitrator in the same matter, and treated thereof. (e) And where a subject may challenge the array for unindifferency, there the King being a party may also challenge for the same cause, as for Kindred, or that he hath part of the land, or the like: and where the array shall be challenged against the King, you shall read in our Books.

(f) By default of the Sheriff, as when the array of a Pannel is returned by a Bayliff of a Franchise, and the Sheriff return not of himself, this shall be quashed, because the party should lose his challenges. But if the Sheriff return a Jury within a Liberty, this is good, and the Lord of the Franchise is driven to his remedy against him.

If a Peer of the Realm or Lord of Parliament be Demandant or Plaintiff, Tenant or defendant, there must a Knight be returned of his Jury, be he Lord Spiritual or Temporal, or else the array may be quashed: but if he be returned, although he appear not, yet the Jury may be taken of the residue. And if others be joyned with the Lord of Parliament, yet if there be no Knight returned, the array shal be quashed against all. (h) So in an attaint there ought to be a Knight returned to the Jury.

(i) And when the King is party as in trabers of an office, he that traverseth may challenge the array, as hereafter in this Section shall appear: And so it is in case of life, and likewise the King may challenge the array, and this shall be tryed by Tryors according to the usual course. (k) The array challenged on both sides shall be quashed.

(l) And if two estrangers make a Pannel, and not in favourable manner for the one party or the other, and the Sheriff returns the same, the array was challenged for this cause, and adjudged good.

(m) If the Bayliff of a Liberty return any out of his Franchise, the array shall be quashed, as an array returned by one that hath no Franchise shall be quashed.

Challenge to the array for favour: (n) He that taketh this, must shew in certain the name of him that made it, and in whose time, and all in certainty: This kind of Challenge being no principall Challenge, must be left to the discretion and conscience of the Triors, as if the Plaintiff or Defendant be Tenant to the Sheriff; this is no principal Challenge, for the Lord is in no danger of his Tenant, but è converso it is a principall Challenge; but in the other he may challenge for favour, and leave it to tryal. So affinity between the son of the Sheriff and the daughter of the party, or è converso, or the like, is no principal Challenge, but to the favour: but if the Sheriff marry the daughter of either party, or è converso, this (as hath been said) is a principal Challenge, or the like. (o) But where the King is party, one shall not challenge the array for favour, &c. because in respect of his allegiance he ought to favour the King more. But if the Sheriff be a Vadelet of the Crown, or other mental servant of the King there the challenge is good, and likewise the King may challenge the array for favour.

Note upon that which hath been said it appeareth, that the challenge to the array is in respect of the cause of unindifferency or default of the Sheriff or other Officer that made the return

(a) 12 Ass. 36. 26 Ass. 31. 3 E. 4. 12. 31 Ass. 7. 29 Ass. 2. 22 E. 4. 2. 12 E. 3. Chall. 114. 21 E. 3. 5. b. 3 H. 7. 5. Pl. Com. 73. 15 H. 7. 9. 7 E. 6. Dyer 78. 12 H. 6. Chall. 159.

(b) 21 E. 4. 74. 49 E. 3. 1. 13 E. 4. 43. 22 E. 3. 12. 9 E. 4. 46. 8 H. 5. 5. 28 Ass. 22. 41 E. 3. Chall. 99.

(c) 11 H. 4. 26. 22 E. 4. 1. 38 E. 3. 25. 38 H. 6. 6.

(d) 44 E. 3. 5. & 38. 44 Ass. 23. 22 E. 4. 1. 3 H. 6. 39. 15 H. 7. 9. b. 27 Ass. 28. 7 H. 7. 10. 26 Ass. 56. 22. 20 H. 6. 34. 33 Ass. 12. 45 Ass. 1. 9 Ass. 8. 8 Ass. 23. 7 E. 3. 56. 21 H. 7. 38. 2 H. 4. 13. 44 E. 3. 43. 20 H. 6. 39. 44 Ass. 18. 3 H. 6. 24. 27 E. 2. Chall. 168. 4 E. 4. 11.

(e) 4 H. 4. 44 E. 3. 38. 38 Ass. 19. 22 E. 4. Chall. 63. Stamf. 162. c.

(f) 39 Ass. 2. 17 E. 3. 50. 17 Ass. 11. 30 Ass. 5. 8 Ass. 3.

(g) 13 E. 3. Chal. 115. Br. Enquest 100. lib. 6. fol. 54 Countesse de Rutlands Case. Plo. Com. 117. 27 H. 8. 22. 4 El. Dier 208. 8 Eliz. Dier 246. 14 Eliz. Dier 318. 12 El. Dier 265. b.

(h) 17 E. 2. Attaint 69.

(i) 32 E. 4. tit. Chall. 63. Stamf. Pl. cor. 19 Ass. 6. b. 4 H. 7. 8. 44 E. 3. 38.

(k) 8 H. 4. 22.

(l) 6 R. 2. Chall. 102. 13 E. 3. ibid. 108.

(m) 32 E. 3. Chall. 110. 111. 32 Ass. 6. 38 Ass. 13

(n) 34 H. 6. Chall. 69. 8 H. 4. 22. 27 Ass. 20. 22 E. 3. 12 Vid. 26 Ass. 21. 38 H. 6. 9. 7 H. 6. 25. 19 H. 6. 48. 20 H. 6. 38. 20 E. 4. 2. 22 E. 4. Chall. 62

(o) 22 E. 4. Chall. 63. 4 H. 7. 8.

return, and not in reſpect of the perſons returned, where there is no unindifferency or default in the Sheriff, &c. for if the challenge to the Array be found againſt the party that takes it, yet he ſhall have his particular challenge to the Polls.

In ſome caſes a challenge may be had to the Polls, and in ſome caſes not at all. Challenge to the Pols is a challenge to the particular perſons, and theſe be of four kinds, that is to ſay, Peremptory; Principal, which induce Favour, and for default of Hundredors.

(p) Peremptory, this is ſo called, becauſe he may challenge peremptorily upon his own diſlike, without ſhewing of any cauſe; and this only is in caſe of Treaſon or Felony, in favorem vitæ, and by the Common Law the priſoner upon an Endictment or Appeal might challenge thirty five, which was under the number of three Juries; but now by the Statute of 22 H.8. the number is reduced to twenty in petty Treaſon, Murder, and Felony; and in caſe of high Treaſon, and Miſpriſion of high Treaſon it was taken away by the Statute of 33 H. 8. but now by the Statute of 1 & 2 Phil. & Mariæ, the Common Law is revived for any Treaſon, the priſoner ſhall have his challenge to the number of 35, and ſo it hath been reſolved † by the Juſtices, upon conference between them in the caſe of Sir Walter Raleigh, and George Brooks. But all this is to be underſtood when any ſubject that is not a Peer of the Realm is arraigned for Treaſon or Felony: But if he be a Lord of Parliament, and a Peer of the Realm, and is to tryed by his Peers, he ſhall not challenge any of his Peers at all, for they are not ſworn as other Jurors be, but find the party guilty or not guilty, upon their faith or allegiance to the King, and they are Judges of the fact, and every of them doth ſeparately give his judgment beginning at the loweſt. But a ſubject under the degree of Nobility may in caſe of Treaſon or Felony challenge for juſt cauſe as many as he can, as ſhall be ſaid hereafter. In an Appeal of death, againſt divers they plead not guilty, and one joynt Venire facias, is awarded; if one challenge peremptorily, he ſhall be drawn againſt all. Otherwiſe it is of ſeveral Venire fac.

(p) 1 H.5. Chal. 162. 9 H.5.7. 15 E.4.32. 14 H. 77. 19 Doct. & Stud. lib. 2. Fortesc. cap. 27. 3 H.7. 2. 2 R.3. 12. 32 H.6.26. 17 Aſſ.6. 37 H.6.8. 22 H. 8.c.14. 33 H.8.tit. Chall. Br. 217. 33 H.8.c.23.1 & 2 P.&M.c.10. 23 H.6.26. 14 H.7.14. Stanf. Pl.Cor. 137, 138.
† Hill. Ja.R.

9 E.4.27.

Note, that at the Common Law before the Statute of 33 E.1. the King might have challenged peremptorily without ſhewing cauſe, but only that they were not good for the King, and without being limited to any number; but this was miſchievous to the ſubject, tending to infinite delayes and danger. And therefore it is enacted, (q) Quod de cætero licet pro Domino Rege dicatur quod juratores, &c. non ſunt boni pro Rege: non propter hoc remaneant inquiſitiones, &c. ſed aſſignent certam cauſam calumniæ, &c. whereby the King is now reſtrained.

(q) 33 E.1. Ordinatio de Inquiſitionibus. Stanf. Pl.Cor. 162.

Principal, ſo called, becauſe, if it be found true, it ſtanderh ſufficient of it ſelf without leaving any thing to the conſcience or diſcretion of the Triors. Of a principal cauſe of challenge to the Array, we have ſaid ſomewhat already; now it followeth with like brevity to ſpeak of principal Challenges to the Polls, (that is) ſeverally to the perſons returned.

Principal challenges to the Poll may be reduced to four heads. First, Propter honoris reſpectum, for reſpect of Honour: Secondly, Propter Defectum, for want of default: Thirdly, Propter Affectum, for affection or partiality; Fourthly, Propter Delictum, for Crime or Delict.

Lib.6.f.52, 53. Counteſſe de Rutlands caſe. 48 E. 3. 30. 48 Aſſ.6. 35 H.6. 46. 22 Aſſ. 24. F.N.B. 165. d.c. & 166. Regiſt. 179.

First, Propter Honoris reſpectum, As any Peer of the Realm, or Lord of Parliament, as a Baron, Viſcount, Earl, Marqueſſe, and Duke, for theſe in reſpect of Honour and Nobility, are not to be ſworn on Juries, and if neither party will challenge him, he may challenge himſelf, for by Magna Charta it is prohibited, Quod nec ſuper eum ibimus, nec ſuper eum mittemus niſi per legale judicium parium ſuorum, aut per legem terræ. Now the common Law hath divided all the ſubjects into Lords of Parliament, and into the Commons of the Realm. The Peers of the Realm are divided into Barons, Viſcounts, Earls, Marqueſſes & Dukes: The Commons are divided into Knights, Eſquires, Gentlemen, Citizens, Yeomen, and Burgeſſes, and in judgment of Law, any of the ſaid degrees of Nobility are Peers to another. As if an Earl, Marques, or Duke be to be tryed for Treaſon or Felony, a Baron or any other degree of Nobility is his Peer. In like manner, a Knight, Eſquire, &c. ſhall be tryed per Pares, and that is by any of the Commons, as Gentlemen, Citizens, Yeomen, or Burgeſſes; ſo as when any of the Commons is to have a tryal either at the Kings ſuit, or between party and party, a Peer of the Realm ſhall not be impanelled in any caſe.

(a) Lib.7.fo. 18. Calvins caſe. Lib 10. fol. 104. 14 H.4.9.b.
(b) Bract.f.185. Brit.f.135 Flet. lib.4.ca.8.26 Aſſ.28. 3 H. 6.39. 9 E. 4. 16 b. 21 H. 6. 20. 10 H.7.20.
(c) Vid. Sect.464. 38 Aſſ. 19. 17 Aſſ. 15, 9 H. 6.38. 9 H.5.5. 10 H. 6,7, 5.18. 2 H.7.1. 10 H. 7. 14. 19 H.6.9. 7 H.6.25.40. 44.12 E.4.13. 3 H.4.4.
(†) 9 H.6. Chal. 27, 9 H. 7. 1.

Secondly, Propter Defectum,

1. Patriæ, (a) as Aliens born.

2. Libertatis, (b) as Villeins or Bondmen, and ſo a Champion muſt be a Freeman.

3. Annui cenſus, i. liberi tenementi. (c) First, what yerly freehold a Juror ought to have that paſſeth upon trial of the life of a man, or in a plea real, or in a plea perſonal where the debt or dammage in the Declaration amounteth to forty Marks, Vide Sect.464. † Secondly, this freehold muſt be in his own right, in fee ſimple, fee tail, for term of his own life, or for another mans life, although it be upon condition, or in the right of his wife out of ancient demeſne, for freehold within ancient demeſne will not ſerve; but if the debt or dammage amounteth

mounteth not to forty Marks, any freehold ſufficeth. (d) Thirdly he muſt have freehold in that County where the cauſe of the Action ariſeth, and though he hath in another, it ſufficeth not. (e) Fourthly, if after his return he ſelleth away his land, or if Ceſty que vie, or his wife dieth, or any entry be made for the condition broken, ſo as his freehold be determined, he may be challenged for ſufficiency of Freehold.

(d) 19 H.6.9.17 Aſſ.15.

(e) 12 H.7.4. 21 H.6.38. 7 H.4.1.

4. Hundredorum: Firſt, by the Common Law in a plea real, mixt and perſonal, there ought to be four of the Hundred (where the cauſe of Action ariſeth) returned for their better notice of the cauſe, for Vicini vicinorum facta præſumuntur ſcire. And now ſince Littleton wrote, (f) in a plea perſonal, if two Hundredors appear, it ſufficeth; and in an attaint, (g) although the Jury is double, yet the Hundredors are not double. Secondly, (h) if he hath either Freehold in the Hundred, though it be to the value but of half an acre, or if he dwell there, though he hath no freehold in it, it ſufficeth. (i) Thirdly, if the cauſe of the Action riſeth in divers Hundreds, yet the number ſhall ſuffice, as if it had come out of one, and not ſeveral hundredors out of each hundred. (k) Fourthly if there be divers hundreds within one Leet or Wape, if he hath any Freehold, or dwell in any of thoſe Hundreds, though not in the proper hundred, it ſufficeth. (l) Fifthly, if the Jury come de corpore Comitatus, or de proximo hundredo, where the one party is Lord of the Hundred, or the tithe, there need no Hundredors be returned at all. (m) Sixthly, if a hundredor after he be returned, ſell away his Land within that Hundred; yet ſhall he not be challenged for the Hundred, for that this notice remains, otherwiſe as hath been ſaid for his inſufficiency of Freehold, for his fear to offend, and to have lands waſted, &c. which is one of the reaſons of Law, is taken away. (n) Seventhly, he that challengeth for the hundred muſt ſhew in what hundred it is, and not drive the other party to ſhew it. Eighthly, his challenge for the hundred is not ſimpliciter, but ſecundùm quid; for though it be found that he hath nothing in the Hundred, yet ſhall not he be drawn, but remain præter H. that is, beſides for the Hundred; and albeit he dwelleth or have Land in the Hundred, yet muſt he have ſufficient Freehold.

(f) 27 Eliz. cap. 6.

(g) 7 H.4.47.

(h) 16 E.4.7. 4 Mar. Br. Chal. 216. 21 E.4.74. 75. 9 H. 6. 66.

(i) 20 H.6.23. 4 Mar. Br. Chall. 216.

(k) 10 H.6.5. 12 H.4.14 19 E.4.5.

(l) 37 H.6.11. 25 E.3.43.

(m) 21 H.6.38. 12 H.7.4.

(n) Eliz. Dyer 231.

3. Propter affectum: And this is of two ſorts, either working a Principal challenge, or to the favour. And again, a Principal challenge is of two ſorts, either by judgment of Law without any Act of his, or by judgment of Law upon his own Act.

Brac. fol. 185. Britton fol. 134. 135. Fleta lib. 4. cap. 8. 21 E.4.11. 12.

And it is ſaid, that a principal challenge is, when there is expreſs favor or expreſſe malice. Firſt, without any Act of his, as if the Juror be (a) of blood or kindred to either party, Conſanguineus, which is compounded ex Con & ſanguines quaſi eodem ſanguine natus, as it were iſſued from the ſame blood, and this is a principal challenge, for that the Law preſumeth, that one Kinſman doth favour another before a ſtranger, (b) and how far remote ſoever he is of kindred, yet the challenge is good. And if the Plaintiff challenge the Juror for kindred to the Defendant, it is no Counterplea to ſay that he is of kindred alſo to the Plaintiff, though he be in a nearer degree. For the words of the Venire facias for kindreth the Juror to be of kindred to either party.

a) Britton fol. 135.

b) Mirror cap. 3. de ordinance dattaint. Bracton } Britton } ubi ſupra. Fleta } 14. 4 El. Dyer 319. 21 E. 4. 75. 40 Aſſ. 20. Pl. Com. 1. 41 E. 3. Chall. 99. 21 E. 4. 75.

(c) If a body politick or incorporate, ſole or aggregate of many, bring any action that concerns their body politick or incorporate, if the Juror be of kindred to any that is of that body (although the body politick or incorporate can have no kindred,) yet for that thoſe bodies conſiſt of natural perſons, it is a principall Challenge. (d) A Baſtard cannot be of kindred to any, and therefore it can be no principal Challenge: And here it is to be known that Affinitas, Affinity, hath in Law two ſenſes. In his proper ſenſe it is taken for that Peerneſſe that is gotten by marriage, Cum duæ cognationes inter ſe diviſæ per nuptias copulantur & altera ad alterius fines accedit, & inde dicitur Affinis. In a large ſenſe Affinitas is taken alſo for Conſanguinity and Kindred, as in the writ of Venire facias, and other where. (e) Affinity or Alliance by Marriage is a principal Challenge, and equivalent to Conſanguinity when it is between either of the parties, as if the Plaintiff or Defendant marry the Daughter or Couſin of the Juror, or the Juror marry the Daughter or Couſin of the Plaintiff or Defendant, and the ſame continues, or iſſue be had. But if the Son of the Juror hath married the Daughter of the Plaintiff; this is no principal Challenge but to the favour; becauſe it is not between the parties. Much more may be ſaid hereof, ſed ſumma ſequor faſtigia rerum.

(c) 7 E.4.14.19 E.4.7. 21 E.4.20. 28 H.6.10. 28 Aſſ. 18. 34 Aſſ. 6.

(d) 41 E.3. Chall 99. 41 E.3.9.26 H.6. Chall. 163.

(e) Mirror Bracton } Britton } ubi ſupra Fleta } 3 E.4.14.21 E.3.5.41. 41 E.3. Chall. 93. 43 Aſſ. 25. 16.22 E.4.2.14 H.7.2 15 H. 7.9.

(f) 19 H.8.7. 28 H.8. Dier 37. 1 Mariæ Dier 91. 2 Eliz. ibid. 177.

(i) If there be a Challenge for Coſinage, he that taketh the Challenge muſt ſhew how the Juror is Couſin. But yet if the Coſinage, that is, the effect and ſubſtance be found, it ſufficeth, for the Law preferreth that which is material before that which is formall.

(g) If the Juror hath part of the Land that dependeth upon the ſame Title.

(h) If a Juror be within the Hundred, Leet, or any way within the ſeignior immediately or mediately, or any other diſtreſſe of either party, this is a principal Challenge. But if either party be within a diſtreſs of the Juror, this is no principal Challenge, but to the favour.

(g) Bracton } Britton } ubi ſupra. Fleta } Mirror ubi ſupra. h) 9 H.6. tit. Chall. 27. 38 H. 3. 25. 22 E. 4. Chal. 27 6 H. 4 H.6.25. 3 H.6.39. 36 H.6. Ch. 46. 22 E. 4. 8. 27 Aſſ. 28. 22 E. 3. 12.

(i) If a witneſſe named in the Deed be returned of the Jury, it is a good cauſe of Challenge of him. (k) So it is if one within age of one and twenty be returned, it a good cauſe of Challenge.

i) 23 Aſſ. 11.

k) Mirror ubi ſupra.

2. (l) Upon his own act, as if the Juror hath given a verdict before, for the same cause, albeit it be reversed by writ of Error, or if after verdict, Judgment were arrested. So if he hath given a former verdict upon the same Title or matter, though between other persons. (m) But it is to be observed, that I may speak once for all, that in this or other like cases, he that taketh the Challenge must shew the Record if he will have it take place as a principal Challenge, otherwise he must conclude to the favour, unless it be a Record of the same Court, and then he must shew the day and term.

(n) So likewise one may be challenged, that he was Inditor of the Plaintiff or Defendant either of Treason, Felony, Misprision, Trespass, or the like in the same cause.

(o) If the Juror be Godfather to the Child of the Plaintiff or Defendant, or è converso, this is allowed to be a good Challenge in our Books.

(p) If a Juror hath been an Arbitrator chosen by the Plaintiff or Defendant in the same cause, and have been informed of, or treated of the matter, this is a principal Challenge. Otherwise if he were never informed nor treated thereof, & otherwise if he were indifferently chosen by either of the parties, though he treated thereof. But a (q) Commissioner chosen by one of the parties for examination of witnesses in the same cause, is no principall cause of challenge, for he is made by the King under the great Seal, and not by the party as the Arbitrator is, but he may upon cause be challenged for favour.

(r) If he be of counsell, Servant, or of Robes, or Fee, or of either party, it is a principal Challenge.

(s) If any after he be returned do eat and drink at the charge of either party, it is a principal cause of Challenge, otherwise it is of a Trior after he be sworn.

(t) Actions brought either by the Juror against either of the parties, or by either of the parties against him, which imply malice or displeasure, are causes of principal Challenge, unless they be brought by Covin, either before or after the return; for if Covin be found, then it is no cause of Challenge; other Actions which do not imply malice or displeasure, are but to the favour.

(u) In a cause where the Parson of a Parish is party, and the right of the Church cometh in debate, a Parishioner is a principall Challenge. Otherwise it is in debt, or any other action where the right of the Church cometh not in question.

(w) If either party labour the Juror, and give him any thing to give his verdict, this is a principal Challenge. But if either party labour the Juror to appear, and to do his conscience, this is no Challenge at all, but lawful for him to do it.

(x) That the Juror is a Fellow Servant with either party, is no principal challenge but to the favour.

(y) Neither of the parties can take that Challenge to the Polls, which he might have had to the Array.

(a) Note, if the Defendant may have a principal cause of Challenge to the Array, if the Sheriff return the Jury, the Plaintiff in that case may for his own expedition alledge the same, and pray Processe to the Coroners, which he cannot have, unless the Defendant will confesse it: but if the Defendant will not confesse it, then the Plaintiff shall have a venire facias to the Sheriff, and the Defendant shall never take any challenge for that cause, and so in like cases. But on the part of the Defendant any such matter shall not be alledged, and Processe prayed to the Coroners, because he may challenge the Jury for that cause, and can be at no Prejudice.

(b) Challenge concluding to the favour when either party cannot take any principall Challenge, but sheweth causes of favour, which must be left to the conscience and discretion of the Triors upon hearing their evidence, to find him favourable or not favourable. But yet some of them come nearer to a principall Challenge then other. (c) As if the Juror be of kindred or under the distresse of him in the reversion or remainder, or in whose right Avowry or Justification is made, or the like: These be no principal Challenges, because he in Reversion, Remainder, or in whose right the Avowry or Justification is, is not party to the Record; otherwise it is, if they were made parties by Aid, Receipt, or Voucher, and yet the cause of favour is apparent; so it is of all principal causes, if they were party to the Record. Now the causes of favour are infinite, and thereof somewhat may be gathered of that which hath been said, and the rest I purposely leave the Reader to the reading of our Books concerning that matter. For all which the rule of Law is, that he must stand indifferent as he stands unsworn.

(d) The subject may challenge the Polls, where the King is party. And if a man be outlawed of Treason or Felony, at the suit of the King, and the party for avoyding thereof alledgeth imprisonment, or the like, at the time of the Outlawry, though the issue be joyned upon a collateral point, yet shall the party have such Challenges, as if he had been arraigned upon the crime it self, for this by a man concerneth his life also.

4. Proper

(l) 8 H.5.10.33 H.6.1. 10 H.6.24. 7 H.4.11.18 E.4.12.21 E.4.74.11 R.2. tit Chall. 100. 27 Ass.13.
(m) 43 E.3.Chall.93. 8 H.5.10.
(n) Mirror ubi sup. Erit. f.12.11 Ass.36.8 H.4.2. 7 E.4.12 Ass.6.19 Ass. 6.40 Ass 10.25 E.3.c.3.
(o) 40 Ass.20.2 H.4.15. 10 H.6. Chall. 40.7 H.6. 40.19 H.6.66.4 E.4.11. 7 E.4.4.
(p) 20 H.6.39. 9 E.4.46. 35 H.6.19 H.6.3 H.6 24 7 H.7.10.
(q) Lib.9.f.71. Peacocks case.
(r) Mirror, Bracton, Britton } ubi supra 12 Ass.36. 26 Ass.56. 28 Ass.19.31 Ass.23.44 Ass.18.
(s) 13 H.4.13.11 R.2. Chall.164.
(t) Bract. Fleta } ubi supra. 44 E.3.5. 38. 44 Ass.23.8 E.3.25. 43 E.3.31.22 E.4.1. 38 H.6.43 E.3. Chall. 93.11 H.4.26.11 H.6.15. 32 E.3.Chall.189. 24 E.3.37.39 Ass.2. 20 Ass.11.43 Ass.46.
(u) 17 Ass.15.
(w) 8 E.3.39. 20 H.6.39. 33 H.8. Dyer 48.
(x) 22 Eliz. Dyer 367. Bracton, Britton, Fleta } ubi supra.
(y) 49 E.3.1.
(a) 9 E.4.6. 21 E.4.31. 22 E.4.3. 14 H.6.2. 20 E.4.2.3 H.7.5. 28 Eliz. Dyer 367.
(b) Mirror cap. 3. de ordinance dattaint. Bract. lib. 4. fol.185. Brit. f.134.135. Fleta lib.4.c.8.7 H.6.25.
(c) 9 H.7.3. 10 H.7.20. 3 H.7.2.10 E.4.12. 15 E. 4. 18. 12 Ass. 23.
(d) 6 R.2. Chal. 141. 19 Ass.6.38 Ass.22. 11 R. 2. Chall.165. 4H.5.ibid. 353.

¶ *Propter delictum.* (e) As if the Juror be attainted or convicted of treason, or felony, or for any offence to the or member, or in attaint for a false verdict, or for perjury as a witness, or in a conspiracy at the suit of the King, or in any suit (either for the King, or for any subject) be adjudged to the Pillory, tumbrill, or the like, or to be branded, or to be stigmatique, or to have any other corporal punishment whereby he becometh infamous, (for it is a maxime in Law, Repellitur à sacramento infamis) these and the like are principall causes of challenge. So it is if a man be outlawed in trespass, debt, or any other action, for he is Exlex, and therefore is not legalis homo. And old Books have said if he be excommunicated, he could not be of a Jury.

(e) Mirror. Bracton, Britton, Fleta } ubi supra. 11 H.4.41. 12 H.4.10. 33 H.6.21.

(f) See the statutes of W.2. and Artic. supra cartas, what persons the Sheriff ought to return on Juries. And see F.N.B. breve de non ponendis in Assesis & juratis, and the Register in the same Writ. And see there what remedy the party hath that is returned against Law.

(f) W.2 cap.38. Artic. super cart. ca.9. F.N.B. 165. & 166. Registr.

It is necessary to be known the time when the challenge is to be taken. (g) First, he that hath divers challenges must take them all at once, and the Law so requireth indifferent trials, & divers challenges are not accounted double. (h) Secondly, if one be challenged by one party, if after he be tryed indifferent, it is time enough for the other party to challenge him. (i) Thirdly, after challenge to the Array, & triall duely returned, if the same party take a challenge to the polls, he must shew cause presently. (k) Fourthly, so if a Juror be formerly sworn, if he be challenged he must shew cause presently, and that cause must rise since he was sworn. (l) Fifthly, when the King is party or in an appeal of felony, the defendant that challengeth for cause, must shew his cause presently. Sixthly, If a man in case of treason or felony challenge for cause, and he be tried indifferent, yet he may challenge him peremptorily. Seventhly, a challenge for the Hundred must be taken before so many be sworn, as will serve for hundredors, or else he loseth the advantage thereof.

(g) 9 E.4.16. 10 H. 5.9. 27 H.6.8.3 H.6.38. Brook tit. Chall. 8. 7 H.6.40. 14 H.7.5.6. (h) 9 E.4 16.27 H.8 2. (i) 43 E.3. Chall. 93. 20 E.3. ibid. 116.22 E.4. ibid. 61.7 H.4.41.3 El. Dower 201. (k) 22 E.4.1.9 H.5.6. (l) 1 H.5.10.38 Ass.22.

8 (m) In a writ of Right, the grand Jury must be challenged before the four Knights, before they be returned in Court, for after they be returned in Court, there cannot any challenge be taken unto them.

(m) 7 H.4.20. 15 E.4.1.

9 Nota (n) The Array of the Tales shall not be challenged by any one party, until the Array of the principal be tried: but if the plaintiff challenge the Array or the principal, the defendant may challenge the Array of the Tales. After one hath taken a challenge to the poll, he cannot challenge the Array.

(n) 9 E.4.27. 9 H.5.11. 34 Ass.6.13 E.3. Chal. 108

Now it is to be seen how challenge to the Array of the principal Pannel, or of the Tales, or of the polls shall be tryed, and who shall be triors of the same, and to whom process shall be awarded.

1 (o) If the plaintiff alledg a cause of challenge against the Sheriff, the process shall be directed to the Coroners, if any cause against any of the Coroners, process shall be awarded to the rest, if against all of them, then the Court shall appoint certain Elisors or Elitors (so named ab eligendo) because they are named by the Court, against whose return no challenge shall be taken to the Array, because they were appointed by the Court, but he may have his challenge to the polls. (p) Note, if process be once awarded for the partiality of the Sheriff, though there be a new Sheriff, yet process shall never be awarded to him: for the entry is, Ita quod vicecomes se non intromittat. But otherwise it is, for that he was tenant to either party, or the like.

(o) 18 E.4.8. (p) 15 H.7.9.14 H.7.31. 18 E.4.3.

2 (q) If the Array be challenged in Court, it shall be tryed by two of them & be impannelled to be appointed by the Court: for the triors in that case shall not exceed the number of two, unless it be by consent. But when the Court names two for some special cause alledged by either party, the Court may name others, if the Array be quashed, then process shall be awarded, as supra.

(q) 29 Ass.3. 19 H.6.48. 21 H.6.Chal.38. 33 H.6. 21.4 E.4.7. 43 E.3.Chal. 95.1 R.2.ibi.101. 34 Ass. 6.27 Ass.28. 43 Ass.26.

(r) If a pannel upon a Venire facias be returned, and a Tales, and the Array of the principal is challenged, the triors, which try and quash the Array, shall not try the Array of the Tales; for now it is as if there had been no appearance of the principal pannell: but if the triors affirm the Array of the principall, then they shall try the Array of the Tales. If the plaintiff challenge the Array of the principal, and the defendant the Array of the Tales, there the one of the principal, and the other of the Tales shall try both Arrayes. For other matter concerning the Tales see (f) in my Reports matters worthy of observation. (t) When any challenge is made to the polls, two triors shall be appointed by the Court, and if they try one indifferent, and he be sworn, then he and the two triors shall try another: and if another be tried indifferent, and he be sworn, then the two triors cease, and the two that be sworn on the Jury shall try the rest. (u) If the Plaintiff challenge ten, and the Defendant one, & the twelfth is sworn, because one cannot try alone, there shall be added to him one challenged by the Plaintiff, and the other by the defendant. When the tryal is to be had by two Counties, the manner of the tryal is worthy of observation, and apparent in our (w) books. (x) If the four Knights in the writ of right be challenged they shall try themselves, & they shall choose

(r) 9 E.4.46. 19 H.6.48. 34 Ass.6.7 E.6. Dier 78. 9 H.5.11. (f) Lib.10.fol. 104,105. Denbawds case. (t) 19 H.6.9. 22 E.4. Chal.61.162. (u) 7 H.4.41. (w) 11 H.4.61.48 E.3.10 11 H.4.63. (x) 22 E.3.18. 39 E.3.3

the grand Aſſiſe, and try the challenges of the parties. (y) If the cauſe of challenge touch the diſhonor or diſcredit of the Juror, he ſhall not be examined upon his oath, but in other caſes he ſhall be examined upon his oath, to informe the triors. (z) If an inqueſt be awarded by default, if defendant hath loſt his challenge, but the plaintiff may challenge for juſt cauſe, and that ſhall be examined and tried.

Whereſoever the Plaintiff is to recover per viſum juratorum, there ought to be ſix of the Jury that have had the view, or known the land in queſtion, ſo as he be able to put the Plaintiff in poſſeſſion if he recover.

In a Proprietate probanda, and a Writ to inquire for waſte, the parties have been received to take their challenges. (a) But paſſing over many things touching this matter, I will conclude with the ſaying of † Bracton, Plures autem aliæ ſunt cauſæ recuſandi juratores, de quibus ad præſens non recolo; ſed quæ jam enumeratæ ſunt, ſufficiant exempli cauſa. And ſo let us return to Littleton.

¶ *De viſneto, &c.* It ſhould be Vicinero: Vicinetum is derived of this word Vicinus, and ſignifieth Neighbourhood, or a place near at hand, or a neighbour-place. And the reaſon wherefore the Jury muſt be of the Neighbourhood, is for that Vicinus facta Vicini præſumitur ſcire, all which is implyed in this word (&c.)

¶ *Quod ſummoneat eos, &c.* Summoneo is compounded of Sub & moneo, & Euphoniæ gratia it is ſaid ſummoneo, to warn or ſummon, as in this caſe the Sheriff muſt warn or ſummon the Recognitors of the Aſſiſe to appear before the Juſtices of Aſſiſe, &c. And it is truly ſaid (b) that in this caſe Legitimã ſummonitionem recipere in propria perſona ubicunque inventus fuerit in comitatu in quo fuerit res petita, qui quidem ſi non inveniatur, ſufficit ſi ad domicilium fiat, dum tamen alicui de familia ſua manifeſtè fuerit relata, &c.

¶ *Per bonos ſummonitores.* Here two things are to be obſerved. Firſt, that the ſummoners muſt be Boni (id eſt) fide digni ut valeant legitimum teſtimonium perhibere, cum inde per Juſticiarios fuerint requiſiti. (c) And another ſaith, Fems, ne ſerfs, ne enfans, ne nul enfamys, ne nul que neſt fife tenant, ne poet eſtre bone ſummoner. 2. It is ſpoken in the plural number, Per bonos ſummonitores, and therefore there muſt be two at the leaſt. Nec ſufficit quod ſummonitio fiat per unum tantùm, &c. neceſſe eſt igitur quod per duos ad minus fiat, &c. There is alſo a ſummons of a Tenant in a reall action, whereof, and of Pernors and Vetors you ſhall read (d) plentifully and plainly in our Books, whereunto being matter of courſe I refer you.

Item Summonitionum alia eſt Generalis, alia Specialis, whereof you ſhall find excellent matter in our (e) old Books, where you ſhall alſo read at large De Summonitione, Præſummonitione, & Reſummonitione.

¶ *Facere recognitionem.* Cognitio is knowledge, or knowledgment, or opinion, and recognition is a ſerious acknowledgment or opinion upon ſuch matters of fact as they ſhall have in charge, and thereupon the Jurors are called Recognitores aſſiſæ, Vide Sect. 233. Recognitio is taken for the confeſſion of the Tenant.

¶ *Pannel,* is an Engliſh word, and ſignifieth a little part; for a Pane is a part, and a Pannel is a little part, as a Pannel of Wainſcot, a Pannel of a Saddle, and a Pannel of Parchment wherein the Jurors names be written and annexed to the Writ. And a Jury is ſaid to be impannelled, when the Sheriff hath entred their names into the pannel, or little piece, of Parchment in Pannello aſſiſæ.

¶ *Briefe de droit.* Breve de recto, Writs of Right be of two natures, 1. a writ of Right, whereof Littleton here ſpeaketh, which is the higheſt writ of all other reall Writs whatſoever, and hath the greateſt reſpect, &c. and the moſt aſſured and final judgment, and therefore this Writ is called a writ of Right right, and this in (f) old books is called Dreit dreit, and this Writ, Eſt darrein remedie de touts recoveries enter touts ordres des pleas, and the Jury in this Writ is called Magna Aſſiſa, or magna Jurata, as Littleton here ſaith. 2. Writs of Right in their nature, as the Rationabili parte, and Ne injuſtè vexes.

¶ *De Recto.* Rectum, is a proper and ſignificant word for the right that any hath, and Wrong or Injury, is in French aptly called Tort, becauſe Injury and Wrong is wreſted or crooked, being contrary to that which is right and ſtraight. Now the Law that is Linea recta eſt index ſui & obliqui. And Britton † ſaith, that Tort a la ley eſt contrary, and as aptly for the cauſe aforeſaid is injury in Engliſh called Wrong. And Injuria is derived of In and jus, becauſe it is contrary to right, ſo as a faire tort is facere tortum, and Fleta ſaith, (g) Et autem jus publicum & privatum quod ex naturalibus præceptis aut gentium, aut civilibus eſt collectum, & quod in jure ſcripto jus appellatur, id in lege Angliæ rectum eſſe dicitur. And in the (h) Mirror, and other places of the Law it is called Droit, as Droit defend, the Law defendeth.

¶ *En le Regiſter.* Regiſter is the moſt ancient book of the Common Law, and it is two

y) 49 E.3. 1.2.

z) 2 H.4.14. 4 E.4.3. 10 E.3.32. 22 Aſſ 28.31. 21 H.6.56.16 Aſſ. 1. 5 E.3.3 5 16.

a) 8 H.5.tit. Chall.167. 2 H.4.3. 34 E.3. Chall. 175.21 H.6.56. 8 E.4.3. 16 H.4.1.

† Bracton lib.4. fol.185.

b) Bracton lib.5.f.333, 334.Mirr.cap.2.Sect.19. Fleta lib.6. cap.6. Brit.cap.121.

c) Bracton, Britton, Fleta } ubi ſupra.

Bracton, Britton, Fleta } ubi ſupra.

d) Regiſt. Judicial. 1.2. 107.47 E.3.32. 24 E.3.35. 3 E.3.48,50 E.3.16,8 H. 6.1.b.F.N.B.97.

e) Mirror. Bracton, Britton, Fleta } ubi ſupra.

Regiſter 223.

(f) Bracton lib 5. fo.372. Britton fo.117. Fleta l.6. ca.1. Glanvil lib.1.c.4,5, &c. lib.2.c.4,7. lib.12 c.1.

† Britton fol.116. Fleta lib.2. cap.1.

(g) Fleta lib.6. cap.1.

(h) Mirror c.2.Sect.16. & cap.5. Sect.2.

twofold, viz. Regiſtrum brevium originalium, and Regiſtrum brevium judicialium. It is a French word, and ſignifieth a memorial of Writs. Sometimes the Regiſter of original writs is called Regiſtrum Cancellariæ, becauſe all original writs do iſſue out of the Chancery, as Extra officinam Juſtitiæ, for the antiquity and eſtimation of which book, I refer the Reader to the Epiſtle before the tenth part of my Commentaries. 13 E.1.cap.24. Pl. Com. 228. b.

¶ *Magna aſſiſa eligenda*, Is a Judicial Writ to the Sheriff to return four lawful Knights before the Juſtices, there upon their oaths to return twelve Knights for the Viſnage to try the Miſe in a Writ of Right.

¶ *Aſſiſe de common de paſture, &c.* Of what things an Aſſiſe of Novel diſſeiſin lay at the Common Law, and of what by the ſtatute, you may read at large in my (k) Reports in John Webbs Caſe, where the Authorities of Law are plentifully cited, and they and the ſtatute well explained. But ſince Littleton wrote, a man may have (l) an Aſſiſe of Novel diſſeiſin, Aſſiſe of Mordanc' or any Præcipe quod reddat, Quod ei deforceat, writs of Dower, or other writs original, as the caſe ſhall require, of Tythes, Penſions, or other Eccleſiaſtical or Spirituall profit, if he be diſſeiſed, deforced, wronged, or otherwiſe kept or put from the ſame, which by the Laws and Statutes of the Realm are made temporal, or admitted to be or abide in temporal hands, ſo as by the ſaid act a Lay-man having tythes or offerings, may either ſue for the ſubtraction or withholding of the ſame in the Eccleſiaſtical Court, or at the Common Law at his election. And ſeeing no ſpeciall Writ is given † by the ſtatute, the party muſt have a general Writt of Aſſiſe de libero tenemento, and make a ſpeciall plaint. But his Præcipe muſt be, Quod reddat omnes & omnimodas decimas majores, mixtas, & minutas, infra Dale quoquo modo creſcen' contingen' ac annuatim renovan' or the like according to his caſe. (m) But neither Aſſiſe nor any Præcipe did lye of them as of tythes, or any other Eccleſiaſtical duty at the Common Law: for the Aſſiſe brought of the tenth part of all manner of Corn growing in an hundred acres of land after the tythes of the Parſon taken was a Lay profit: Apprehender, and no Eccleſiaſtical duty. (k) Lib.8. fol.45. (l) 32 H.8. cap.7. † 7 E. 6. Dier 83. &c. (m) 44 E. 3. 5. Vide Regiſt. 165. Vid. le briefe de indicavit. W.2. c. 5. Conjunctim feoffatis ca. ultimo. Bracton lib.5. fol.402. Britton fol. 260. Regiſt. fol.35. 4 E.3 27.29. 16 E. 3. Quare Imp. 147. Vide 2 H.3.tit. Grant. 89.

But tythes or other Eccleſiaſtical duties, that came to the Crown by the ſtatutes (n) of 27 H.8. 31 H.8. 37 H.8. and 1 E. 6. are by thoſe ſtatutes, and this of 32 H. 8. and of 1 and 2 Phil. and Mariæ, in the hands of Lay-men temporal inheritances, and ſhall be accounted Aſſets: and husbands ſhall be Tenants by the Curteſie, and wives endowed of them, and ſhall have other Incidents belonging to temporal inheritances, only this Eccleſiaſtical quality they have, that the owner or poſſeſſor thereof may ſue for the ſubtraction of the ſame in the Eccleſiaſtical Court. (n) 27 H. 8. of Monaſteries not printed. 31 H.8. c.13. 37 H.8.c.4. 1 E.6. cap.14. & 2 Ph. & Mar. cap.8. 2 E.3. cap.13.

But by another (o) ſtatute, remedy is given as well to the Lay perſon, as to the Eccleſiaſtical perſon for ſubtraction of all manner of prædial Tythes, and he ſhall recover the treble value if they be not juſtly divided or ſet forth, & albeit the treble value be not expreſſly given to the proprietary of the Tythes, yet foraſmuch as he is the party grieved, & he hath the property & intereſt in the tythes, the treble value is given to him, & whenſoever a Statute giveth a forfeiture or penalty againſt him which wrongfully detaineth or diſpoſſeſſeth another of his duty or intereſt, in that caſe he that hath the wrong ſhall have the forfeiture or penalty, and ſhall have an action therefore upon the ſtatute at the Common Law, & the King ſhall not have the forfeiture in that caſe. And ſo it was (p) adjudged in the Exchequer upon conference with other Judges in an information for the treble value for not ſetting out of tythes in Iclington in the County of Cambridg. And if the proprietary will ſue for ſuch ſubtraction of tythes in the Eccleſiaſtical Court, then he ſhall recover but the double value by the expreſſe words of the Act. Wherein it is to be obſerved, that the Act of Parliament doth give a temporal remedy at the Common Law to Parſons & Vicars and other Eccleſiaſtical perſons for an Eccleſiaſtical duty, & to Lay men proprietaries of tythes the like remedy: but as it hath been ſaid, they have election either to ſue for the treble value at the Common Law, or for the double value in the Eccleſiaſtical Court, or for ſubtraction of tythes there alſo. (o) 2 E.6. cap. 13. (p) Paſch. 29 Eliz. between the Queen and Wood in the Exchequer. And ſo it was reſolved by all the Judges upon conference, Mich. 4. Ja. Regis.

¶ *Et Aſſiſe de Mortdanceſter.* Aſſiſa mortis anteceſſoris. (q) This writ a man may have after the deceaſe of his immediate Anceſtor, as where his father, mother, brother, ſiſter, uncle or aunt dye ſeiſed of any lands, and an eſtranger abate, &c. (q) Britton fol.178, 179. &c. Bracton lib.4. tractat.3. per totum, fol. 252. &c. Mirror cap.2. Sect.15. F. N. B. 114, &c.

¶ *Aſſiſe de darreine preſentment.* Aſſiſa ultimæ præſentationis, whereof you ſhall read (r) plentifully in our books. (r) Britton c.90. fol.222. Bract. lib.4. fol.238. Mirror ubi ſupra. F. N. B.195. Regiſt.ori. 30

To theſe may be added Aſſiſa utrum, or Juris utrum, (ſ) which is the higheſt writ a Parſon, Vicar, &c. can have for the recovering of the Glebe land, &c. in right of his Church. But it may be demanded, wherefore theſe originall writs are called by the ſpecial name of Aſſiſes more than other original writs: and here Littleton yieldeth the reaſon, becauſe that by theſe writs it is commanded to the Sheriff Quod ſummoneat 12, which is as much to ſay, as to ſummon a Jury. So as in theſe caſes there is a Jury returned the firſt day, and they are to (ſ) Bracton fol. 285. 286. Britton cap. 95. fol.214. Mirror ubi ſupra. F. N. B. 48, 49.

appear as ſoon as the Defendant. And becauſe by theſe writs a Jury is to be returned, the Law calleth them Aſſiſes, Ab effectu, becauſe an Aſſiſe (which in this ſenſe ſignifieth a Jury) is to be returned. But beſide the ſignification of the Writ † of Aſſiſe whereof Littleton here ſpeaketh, it ſignifieth the whole proceeding upon the Writ.

† Mag. Chart. cap. 12. And w. 1. cap. 25.

In other originall Writs regularly no Jury is to be returned before the appearance of the parties, and an iſſue joyned between them, and therefore theſe other originals are not called Aſſiſes.

¶ *Pur un ordinance.* Here Aſſiſa ſignifieth an Ordinance, &c. Ordinance, Ordinatio is derived of the verb ordinare, To ordain or ſet in order. And note, an Act (r) of Parliament (as Littleton here proveth) is an Ordinance, for it ſets down orders which are to be kept as Laws: and ſo is Ordinatio Foreſtæ, Ordinatio de Inquiſitionibus, and Ordinatio contra Servientes, and other ſtatutes many times called Ordinances, and it is ſaid almoſt in every Act of Parliament, be it therefore Ordained, &c. by authority of this Parliament, or the like. But è converſo, every Ordinance is not a ſtatute, as that of 8 H. 6. cap. 29. for every ſtatute muſt be made by the King, with the aſſents of the Lords and Commons, and if it appear by the act, that it was made by two of them only, it is no ſtatute.

(r) 13 H. 3. Juris utrum 16. 19 E. 3. 1. 7. 42 E. 3. 38. 29 E. 3. 7. Regiſt. orig. 189. 33 E. 1. 9 R. 2. cap. 2. Vide L. 8. le Princes caſe.

The example put by Littleton, is Aſſiſa panis & cervifiæ, (ſ) This Ordinance was made at a Parliament holden anno 51 H. 3. and the like Ordinance was made, entituled, Aſſiſa cervifiæ, which you may ſee in old Magna charta, fol. 57. b. (t) And ſo Aſſiſa de Claredon, which was in 10 H. 2. and Aſſiſa Foreſtæ; ordained in anno 34 E. 1. and ſuch like. And aptly an Ordinance of Parliament Antiquity hath called an Aſſiſe, for that an Act of Parliament doth ordain ſuch a certain order, as nothing can be done more or leſs by right. (u) And Fleta ſaith, Et habet rex in poteſtate ſua, ut leges & conſuetudines & aſſiſas in regno ſuo proviſas & approbatas & juratas, &c. Where Aſſiſes are taken for ſtatutes, which are the effects of the Seſſions of Parliament.

(ſ) Mir. c. 1. Sect. 13. & c. 4. de Articles de Eire, Bracton lib. 3. fol. 136. (t) Stamf. f. 118. Mir. c. 2. fect. 15. Hoveden 313. Regiſt. orig 279. (u) Fleta lib. 1. cap. 17.

De ponderibus & menſuris, of Weights and Meaſures is a moſt neceſſary learning to be known, and daily in uſe, but it belongeth not to this Treatiſe. In ſome other (if God ſo pleaſe) ſomewhat ſhall be ſaid of them.

## Sect. 235.

¶ *Et le Tenant attorna.* Here it appeareth that an Attornment (that is, an agreement to the Grant) is no ſeiſin of the Rent.

¶ *Il ne ad aſcun Remedie, &c.* which is as much to ſay, as he hath not any remedy either at the Common Law, or in any Court of equity, which is worthy of obſervation.

¶ *Voile doner al grantee un denier, ou un maile, &c. en noſme de ſeiſin de rent, &c.* Here it is to be obſerved, that payment of any money in name of ſeiſin of the Rent, before any rent become due, is a good ſeiſin of the rent to have an Aſſiſe when it is due, and that which is given in the name of ſeiſin of the Rent, worketh his

See more of this in the Chapter of Attornment. Sect. 56, 5.

¶ Item ſi ſoit ſeignior & Tenant, & le Seignior granta le rent ſon tenant per ſon fait a un auter, ſavant a luy les ſervices, & l' Tenant atturna, ceo eſt un Rent Seck, come eſt dit avebant. Mes ſi l'rent a luy ſoit denie al prochein jour de payment, il ny ad aſcun remedie, pur ceo q̄ il navoit de ceo aſcū poſſeſſion. Mes ſi le Tenant quaunt il atturna al grantee, ou apres, voile doner al grantee un denier, ou un maile, &c. en

ALſo if there be Lord and Tenant and the Lord granteth the Rent of his Tenant by Deed to another, ſaving to him the other Services, and the Tenant atturneth, that is a Rent Seck, as it is aforeſaid. But if the Rent be denied him at the next day of payment; hee hath no Remedy, becauſe that he had not thereof any poſſeſſion. But if the Tenant when he atturneth to the Grauntee, or afterwards, will give a peny or a halfe-peny to the Grantee in

noſme

noſme de ſeiſin de le rent, donques ſi apres a le procheine jour de payment le rent a luy ſoit denie, il aver Aſſiſe de Novel Diſſeiſin. Et iſſint eſt lou home grãta per ſon fait un ãnual rẽt iſſuant hors de ſa terre a un auter, &c. ſi le Grantor adonques ou apres paya al Grantee un denier, ou un maile en noſme de ſeiſin de le rent, donques ſi apres al procheine jour de payment le rent ſoit denie, le Grantee poet aver aſſiſe, ou autrement remy, &c.

name of ſeiſin of rent, then if after at the next day of payment the Rent be denied him, he ſhall have an Aſſiſe of *Novel Diſſeiſin*. And ſo it is, if a man grant by his Deed a yearly Rent iſſuing out of his land, to another, &c. if the Grauntor then after pay to the Grauntee a penny or a halfpenny in the name of Seiſin of the Rent, then if after the next day of payment the Rent be denyed, the Grantee may have an Aſſiſe, or elſe not, &c.

effect to give ſeiſin, and yet is no part of the rent, nor ſhall be abated out of the rent: but you ſhall read more hereof hereafter, *Sect.* 565.

¶ *Ou denier, ou un maile, &c.* Here by this (&c.) is implyed, that ſo it is of the gift of a Sheep, or an Ox, or a Ring, or a pair of Gloves, or a pound of Pepper, or of any valuable thing.

¶ *Iſſint ſi home grant per ſon fait un annual rent iſſuant hors de ſon terre a un auter, &c.*
By this (&c.) is implyed, that the grant and delivery of the Deed is no ſeiſin of the Rent: and that a ſeiſin in Law, which the Grantee hath by the grant, is not ſufficient to maintain an Aſſiſe, or any other reall Action, but there muſt be an actuall Seiſin.

## *Sect.* 236.

¶ Item de Rent ſecke, home poet aver Aſſiſe de Mortdanceſter, ou Briefe de Ayel, ou de Coſinage, & touts auters manners dactions Reals, come la caſe giſt, ſi come il poet aver daſcun auũt rent.

Alſo of Rent ſeck a man may have an Aſſiſe of *Mortdanceſter*, or a Writ of *Ayel* or *Coſinage*, and all other manner of Actions realls, as the caſe lyeth, as he may have of any other Rent.

¶ *Briefe de Ayel.* Breve de Avo. This Writ lyeth where the Grandfather or Grandmother was ſeiſed of any Land in fee the day that he dyed, and an ſtranger abate, the heir ſhall have his Writ. (w) And if the great Grantfather, Beſaiel, Proavus, or great Grandmother Beſaieles Proavia, be ſeiſed, as is aforeſaid, and die, &c. the heir ſhall have a Writ de Beſaiel, proavo, or Beſaiels proavia, &c.

Bract. li. 2. fo. 67. Brit. c. 89. & c. 76. Fleta li. 5. c. 7, 8. &c. F. N. B. 221.

(w) 6 E. 3, 14. 7 E. 3. 25. Regiſt. 226. F. N. B. 221. a. b. Britton cap. 76.

¶ *Briefe de Coſinage.* Breve de Conſanguinitate. (a) This Writ lyeth where the great Grandfathers father (Tritavus (id eſt) tertius avus, or abavus, (id eſt) avus avi) was ſeiſed, as is aforeſaid, or where Grandfathers or Grandmothers mother, &c. ut ſupra. And ſo it is of the ſeiſin of the brother of the Grandfathers Grandfather, &c.

(a) Bract. lib. 2. f. 67. Brit. c. 89. & c. 76. Fleta l. 5. cap. 7, 8. F. N. B. 221. 15 E. 2. Hors de ſon fee

¶ *Rent ſecke.* And ſo it is of a Rent charge to all reſpects.

¶ *Et touts auters manners dactions reals.* Hereupon ſome have gathered, that a man ſhall have a Writ of Right of a Rent ſeck, or of a Rent charge, albeit they be againſt common right. But that which hath been ſaid by Littleton of an Aſſiſe of Mordaunceſter, a Writ of Ayel, Coſinage, and other actions reals, is to be underſtood after Seiſin had by ſome of the Anceſtors of the Demandant; for without an actual ſeiſin, or a ſeiſin in Deed, none of theſe are maintainable.

27. 3 E. 3. 35. 4 E. 3. droit 31. F. N. B. 14 E. 4. 5. Diverſity des Courts 147. 33 E. 3. Judgm. 355.

Sect.

## *Sect.* 237.

¶ *Rescow.* Rescuſſus is here deſcribed by Littleton: It is an ancient French word comming from Reſcourrer, (id eſt) Recuperare, that is, to take from, to reſcue, or recover. Reſcous is a taking away, and ſetting at liberty againſt Law, a diſtreſs taken, or a perſon arreſted by the Proceſs or courſe of Law. And all is one, as to the point of the Diſſeiſin, to reſcue the diſtreſs after it is taken, and before hand to reſiſt and withſtand the taking of it, but yet it is no Reſcous untill it be diſtreyned. And therefore you may make ſix Diſſeiſins of a Rent ſervice: Reſcous of a diſtreſs, reſiſtance to diſtrein, Replevin, Incloſure, Counterpleading of the Title, and vouching of a Record, and failing. If the Tenant reſcue the Diſtreſs, and after is diſſeiſed of the Tenancy, yet the Aſſiſe lieth againſt him, for the diſſeiſin done of the Rent by the Reſcous.

18 E.3.3.41 E.3.20.b. 20 H.7.1.2. 21 H.7.40.2. F.N.B.102.b. 6 H.6. Diſſeiſin 9. 4 E.2. Aſſ.43. 8 E.1.ibid.416. W.2.c.6. 12 H.7. Kelway 20.

¶ *Pur ſon Rent arere.* Here Littleton deciſeth an ancient queſtion in our Books, (p) viz. That the Rent muſt be behind, or elſe the Tenant may make Reſcous: for if no Rent be behind when the Diſtreſs is taken, how can the Reſcous amount to a diſſeiſin of the rent when none is due? And ſo it is, if the Tenant reſiſt the Lord to diſtreyne, when there is no Rent behind, this can be no diſſeiſin of the Rent for the cauſe abovelaid, and this (as it appeareth by Littleton) holdeth as well in caſe of a rent ſervice between Lord and Tenant, as in caſe of a Rent charge, &c. And ſo I heard Sir Chriſtopher Wray Chief Juſtice ſay, that he had adjudged it: And that which the Tenant may do when there is no rent behind, may a ſtranger do if his beaſts be diſtreined. If the Tenant tender the Rent to the Lord when he is to take the diſtreſs, if notwithſtanding the Lord will diſtreyn, the Tenant may make Reſcous. If the rent of the Lord be behind, and the Lord diſtreyn the Cattell of the Tenant in the high way within his fee, the Tenant may make Reſcous,

(p) 6 E.2. Reſcous 10. 40 E.3.3.31 E.3. Reſcous 17 22 H.6.2.b. 6 E.4.11.b. 7 E.4.10.5 E.4.8.34 H.6.47. F.N.B.102. E.2 H.4.21.16. 4 E.6. Diſtreſs. Br.24. 39 E.3.35. 39 H.6.7. Lib.4. fol.11. Nevils caſe. 8 H.4.1.

¶ Item ſont trois cauſes de diſſeiſin de Rent Service, ſ. Reſcous, Replevin, & Encloſure: Reſcous eſt, quaunt le Seignior en la terre tenus de luy diſtrein p̄ ſ̄ rent arere ſi le diſtres de luy ſoit reſcous: ou ſi le ſeignior vient ſur la terre, & voile diſtreyner, & le Tenant ou auter hōe ne luy voile ſuffer, &c. Replevin eſt, quant le Seignior ad diſtreiñ, & Replevin ſoit fait de les diſtreſſe per Briefe, ou per Plaint. Encloſure eſt, ſi les Terres ou les Tenements ſont iſſint encloſes, que le Seignior ne poyt vener deins les t̄res ou Tenements pur diſtreyñ. Et la cauſe pur que tiels choſes iſſint faits cōt diſſeiſins al Seignior, eſt, pur ceo que pur tiels choſes le Seignior eſt diſturbe de le mā per que il doit avoire & vener a ſon rent, ſ, de le diſtreſſe.

Alſo there be 3. cauſes of Diſſeiſin of Rent Service, that is to ſay, Reſcous, Replevin, and Encloſure: Reſcous is, when the Lord diſtraineth in the Land holden of him for his Rent behind, if the diſtreſſe be reſcued from him, or the Lord come upon the Land, and will diſtreine, and the Tenant or another man wil not ſuffer him, &c. Replevin is, when the Lord hath diſtrained, and Replevin is made of the diſtreſs by writ or by Plaint. Encloſure is, if the Lands and Tenements be ſo encloſed, that the Lord may not come within the lands and tenements for to diſtrein. And the cauſe why ſuch things ſo done be Diſſeiſins made to the Lord, is for this, that by ſuch things the Lord is diſturbed of the mean by which he ought to have come to his Rent, s. of the diſtreſs.

9 E.4.24.

27 E.3.43. Kids ca. Reſcous 14.

ſcous for that it is defended by Law to diſtrein in the high way. And by the ſame reaſon if the Lord will diſtrein averia carucæ, where there is a ſufficient diſtreſs to be taken beſides, or if the Lord diſtrein any thing that is not diſtreinable either by the Common Law, or by any ſtatute, the Tenant may make reſcous.

Note, there is a reſcous in Deed and a reſcous in Law: of a reſcous in Deed ſomewhat hath already been ſpoken. A reſcous in Law is when a man hath taken a diſtreſs and the cattle diſtreined as he is driving of them to the Pound go into the houſe of the Owner, if he that took the diſtreſs demand them of the Owner, and he deliver them not, this is a reſcous in Law and ſo of the like. 2 E. 3. Reſcous 12.

And every word of Littleton is material, for he ſaith:

¶ *En la terre tenus de luy.* And therefore if the Lord diſtrein out of his fee in Lands not holden of him, the Tenant may make Reſcous, unleſs it be in ſome ſpecial Caſes.

As if the Lord come to diſtrein Cattle which he ſeeth then within his fee, and the Tenant or any other, to prevent the Lord to diſtrein, drive the Cattle out of the fee of the Lord into ſome place out of his fee, yet may the Lord freſhly follow, and diſtrein the Cattle, and the Tenant cannot make Reſcous, albeit the place wherein the diſtreſs is taken is out of his fee, for now in judgment of Law the diſtreſs is taken within his fee, and ſo ſhall the Writ of reſcous ſuppoſe. 44 E. 3. 20. 5 R. 2. Reſcous 11, 11 H. 7. 4. 21 H. 7. 40. 34 H. 6. 18. 16 E. 4. 10. lib. 9. fol. 22. in caſe de avowrie.

But if the Lord coming to diſtrein had no view of the Cattle within his Fee, though the Tenant drive them off purpoſely, or if the Cattle of themſelves after the view go out of the fee, or if the Tenant after the view remove them for any other cauſe than to prevent the Lord of his diſtreſs, then cannot the Lord diſtrein them out of his fee, and if he doth, the Tenant may make Reſcous.

If a man come to diſtrein for Damage Feaſant, and ſee the beaſts in his ſoyl, and the Owner chaſe them out of purpoſe before the diſtreſs taken, the Owner of the ſoyle cannot diſtrein them, and if he doth, the Owner of the cattle may reſcue them, for the beaſts muſt be damage Feaſant at the time of the diſtreſs, and ſo note a diverſity. 16 E. 4. 10. 2 E. 2. avowrie 182. lib. 9. ubi ſupra.

There is a diverſity (a) between a Warzant of Record, and a Warzant, or an Authority in Law, for if a Capias be awarded to the Sheriff to arreſt a man for Felony, albeit the party be innocent, yet cannot he make Reſcous. But if a Sheriff will by authority which the Law giveth him, arreſt any man for felony which is not guilty, he may reſcue himſelf. (a) 4 H. 7. 20. tit. Juſtice de Peace, 9.

¶ *Replevin*, (b) Is derived of Replegiare, to redeliver to the owner upon pledges or ſurety. (b) Brit. f. 108. Fleta lib. 4. cap. 1. Mirror cap. 2. Sect. 15.

(c) Alſo to counterplead the Plaintiff in an Aſſiſe by which he is delayed, maketh him to pleadeth it a diſſeiſor. Otherwiſe it is, if he had pleaded Nul tort, &c. (c) 24 Aſſ. 3. 29 Aſſ. 52. Fleta lib. 4. cap. 1. Britton fol. 108.

¶ *Encloſer*, Is here alſo deſcribed, and needs no other explication, for the Lord cannot (d) break open the gates, or break down the Incloſures to take a diſtreſs, and therefore the Law accounts it a diſſeiſin. But all theſe are intended by Littleton to be diſſeiſins after an actual ſeiſin had, and when the Rent is behind, otherwiſe none of theſe are diſſeiſins at all. (d) 10 E. 3. 9. 49 E. 3. 14. 7 E. 3. 1. 11 H. 7. 28. 8 Aſſ. 18. 10 E. 4. 8.

But wherefore ſhould a Reſcous of the diſtreſs by the party himſelf, or a Replevin which is a redelivery of the diſtreſs by the Sheriff by the courſe of Law to the party by any diſſeiſin of the Rent ſervice? Littleton doth here yield the true reaſon, becauſe that by the reſcue, and by the ſuing of the Replevin, the Lord is diſturbed of the mean by the which he ought to have and come to his Rent, viz. of the diſtreſs. Bract. lib. 4. fol. 161. 204. Britton fol. 108. Fleta lib. 4. cap. 1.

And ſo it is of an Incloſer, for he that diſturbs a man of the mean diſſeiſeth him of the thing it ſelf. (e) As the turning of the whole ſtream that runs to a Mill is a diſſeiſin of the Mill it ſelf. (e) 9 Aſſ. 19. Mirror ca. 2. Sect. 15. Brit. fo. 108. 114. 118. 141.

So it is if a man be diſturbed to enter and manure his Land, (f) this is a diſſeiſin of the Land it ſelf: For Qui adimit medium dirimit finem. And Qui obſtruit aditum deſtruit commodum. (g) And therefore where it is ſaid that a man ſhall not be puniſhed for ſuing of writs in the Kings Court, be it of right or wrong, it is regularly true, but it fareth in this ſpecial caſe of the Writ of Replevin for the cauſe aforeſaid: (h) But Perjer is no diſſeiſin of a Rent ſervice without Reſcous or Reſiſtance. (f) 26 Aſſ. 17. 3 E. 4. 2. per Littl. 49 E. 3. 14. b. (g) F. N. B. 42. g. 22 E. 3. 15. 43 Aſſ. 40. 43 E. 3. 20. faux judg. 10. 8 E. 4. 15. per Moyle. 2 R. 3. 19. (h) 3 E. 3. 7. 8 H. 6. 11.

*Sect.*

## *Sect.* 238.

Britton ubi ſupra. Fleta lib.4. cap. 1.

¶ *Sont* 4. *cauſes de diſſeiſin de Rent Charge.* And you may add a fifth, viz. Reſiſtance to Diſtretin, Counterpleading and Vouching a Record and fayter thereof, as hath been ſaid before.

14 E.4.4. 35 H.6.7.3 Aſſ. 3.10 E.3.9.40 E.3.24. 3 H.6.35.3 E.3.75.29 Aſſ. 51.39 Aſſ.4.40 Aſſ.3. 13 E.2 Aſſ.404.3 Aſſ.8.8 H. 6.11. 18 E.3. Aſſ.78.

¶ *Denier.* Deniall is a diſſeiſin of a Rent Charge, aſwell as of a Rent ſecke, albeit he may diſtrein for the Rent Charge, aſwell as for a Rent Service. Nota, That when Books ſay that a detainer of a Rent Charge or Secke is a diſſeiſin, it muſt be intended upon a demand made.

If there be two Joyntenants, and the grantee of a Rent charge diſtreine for the rent, and one of them make Reſcous, they are both diſſeiſors, for a diſtreſſe for the Rent is a demand in Law, and then the Non-payment is a denial and a diſſeiſin, but he that made the Reſcous is only the Diſſeiſor with force.

¶ *Et ſont* 4. cauſes *de diſſeiſin de rent charge ſcilicet,* Reſcous, Replevin, Encloſure, *&* Denier: car Denier eſt un diſſeiſin de Rent charge, come eſt avantdit de rent Secke.

AND there be four cauſes of diſſeiſin of a Rent charge, *ſcz.* Reſcous, Replevin, Incloſure, and Denyall. For Denyall is a diſſeiſin of a Rent Charge, as is ſaid before of a Rent Secke.

## *Sect.* 239.

49 E.3.15.29 Aſſ.9. 37 Aſſ.9.10 E.3.19. 33 H.6. 53.25 H.6.7.b.

¶ The reaſon wherefore Incloſure is a diſſeiſin of a Rent Secke, becauſe the Grantee cannot come upon the land to demand it.

¶ *Et deux ſont* cauſes *de diſſeiſin de Rent Seck, ceſtaſcavoir,* denier *&* encloſure.

AND there be two cauſes of diſeiſin of a Rent ſecke, that is to ſay, deniall and incloſure.

## *Sect.* 240.

(h) Fleta lib.1.cap.42. 49 E.3.14.49 Aſſ.5.29 Aſſ.49.

¶ *Forſtalla.* (h) Foreſtallamentum, ſignifieth Obtruſionem viæ vel impedimentum tranſitus, &c.

¶ *Ove force & arms,* vi & armis.

(i) Vide ſect.421.

Force, vis, in (i) the Common Law is moſt commonly taken in ill part, and taken for unlawfull violence, for Maximè paci ſunt contraria vis & injuria. And therefore Briton ſaid well, ſpeaking in the perſon of the King, Nous volons que touts gens pluis uſeant judgement que force. Arma, Arms, in the Common Law ſignifieth any thing a man ſtriketh or hurteth

¶ *Et il ſemble que il y ad un auter cauſe de diſſeiſin de touts les trois ſervices avantdits, ceſtaſcavoir, ſi l'ſeignior ſoit en alant a la terre tenus de luy pur diſtreyner pur le Rent arere, & le Tenant ceo oyant, luy encounter, & luy forſtala la voy ovesque force & armes, ou luy manace en tiel forme que il ne oſaſt*

¶ AND it ſeemeth that there is another cauſe of diſſeiſin of all the three ſervices aforeſaid, that is, if the Lord is going to the Land holden of him, for to diſtreine for the Rent behind, and the Tenant hearing this, encountreth with him, foreſtalleth him the way with force and armes, or menaceth him in ſuch forme, that

bener

vener a ſa terre pur diſtreiner p̄ ſon rent arere pur doubt de mort, ou mutilation de ſes membres, ceo eſt un diſſeiſin, pur ceo que le Seignior eſt diſturbe de le meãe, pur que il doit vener a ſon rent. Et iſſint eſt ſi p̄ tiel forſtalemẽt ou menace, celuy q̄ ad un rent charge ou rent ſecke eſt forſtalle, ou ne oſaſt veñ a la terre a demaũder le rent arere, &c.

he dare not come to the Land to diſtraine for his Rent behind, for doubt of death, or bodily hurt, this is a diſſeiſin, for that that the Lord is diſturbed of the mean whereby he ought to come to his rent. And ſo it is if by ſuch foreſtalling or menacing, he that hath Rent charge or Rent ſeck is foreſtalled, or dare not come to the Land to ask the rent behind, &c.

withall; (k) Omnes illos dicimus armatos qui habent cum quo nocere poſſunt. Telorum autem appellatione omnia in quibus ſinguli homines nocere poſſunt accipiuntur. Sed ſi quis venerit ſine armis & ipſa concertatione ligna ſumpſerit, fuſtes & lapides, talis dicetur vis armata: ſed ſi quis venerit cum armis, armis tamen ad dejiciendum non uſus fuerit, & dejecerit, vis armata dicitur eſſe facta; ſufficit enim terror armorum ut videatur armis dejeciſſe. And, Armorum quædam ſunt tuitionis (& quod quis ob tutelam corporis ſui, vel ſui juris fecerit, juſtè feciſſe videtur) quædam pacis & Juſtitiæ, quædam perturbationis pacis, & injuriæ, quædam uſurpationis rei alienæ.

(k) Bracton lib. 4. f. 16 & lib. 5. fol. 144. Fleta lib. 4. cap. 4.

Againe, Armorum quædam ſunt moluta, & quædam quæ faciunt Bruſuram, &c. Arma moluta plagam faciunt, ſicut gladius, biſacuta, & hujuſmodi; ligna verò & lapides Bruſuras, orbes, & ictus, &c. To conclude this, it is truly ſaid, that Armorum appellatione non ſolùm ſcuta & gladii & galeæ continentur; ſed & fuſtes & lapides, as the Poet ſaith:

Jamque faces & ſaxa volant, furor arma miniſtrat. Virgil 1. Aeneid.

Sed vim vi repellere licet, modò fiat moderamine inculpatæ tutelæ, non ad ſumendam vindictam, ſed ad propulſandam injuriam.

¶ *Pur doubt de mort & mutilation de ſes membres.* For it muſt not be Vagus & vanus timor, ſed talis qui cadere poſſit in virum conſtantem, & non in hominem vanũ & meticuloſum; talis enim debet eſſe metus qui in ſe continet mortis periculum, & corporis cruciatum. Littleton here ſaith it muſt be for fear of death, † or mutilation of members. Et nemo tenetur exponere ſe infortuniis & periculis. And therefore a foreſtalment with ſuch a menace is diſſeiſin, not only (ſaith Littleton) of a Rent ſervice, but alſo of a Rent charge and Rent ſeck. Theſe be all the diſſeiſins of a Rent that our Author ſpeaks of. See hereafter (l) where a diſſeiſin ſhall be by way of admittance of the owner of the rent. And Littleton doth adde the binding reaſon in caſe of foreſtalment, becauſe the Lord is diſturbed of the mean by which he ought to come to his Rent, whereof there hath been ſpoken ſufficient before, as well in caſe of the Rent charge and Rent ſeck, as of the Rent ſervice.

Bracton lib. 2. 16. Britton fol. 19. 28 38. Fleta lib. 3. cap. 7.

† See of this in the Chapter of Deſcents. 49 E. 3. 14. 49 Aſſ. 5. 29 Aſſ. 49, &c.

(l) Vide Sect. 589.

¶ *&c.* Of the (&c.) in the end of this Section, and what is implyed therein, ſufficient hath been ſpoken before.

Now hath Littleton ſpoken of remedies for the recovery of the arrerages of Rents. But ſince Littletons time a right profitable ſtatute † in the 32 year of H. 8. hath been made for the recovery of arrerages of Rents in certain caſes where there lay no remedy at the Common Law, and giveth further remedy in ſome caſes where at the Common Law there was ſome remedy, which ſtatute hath been well and beneficially expounded, and hereupon 8. things are to be obſerved. Firſt, when Littleton wrote, the Heirs, Executors, or Adminiſtrators of a man ſeiſed of a Rent ſervice, Rent charge, Rent ſeck, or Fee farm in fee ſimple or fee Tail, had no remedy for the arrerages incurred in the life of the owner of ſuch rents. But now a double remedy is given to the Executors or Adminiſtrators for payment of debts, &c. viz. either to diſtrein, or to have an action of debt.

† 32 H. 8. cap. 37.

Lib. 4. fol. 49, 50. 8. Ognels caſe 40 E. 3. Execution. 98. 45 E. 3. l. 71. 9 H. 6. 43. 14 H. 6. 20. 19 H. 6. 43. 34 H. 8. 20. 32 E. 3. Det. 9. 9 H. 7. 17. 19 E. 3. Juriſdiction 22.

2 That the preamble of the ſtatute concerning Executors or Adminiſtrators of Tenant for life is to be intended of Tenant pur auter vie, ſo long as ceſtuy que vie liveth, who are alſo holpen by the ſaid double remedy: but after the eſtate for life determined, his Executors or adminiſtrators might have had an action of debt by the Common Law, but they could not have diſtreyned

distreined, which now they may do by force of this statute, for in that point it addeth (m) another remedy, than the Common Law gave.

(m) 23 Eliz. Dier 375.

3. If a man make a Lease for life or lives, or a gift in Tail reserving a Rent, this is a Rent service within this statute.

4. The distress is the more plain and certain Remedy, than the action of debt, for ꝑ action of debt must be brought against them that took the profits when the Rent came behind, or against their Executors or Administrators, but the distress may be taken upon the land, be it either in the Tenants own hands, or in the hands of any other that claims by or from him, (that is by interpretation under him) by purchase, gift, or descent, and these words, Claiming only by and from him, are to be understood claiming only from or under him by purchase, gift, or descent, and not paramount or above him, as the Lord by escheat claimeth not under ꝑ Tenant, by purchase, gift, or descent, but by reason of his seignory which is a Title paramount.

26 E. 3. 64. 11 H. 4. fol. ultimo. Ognels case. ubi supra. & lib. 7. fol. 39. b. Lillingtons case.

5. If there be Lord and Tenant, and the Rent is behind, ꝑ the Lord grant away his seignory, and dyeth, the Executors shall have no remedy for these arrerages, because the grantor himself had no remedy for them when he dyed in respect of his grant, and the statute is (in like manner as the Testator might or ought to have done) Et sic de similibus; for ꝑ act giveth no remedy when the Testator himself hath dispenced with the arrerages, or had no remedy when he dyed.

6. If the Tenant make a lease for life, the Remainder for life, the Remainder in fee, the tenant for life pays not the Rent due to the Lord, the Lord dyeth, the Tenant for life dyeth, the Executors cannot distrein upon him in Remainder, because he claims not by or from ꝑ Tenant for life. And so it is of a Reversion for the cause aforesaid. But if a man grant a Rent charge to A. for the life of B. and letteth the lands to C. for life, the Remainder to D. in fee, the Rent is behind by divers years; B. dyeth, and after C. dyeth, A. may distrein D. in Remainder for all the arrerages, by the latter branch of the statute of 32 H. 8. and this diversity riseth upon the severall pennings of the former branch ꝑ of this latter, which you may read in the statute it self, and so expounded and adjudged (o) in Edridges case, and the latter clause giveth the lesser estate the greater Remedy.

(o) Lib. 5. fol. 118. Edridges case.

† 40 E. 3. 3. b. 11 H. 4. 85. 14 E. 4. 4. 20 E. 7. 1. a. 28 H. 8. Dier 24.

7. For the Arrerages of a Nomine pœnæ, and for relief, or for aid, Pur faire fits chivaler, or Pur file marier this statute † giveth no Remedy. For, for the arrerages of the Nomine pœnæ, the Grantee himself may have an action of debt and consequently his Executors or Administrators, and yet the Nomine pœnæ as an incident to the Rent shall descend to the heir. For relief the Lord cannot have an action of debt but distrein, but his Executors by (p) the Common Law shall have an action of debt; for it is no rent but a casual improvement of services for the said Aids, if the Lord doth levy them, the son and the daughter respectfully shall have nothing then against the Executors or Administrators of the Lord, and if they have nothing, then against the heir, but this is by the statute (q) of W. 1. Note, that all manner of arrerages of rents issuing out of a freehold or inheritance, whether they be in mony, or corn, cattell, fowl, pepper, comine, victual, spurs, gloves, or any other profit to be delivered or yelded, and whether they be annual, or every 2. 3. or 4. years, &c. or the like, are within this statute, but work days, or any corporal service, or the like, are not within this statute.

(p) 34 E. 1. Avowry 233. F. N. B. 122. 10 H. 6. 11. 11 H. 6. 8. Mich. 32 H. 8. Rot. 429. Leakes case. Ognels case, ubi supra. 3 E. 3. Debt 157.

(q) W. 1. cap. 36. F. N. B. 82. 122.

8. A feme sole is seised of a rent in fee, &c. which is behind ꝑ unpaid, she taketh husband, the Rent is behind again, the wife dyeth, the husband by the Common Law should not have the arrerages grown due before the marriage, but for the arrerages become due during the coverture, the husband might (r) have an action of debt by the Common Law, but now this statute † by a particular clause giveth the husband the arrerages due before marriage, ꝑ the said double remedy for the same, and ꝑ he may distrein for the arrerages grown due during the coverture, so it giveth him that which he could not have before, and further remedy for ꝑ, which the Common Law gave him, and so it hath been (s) adjudged.

(r) 26 E. 3. 64. 10 H. 6. 11. † 22 H. 6. 25. F. N. B. 121.

(s) Hil. 39 Eliz. Rot. 457 inter Sharpe & Pole. Vide Ognels case, ubi supra.

The Bishop of (t) Norwich had the first fruits of all the Clergy within the Diocess at every avoydance, the Church became void, & another Parson became Incumbent, who paid the Bishop parcell of his first fruits according to the taxation of the Church, and for the rest he had a day given unto him to pay it, the Bishop dyed, the residue was not paid, whereupon his Executors brought an action of debt, and it is adjudged that no action doth lye, because it is a meer spirituall thing and no lay contract; and therefore the Court had no jurisdiction to hold plea of it. I have been the longer in the exposition of the said Statute, for that it is a generall case, and doth concern most part of the Subjects of England.

(t) 19 E. 3. Jurisdict. 22.

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Finis Libri secundi.

THE

# THE THIRD BOOK OF THE First Part of the Institutes OF THE LAWES of ENGLAND.

## CHAP. 1. *Of Parceners.* Sect. 241.

¶ PArceners ſont en deux maners, ceſtaſcavoir, parceners ſolonqꝫ l'courſe del cõmon Ley, & parceners ſolonqꝫ cuſtom. Parceners ſolonque le courſe del commõ ley ſont, lou hom ou feme ſeiſie de certaine terres ou tenements en fee ſimpl', ou en taile, nad iſſue forſqꝫ files & devie, & les tenements diſcendont a les iſſues, & les files entront en les terres ou tenements iſſint

PArceners are of two ſorts (to wit) Parceners according to the courſe of the Common Law, and Parceners according to the cuſtom. Parceners after the courſe of the Common Law are where a man or woman ſeiſed of certaine Lands or Tenements in fee ſimple or in taile, hath no iſſue but daughters & dieth, and the Tenements deſcend to the Iſſues, and the Daughters enter into the Lands or Tenements

¶ Our Author having treated in his two former books firſt of eſtates of lands & tenements, and in his ſecond book of Tenures wherby the ſame have bẽn halden: Now in his third book doth teach us divers things concerning both of them, as firſt the qualities of their eſtates. 2. In what caſes the entry of him & right hath may be taken away. 3. The remedies, and in what caſes the ſame may be prevented, or avoided. 4. How a man may be barred of his right for ever, & in what caſes the ſame may be prevented or avoyded. For the firſt, he having ſpoken of ſole eſtates, divideth the quality of eſtates into Individed, and Conditional. Individed, into Coparcenary, Joyntenancy, & Tenancy in common. Coparcenary, into Parceners by the Common

Common Law, and Parceners by the Cuſtome, and he beginneth his third book with Parceners claiming by deſcent, which comming by the Act of Law, and right of bloud, is the nobleſt and worthieſt means whereby lands do fall from one to another. Conditionall, into conditions expreſſe or in deed, and conditions in Law. Conditions in deed, into Gages, which he divideth into Vadia mortua, and Vadia viva. Vadia mortua, ſo called, becauſe either money or land may be loſt: and Viva, becauſe neither mony nor land can be loſt, but both preſerved. Then ſpeaketh he of Deſcents, whereby the entry of him that right hath may be taken away.

Vide Sect. 385.

And next to that the remedy how to prevent the ſame, viz. by continual claim, Then he teacheth how a man having a defeaſible, or an imperfect eſtate, may perfect and eſtabliſh the ſame by three means, viz. by Releaſe, by Confirmation and Attournment where that is requiſite.

discendus a eux, donques eles ſont appels Parceners, & quaunt a files eles ſont forſq; un heire a lour anceſtor. Et eles ſont appel Parceners, p̄ ceo que per le briefe q̄ en appel Briefe de Participatione faciend' la ley eux voet coherc̄ q̄ partitiō ſerra fait enter eux. Et ſi ſont deux files al queux les terres diſcendont, donque eles ſont appels deux Parceners. Et ſi ſont trois files, donque eles ſont appels trois Parceners, Et ſi quater files, quater Parceners, & iſſint ouſter.

ſo deſcended to them, then they are called Parceners, and be but one heire to their Anceſtor. And they are called Parceners, becauſe by the Writ which is called *Breve de participatione faciendа*, the Law will conſtrain them, that partition ſhall bee made among them: and if there bee two daughters to whom the land deſcendeth, then they be called two Parceners; and if there be three daughters, they be called three Parceners; and if four daughters, four Parceners, and ſo forth.

Having ſpoken of a Deſcent, being an act in Law which taketh away an entry, he doth then ſpeak of a diſcontinuance, the act of the party, whereby the entry of them that right have ſhall be taken away. And next unto that he teacheth in what caſe the ſame may be avoyded by Remitter. After he had treated of deſcents and diſcontinuances, which take away entries, but bar not Actions. Laſtly, he ſetteth forth the learning of Warranties, (a curious and cunning kind of learning, I aſſure you) whereby both Entry, Action, and right may be barred, and the remedies how they may be prevented before they fall, and in what caſes they may be avoyded after they be fallen. And thus have you an account of the thirteen ſeveral Chapters of his third book. And now his method being underſtood, let us hear what our Author will ſay unto us concerning Parceners.

¶ *Et quant a files eles ſont forſque un heire a lour* (a) *anceſtor.* This is falſe printed, for the original is, Et quanque files eles ſont, eles ſont parceners, & ſont forſque un heire a lour auncеſtor.

(a) Brack. lib. 2. fo. 66. 71. &c. & 76. &c. & lib. 5. fol. 443. Brit. fol. 58. 112. 128. 183. 184. 185. 189. 193. Flet. lib. 5. cap. 9. lib. 6. cap. 47. Glan. lib. 7. cap. 3. & lib. 13. c. 11.

¶ *Parceners.* (b) Jus deſcendit quaſi uni hæredi propter juris unitatem, ſicut ſunt plures filiæ, &c. & ubi omnes ſimul & in ſolidum hæredes ſunt, plures cohæredes ſunt quaſi unum corpus, propter unitatem juris quod habent. Whereupon it followeth, that albeit where there be two Parceners, (c) they have moities in the Lands deſcended to them, yet are they both but one Heir, and one of them is not the moity of an Heir, but both of them are but unus hæres.

(b) Brack. li. 2. fo. 66. 76. Fleta ubi ſupra. Brit. ubi ſup. & Statut de Hibern.

(c) Vide ſect. 8. verſ. fin.

And it is to be obſerved, that there is a diverſity between a deſcent which is an act of the Law, and a purchaſe, which is an act of the party. (d) For if a man be ſeiſed of lands in fee, and hath iſſue two daughters, and one of the daughters is attainted of felony; the Father dyeth, both daughters being alive, the one moiety ſhall deſcend to the one daughter, and the other moity ſhall eſcheat.

(d) Fleta lib. 5. cap. 9. Fleta lib. 6. cap. 47.

But if a man make a leaſe for life, the remainder to the right heirs of A. being dead, who hath iſſue two daughters, whereof the one is attainted of Felony; in this caſe ſome hath ſaid, that the remainder is not good for a moity, but void for the whole, for that both the daughters ſhould have bin (as Littleton ſaith) but one heir.

A man

A man makes a gift in tail, reserving two shillings rent to himself during his life, and if he die, his heir within age, then reserving a rent of 20 shillings to his heirs for ever, he dieth, having issue two daughters, the one of full age, the other within age; in this case the Donée shall hold by fealty only, inasmuch as the one daughter as well as the other is his heir, and both of them (as Littleton saith) make but one heir, ergo his heir is not within age, neither is his heir in that case of full age. But if the reservation had been, and if he dye, his heir neither being within age, nor of full age, &c. in this case the reservation had been good, and if it doth not begin in his next heir, it shall never begin as this case is, for that the precedency is not performed. (e) But yet if one of them be of age, and the other within age, she shall have her age and other priviledges and advantages that an heir within age shall have, and when they are demandants, for the homage of the one, the Paroll shall demurr against them both. (f) Sunt autem plures participes quasi unum corpus in eo quod unum jus habent & oportet quod corpus sit integrum, & quod in nulla parte sit defectus. And when the right heir doth claim by purchase, he must be (say they) a compleat right heir in judgment of Law. And therefore if lands be given to a man and to the heirs females of his body; and he hath issue a son and a daughter, and dyeth, the daughter shall have the land by descent: but if a remainder be limited to the heirs females of the body of J. S, and he hath issue a son and a daughter, his daughter shall never take it by purchase, for that she is not heir female of the body of J. S, because he hath a son.

(e) Temps E. 1, Age 128. 8 E. 2. Judgment 140. 30 E. 3. 7. 44 E. 3. Age 47. 26 Ass. 65. 13 E. 3. Age 51. 28 Ass. 22. 19 Ass. 25. 57. 34 H. 6. 4 Ass. 17.

(f) Flet. lib. 5. c. 9. & l. 6. cap. 47.

If a man give lands to another, and to the heirs males of his body, upon condition, that if he die without heir female of his body, that then the Donor shall re-enter, this condition is utterly void; for he cannot have an heir female, so long as he hath an heir male.

And as they be but one heir, and yet several persons, so have they one entire freehold in the land, as long as it remains undivided in respect of any strangers Præcipe. (g) But between themselves to many purposes they have in judgment of law of several freeholds, for the one of them may infeoff another of them of her part, and make livery. (h) And this Coparcenary is not severed or divided by Law, by the death of any of them; for if one die, her part shall descend to her issue, and one Præcipe shall lye against them, for they shall never joyn as heirs to several Ancestors in any action Ancestrel, but when one right descends from one Ancestor: and then propter unitatem Juris, though they be in several degrees from the common Ancestor, yet they shall joyn. But the issues of several Coparceners, because several rights descend, shall never joyn as heirs to their mothers, and when they have recovered, a writ of Partition lyeth between them.

(g) 10 E. 4. 17 E. 3 46.

(h) 37 H. 6. 8. 19 H. 6. 45.

Vide Sect. 313.

For example, (i) If a man hath issue two daughters, and is disseised, and the daughters have issue and die, the issues shall joyn in a Præcipe, because one right descends from the Ancestor, and it maketh no difference whether the common Ancestor being out of possession, dyed before the daughters, or after; for that in both cases they must make themselves heirs to the Grandfather which was last seised, and when the issues (k) have recovered, they are coparceners, and one Præcipe shall lye against them. And likewise if the issues of two Coparceners which are in by several descents, be disseised, they shall joyn in assise. But in the same case, if the two daughters had been actually seised, and had been disseised, after their deceases the Issues shall not joyn, because several rights descended to them from several Ancestors: and yet when they have severally recovered, they are Coparceners, and one Præcipe lieth against them, and a release made by one of them to the other is good. And so note a diversity, inter descensum in capita, & in stirpes.

(i) 7 E. 3. 30. 34. 48 E. 3. 14. 24 E. 3. 13. F. N. B. 221. 35 H. 6. 23. 27 E. 3. 89. 31 H. 6. 14. b.

(k) 37 H. 6. 8. 9 E. 4. 13. b. 42 E. 3. 10. 17.

And the Statute of Gloucester cap. 6. made Anno 6. Edw. 1. speaketh, Si home murge, &c. If a man dieth: So as that Statute extendeth not but where one dyeth and hath divers heirs, whereof one is son or daughter, brother or sister, nephew or neece, and the others be in a further degree, all their heirs from henceforth shall have their recovery by a writ of Mortdauncestor. And this seemeth to me to be the Common Law, for Bracton who writ before this Statute, saith, In casu cum fit assisa mortis antecessor' conjungenda cum consanguinitate, non erit postea recurrendum ad Præcipe de Cõsanguinitate, sed ad assisã mortis, quia persona quæ propinquior est, & facit Assisã, & trahit ad se personam & gradum remotiorem ut ubi potius precedat Assisa quam Præcipe, quia id quod est magis remotũ, non trahit ad se quod est magis junctum, sed è contrario in omni casu. And herewith agreeth the most of our (m) Books: and two Coparceners shall have a writ of Ayel, and by their count suppose the common Ancestor to be Grandfather to the one, and great Grandfather to the other.

(l) Bracton lib. 4. 254. b. Britton fol. 181, 182. & 178, 204. Fleta lib. 5. cap. 1. & 2. & 9. in fine.

(m) 19 E. 3. tit. Joyndre in Action 31. 7 E. 2. 30. & 34. 27 E. 3. 89. 48 E. 3. 14. 24 E. 3. 13 F. N. B. 221. Register.

I have been the longer herein for that this Inheritance of Coparceners is the rarest kind of Inheritance that is in the Law.

Vide 32 E. 1. Joyndre in Action 34. 13 E. 3. ib. 29. Temps E. 2. ib. 35. 30 E. 1. ib. 36. 25 H. 6. 23.

Furthermore it is to be observed, That herein also in case of Coparceners (n) sometimes the descent is in stirpes, (viz.) To Stocks of Roots, and sometime in Capita, To Heads. As if a man hath issue two daughters and dieth, this descent is in Capita, viz. That every one shall inherit alike, as Littleton here saith. But if a man hath Issue two daughters, and

(n) Bracton lib. 2. 66. Britton cap. 71. Fleta lib. 5. cap. 9. & 6. cap. 47.

the eldeſt daughter hath iſſue three daughters, and the youngeſt one daughter; all theſe four ſhall inherit, but the daughter of the youngeſt ſhall have as much as the three daughters of the eldeſt, Ratione ſtirpium, and not Ratione capitum, for in judgment of Law every daughter hath a ſeveral Stock or Root.

Alſo if a man hath iſſue two daughters, and the eldeſt hath iſſue divers ſons and divers daughters, and the youngeſt hath iſſue divers daughters, the eldeſt ſon of the eldeſt daughter ſhall only inherit, for this deſcent is not in Capite, but all the daughters of the youngeſt ſhall inherit, and the eldeſt ſon is Coparcener with the daughters of the youngeſt, & ſhall have one moity, (viz.) his mothers part: ſo that men deſcending of daughters may be coparceners, as well as women, and ſhall jointly implead and be impleaded, as is aforeſaid.

(o) 20 E.2, Nuper ob.14. F.N.B.197.7 E.3.13.

(o) If there be two Coparceners, and the one bring a Rationabili parte, or a Nuper obiit againſt the other, the Defendant claim by purchaſe, and diſclaim in the blood, the Plaintiff ſhall have a Mordaunceſter againſt her as a ſtranger for the whole.

Bract. lib.2.fo.66.71, &c. Brit.c.71. Fleta lib.5.c.9.

¶ *Parceners ſont en deux manners.* Here Littleton doth divide Parceners, and herewith do agree the ancient books of Law. †

¶ *Et ils ſont appels parceners, &c.* Parceners, Participes. Et dicuntur Participes, quaſi partis capaces, five partem capientes; quia res inter eas eſt communis, ratione plurium perſonarum. This Tenancy in the ancient books of Law is called Adæquario, and ſometime Familia hirciſcunda, an Inheritance to be divided, and many times Parceners are called Coparceners.

(p) Regiſt. Orig.76.316. Regiſt. Jud.80. Brit.ubi ſup. Flet. ubi ſu. Bract. ubi ſup. & l.5.fo.443.b.

¶ *Breve de Participatione facienda.* This is falſe printed, & ſhould be, De partitione facienda, a Writ whereby the coparceners are compelled to make partition. Item eſt alia Actio mixta, quæ dicitur Actio Familiæ hirciſcundæ, & locum habet inter eos qui communem habent hæreditatem, &c. Et locum habet, ut videtur, inter Cohæredes, ubi agitur de proparte ſororum, vel inter alios ubi res inter partes & Cohæredes dividi debeat, ſicut ſunt plures ſorores, quæ ſunt quaſi unus hæres, vel inter plures fratres, qui ſunt quaſi unus hæres, ratione rei quæ diviſibilis eſt inter plures maſculos, &c.

¶ *Des terres & tenements.* It is to be conſidered of what Inheritances daughters ſhall be Coparceners, and how and in what manner partition ſhall be made between them, Wherein it is to be obſerved, That of Inheritances ſome be entire, and ſome be ſeveral: again, of entire, ſome be diviſible, and ſome be indiviſible. And here it appeareth by Littleton, That Parceners take their appellation, becauſe they are compelled to make partition by Writ of Partitione facienda; where note, that Littleton alloweth well to find out the true derivation of words, as often hath been and ſhall be obſerved.

If a Villein deſcend to two Coparceners, this is an entire Inheritance, and albeit the Villein himſelf cannot be divided, yet the profit of him may be divided; one Coparcener may have the ſervice one day, one week, &c. and the other another day or week, &c. and for the ſame reaſon a woman ſhall be endowed of a Villein, as before it appeareth in the chapter of Dower. Likewiſe an Advowſon is an entire Inheritance, (q) and yet in effect the ſame may be divided between coparceners, for they may divide it to preſent by turns.

(q) 13 E.2.tit.Quar.Imp. 170.17 E.3. 38 Fleta l.5. c.9. Mirror cap.2. Sect.17.

A Rent charge is entire, and againſt common right, (r) yet may it be divided between Coparceners, and by act in law the Tenant of the land is ſubject to ſeveral diſtreſſes, and partition may be made before ſeiſin of the Rent.

(r) 44 E.3.tit. Partic.6. & tit. Avowry 75.2 H.6. fol.11.

Entire inheritances not diviſible, we find divers in our books, and ſome inheritances that are diviſible, and yet ſhall not be parted or divided between Coparceners, as hereafter ſhall appear.

(ſ) 2 E.2.tit.Dower 123. (t) 17 E.2.nuper ob.12. 16 E.2.ib.11. 5 Mariæ Dier.153.

(ſ) If a man have reaſonable Eſtovers, as Houſebote, Heybote, &c. appendant to his freehold, they are ſo entire as they ſhall not be divided between coparceners. (t) So if a Corody in certain be granted to a man and his heirs, and he hath iſſue divers daughters, this Corody ſhall not be divided between them, but of a Corody certain, Partition may be made.

(u) 17 E.3.72. (w) 13 E.2. Quar.Imp. 170. Fleta lib.5.cap.9. (x) Mich.24 & 25 Eliz. inter Comitem de Huntingdon & Seignior Mountjoy.

(u) Homage and Fealty cannot be divided between Coparceners. (w) So a Piſchary incertain, or a common ſauns nombre, cannot be divided between Coparceners, for that would be a charge to the Tenant of the Soile. (x) The Lord Mountjoy ſeiſed of the Mannor of Canford in fee, did by Deed, indented and inrolled, bargain and ſell the ſame to Brown in Fee, in which Indenture this clauſe was contained, Provided alwayes, and the ſaid Brown did covenant and grant to and with the ſaid Lord Mountjoy, his heires and aſſigns, that the Lord Mountjoy, his Heirs and Aſſigns might digg for Ore in the lands (which were great waſts) parcell of the ſaid Mannor, and to digg turfe alſo for the making of Allome. And in this caſe three poynts were reſolved by all the Judges. Firſt, that this did amount to a grant of an intereſt and Inheritance to the Lord Mountjoy, to digg, &c. Secondly, that notwithſtanding

ding this grant. Brown his heirs and assigns might dig also, and like to the case of Common Sauns nomber. Thirdly, that the Lord Mountjoy might assign his whole interest to one, two, or more; but then if there be two or more, they could make no division of it, but work together with one stock, neither could the Lord Mountjoy, &c. assign his interest in any part of the waste to one or more, for that might work a prejudice and a surcharge to the tenant of the land; and therefore if such an incertain Inheritance descendeth to two Coparceners, it cannot be divided between them. Vide 5 Mariæ Dier. 153.

But then it may be demanded, what shall become of these Inheritances? The answer is, that it appeareth in our Books, that regularly (y) the eldest shall have the reasonable Estovers, Common Piscary, Corody incertain, &c. and the rest shall have a contribution, that is, an allowance of the value in some other of the inheritance, and so of the like. But what if the common Ancestor left no other inheritance, to give any thing in allowance, what contribution or recompence shall the younger Coparceners have? It is answered, that if the Estovers, or Piscary, or Common be uncertain, then shall one Coparcener have the Estovers, Piscary, or Common, &c. for a time, and the other for the like time: as the one for one year, and the other for another, or more or lesser time, whereby no prejudice can grow to the owner of the soil. Or in the case of the Piscary, one may have one fish, and the other the second, &c. or the one may have the first draught, and the second the second draught, &c. And if it be of a park, one may have the first beast, and the second the second, &c. And if of a Mill, one to have the Mill for a time, and the other the like time, or the one one toll dish, and the other the second, &c. And this appeareth to be the ancient Law, for it is said, (z) Sunt aliæ res hæreditariæ quæ veniunt in partitionem, quæ cum dividi non possunt concedunntur uni, ita quod aliæ cohæredes alibi de communi hæreditate habeant ad valorem, sicut sunt vivaria, piscariæ, parci, vel saltem quod partem habeant pro defectu, sicut secundum piscem, tertium vel quartum, vel secundum tractum, tertium vel quartum. Item in parcis secundam, tertiam aut quartam. (y) 7 E. 2. dower 112. 13 E. 2. Quar. Imp. 170. Fleta ubi supra. vide Mirror ca. 2. Sect. 17. (z) Bracton lib. 2. 76. Britton cap. 71, 72. Fleta lib. 5. cap. 9.

But now let us turn our eye to inheritances of Honour and Dignity. And of this there is an ancient Book case (†) in 23 H. 3. tit. partition 18. in these words: Note, if the Earldom of Chester descend to Coparceners, it shall be divided between them as well as other Lands, and the eldest shall not have this Seignior and Earldom entire to her self, Quod nota, adjudge per totam Curiam. By this it appeareth, that the Earldom (that is, the possessions of the Earldom) shall be divided; and that where there be more daughters than one, the eldest shall not have the Dignity and Power of the Earl, that is, to be a Countesse. What then shall become of that Dignity? The answer is, (a) that in that case the King, who is the Sovereign of Honour and Dignity, may for the incertainty confer the Dignity upon which of the Daughters he please. And this hath been the usage since the Conquest, as it is said. (†) 23 H. 3. tit. Part 18. (a) 3 H. 3. tit. prescription.

But if an Earl that hath his dignity to him and his heirs dyeth, having issue one daughter, the dignity shall descend to the daughter; for there is no incertainty but only one daughter, the dignity shall descend unto her and her posterity, as well as any other inheritance, and this appeareth by many presidents, and by a late judgment given in Sampson Leonards case, who married with Margaret the only sister and heir of Gregory Fines Dacre of the South, and in the case of William Lord Ros.

But there is a difference between a dignity or name of Nobility, and an office of Honour. For if a man hold a Mannor of the King to be high Constable of England, and die, having issue two daughters, the eldest daughter taketh husband, he shall execute the office solely, and before marriage it shall be exercised by some sufficient deputy; and all this was resolved by all the Judges of England, in the case of (b) the Duke of Buckingham. But the dignity of the Crown of England is without all question descendible to the eldest daughter alone, and to her posterity, and so it hath been declared by Act of Parliament: (†) For Regnum non est divisibile. And so was the descent of Troy. (b) 11 Eliz. Dyer 285. the Duke of Buckinghams Case. (†) 25 H. 8. cap. 22.

Præterea sceptrum Ilione quod gesserat olim
Maxima natarum Priami.——— Virgil. 1. Eneid.

(b) If a castle that is used for the necessary defence of the Realm, descend to two or more Coparceners, this Castle might be divided by Chambers and Rooms, as other Houses be, but yet for that it is Pro bono publico & pro defensione Regni, it shall not be divided; for as one saith, Propter jus gladii dividi non potest. And another saith, (†) Pur le droit del espee que ne soeffre division en aventure que la force del Realme ne defaille pax taunt. But Castles of habitation for private use, that are not for the necessary defence of the Realm ought to be parted between Coparceners as well as other houses, and wives may thereof be endowed, as hath been said in the Chapter of Dower. (b) Bract. lib. 2. fol. 76. Fleta lib. 5. cap. 9. (†) Britton 386, 187. Vide Sect 36.

If there be two Coparceners of certain Lands with warranty, and they make partition

of the Land, the warranty ſhall remain, becauſe they are compellable to make partition. (c) But otherwiſe it was of Joyntenants at the Common Law, as ſhall be ſaid hereafter in his proper place. (d) Thomas de Eberſton ſeiſed of the Mannor of Eberſton, within the Forreſt of Pickering, had kept, time out of mind, a Woodward for keeping of the woods parcell of that Mannor, and had the barks of all the Trees felled in the ſaid Woods by any of the Forreſters of that Forreſt as belonging to his Mannor (which he could not have without a Preſcription.) Thomas of Eberſton infeoffed two of the ſaid Mannors, between whom partition was made, ſo as one of them had the one half in ſeverality, and the other the other half. Robert Wyerne afterwards had the one half, and Thomas Thurniſe the other, and they in the Eyre of Pickering claimed to keep a Woodward within the ſaid Woods, and the barke aforeſaid, and the truth hereof and the uſage being ſpecially found by the Forreſters, Wardrers, and Regarders, Willoughby, Hungerford, and Hanbury, Juſtices Itinerants within the Forreſt, gave judgment as followeth: Ideo conſideratum eſt quod prædict' Robertus & Thomas habeant Woodwardum & Corticem in boſco prædicto de quercubus prædictis ſibi & hæredibus ſuis imperpetuum. Salvo ſemper jure, &c.

(c) 19 E. 3. garrantie 70.
(d) Trin. Pickering 8 E. 3. Rot. 54.

## *Sect.* 242.

¶ Auxy ſi home ſeiſie de tenements en fee ſimple ou en fee taile, deviſe ſauns iſſue de ſon corps engender, & les tenements diſcendont a ſes ſoers, els ſont Parceners, come eſt avantdit. Et meſn le manner, lou il nad pas ſoers mes les tenements diſcendont a ſes aunts, els ſont Parceners, &c. Mes ſi home nad forſque un file, el ne poit eſtre dit parcener, mes el eſt appelle file & heire, &c.

ALſo if a man ſeiſed of Tenements in Fee ſimple or in Fee-tail, dyeth without iſſue, of his body begotten, and the Tenements deſcend to his Siſters, they are Parceners, as is aforeſaid. And in the ſame manner, where he hath no Siſters, but the Lands deſcend to his Aunts, they are Parceners, &c. But if a man hath but one Daughter, ſhe ſhall not be called Parcener, but ſhe is called Daughter and Heire, &c.

¶ *Ou en Fee taile.* This muſt be intended of an eſtate Tayl made to the Father & to the heirs of his body, for otherwiſe if the ſtate Tayl were made to a man and to the heirs of his body, his ſiſters cannot inherit. And not only Daugheers ſhall be Coparceners, but Siſters, Aunts, great Aunts, &c.

¶ *File & heire, &c.* Here by (&c.) is implyed Siſter and heir, Aunt and heir, great Aunt and heir, and ſo upward.

## *Sect.* 243.

¶ By this Section, and the (&c.) in the end of it, it is to be underſtood, that there are two kind of partitions, between Coparceners, the one in deed or expreſſe, and the other in Law or implicite. Of partitions in deed or expreſſe, ſome be voluntary, whereof Littleton enumerates foure Manners, and one compulſory, that is, by Writ of Partition.

¶ ET eſt aſcavoir, que partition enter parceners poit eſtre fait en divers manners. Un eſt quãt els agreeont de faire partition, & font partition de les Tenements, ſicome ſi ſoyent deux parceners

AND it is to be underſtood, that partition may be made in divers manners. One is, when they agree to make partition, and do make partition of the tenements. As if there bee two Parceners to divide between them

a

a devider enter eux les Tenements en deux parts, chescun part per soy en severaltie, & ō egal valu. Et si sont 3. parceners a devider les tenements en trois parts per soy en severaltie, &c.

the Tenements in two parts, each part by it selfe in severalty, and of equall value. And if there be three Parceners, to divide the Tenements in three parts by it self in severalty, &c.

The first partition in deed between coparceners, is that which Littleton here speaketh of, viz. Quant eels agreont & font partition de les tenements, &c. chescun part per soy en severalty & de egal value, &c. If Coparceners make partitions at full age, and unmaried, and of sane memorie, of lands in fee, it is good and firm for ever, albeit the values be unequal; but if it be of lands entailed, or if any of the Parceners be of non sane memorie, it shall bind the parties themselves, but not their issues, unlesse it be equal. Or if any be Coverr, it shall bind the husband, but not the wife or her heirs. Or if any be within age, it shall not bind the Infant, as shall be said more fully hereafter: The second partition followeth in the next Section. And here the (&c.) implyeth further, that if there be four Parceners, then four parts; if five, five parts, and so forth. It further implyeth, that all this must be in severalty, whereof and with what limitations this is to be understood, it hath bin declared before. Vide Sect. 241.

## *Sect.* 244.

¶ Un auter partition est, a estier per agreement enter eux, certaine de lour amies, ō fair partition des terres ou tenemts en le forme avantdit. Et en tiels cases apres tiel partition, le eign file primerment estiera un des partes illint divides, que el voit aver pur sa part, & donques le second file prochein apres luy auter part, & donques l'tierce soer auter part, dōques la 4. auter part, &c. si illint soit quesoient plusors soers, &c. si ne soit auterment agree enter eux. Car il poit estre agree enter eux, que un avera tiels tenemts, & un autr tiels tenemts, &c. sans alcun tiel primer election, &c.

ANother partition there is, *viz.* to choose by agreement betweene themselves certaine of their friends to make partition of the Lands or Tenements in form aforesaid. And in these cases after such partition, the eldest daughter shall choose first one of the parts so divided which she will have for her part, and then the second Daughter next after her another part, and then the third Sister another part, then the fourth another part, &c. if so be that there be more Sisters, &c. unlesse it bee otherwise agreed between them. For it may be agreed betweene them, that one shall have such Tenements, and another such Tenements, &c. without any primer election.

¶ Donques le 4. *auter part, &c.* Here the (&c.) implyeth the 3th Sister, and after her the 6th, and so forth. 31 Ass. 26.

¶ *Car il poit estre agree enter eux que un avera tiels tenements & un auter tiels tenements, &c.*

Here by this (&c.) is implyed divers rules of Law proving the conclusion of Littleton in this Sect. viz. Modus & conventio vincunt legem. Pacto aliquid licitum est, quod sine pacto non admittitur. Quilibet potest renunciare juri pro se introduct'. But with this limitation, that these Rules extend not to any thing, that is against the Commonwealth, or common right. For, Conventio privatorum non potest publico juri derogare.

*Sect.*

## *Sect.* 245.

¶ *Enitia pars.* It is called in old Books † Æsnetia, which is derived of the French word Eisne for eldest, as much to say as the part of the eldest; for Bracton saith, Quod Eisnetia semper est præferenda propter privilegium ætatis, sed esto quod filia primogenita, relicto nepote vel nepte in vita patris vel matris decesserit, præferenda erit soror antenata tali nepoti vel nepti quantum ad Eisnetiam, quia mortem parentum expectant. And herewith agreeth Fleta also, Quod nota: whereby it appeareth that Enitia pars is personal to the eldest, and that this prerogative or privilege descendeth not to her issue, but the next eldest sister shall have it. (f) And here is a diversity to be observed between this case of a partition in deed by the act of the parties, (for there the privilege of election of the eldest daughter shall not descend to her issue.) And where the Law doth give the eldest any privileg without her act, there that privileg shal descend. As if there be divers Coparceners of an Advowson † and they cannot agree to present, the Law doth give the first presentment to the eldest, and this privileg shall descend to her issue, nay her Assignee shall have it, and so shall her husband that is Tenant by the courtesy, have it also.

† Bracton lib. 2. 77. Fleta lib. 5. cap. 9. Britton cap. 72.

(f) 45 E. 3. fines 41. 19 E. 3. quar. Imp. 59. 18 E. 3. ibid. 176. 5 H. 5. 10. 38 H. 6. 9. Doct. & Stud. 116, 117. Vide Bract. 238, 249.
(†) 5 H. 7. 8. 34 H. 6. 40. 11 H. 4. 54. 20 E. 3. quar. Imp. 63. 24 E. 3. Ibid. 198. 15 E. 3. Dar. Presentment 11. 17 E. 3. 20, 21. 21 E. 3. 21. F. N. B. 32.

¶ *Donques il est dit leigne socr eslier pluis darreine, &c.* By this and the &c. in the end of this Section is implyed, the rule of Law is Cujus est divisio, alterius est electio. And the reason of the Law is for avoyding of partiality.

Ipsæ etenim leges cupiunt ut Jure regantur.

which might apparently follow if the eldest might both divide and chuse. Now followeth the third partition in Deed.

AND the part which the eldest sister hath, is called in Latine *Enitia pars*. But if the Parceners agree that the eldest sister shal make partition of the Tenements in manner aforesaid, & if she do this, then it is said that the eldest Sister shal choose last for her part, and after every one of her sisters, &c.

¶ Et la part que leigne soer ad est appelle en Latin Enitia pars. Mes si les parceners agreeont, que leigne soer ferra partitiõ de les tenemẽts en le foꝛm̃ avantdit, & si ceo el fait, donq; el est dit q̃ leigne soer eslier̃ pluis darreine pur sa part, & apres chescun de ses soers, &c.

## *Sect.* 246.

¶ Un auter partition ou allotment est, sicome soient quater parceners, & apres le partition de les Terres fait, chescun part del terre soit per soy solement escript en un petit escrovet, & soit covert tout en cere, en le manner dun petit pile, issint que nul poit veir lescrovet, & donque soient les 4. piles de cere mis en un bonnet a garder en les maines dun indifferent home, &

ANother partition or allotment is, as if there be four Parceners, and after partition of the Lands be made, every part of the Land by it self is written in a little scrowl, and is covered all in waxe in manner of a little ball, so as none may see the scrowle, and then the four balls of waxe are put in a hat to bee kept in the hands of an indifferent man, and then the eldest Daughter shall first

donqs

donqs leigne file primermēt mettra ſa maine en le bonnet, quel prendra un pile de cere ovelque leſcrovet deins ūn le pile pur ſa part, & donqz le ſecond ſoer mettra ſa maine en le bonnet & prendra un auter, le tierce ſoer le 3. pile, & le 4. ſoer le 4. pile, &c. & en ceo cas covient cheſcun de eur luy tener a ſa chance & allotment.

put her hand into the hat, and take a ball of waxe with the ſcrowle within the ſame ball for her part: And then the ſecond ſiſter ſhall put her hand into the hat, and take another, the 3. ſiſter the 3. ball, and the 4. ſiſter the 4. ball, &c. And in this caſe every one of them ought to ſtand to their chance and allotment.

*Allotment.* Of this partition by Lots, ancient Authoꝛs wꝛite, that in that caſe Coparceners Fortunam faciunt judicem: And Littleton here termeth it chance, foꝛ in the end of this Section he ſaith, that in this caſe every one of them ought to hold herſelf to her chance: and of this kind of diviſion, you ſhall read in holy Scripture, where it is ſaid, Dedi vobis poſſeſſionem quam dividetis ſorte.

Fleta lib. 5. cap. 9. Bracton lib. 2. 75. Britton cap. 72. Vide Numbers cap. 26. Verſe 54, 55. & cap. 33. v. 54. Of diviſion by lots.

The &c. in the end of this Section, implyeth, that if there be moꝛe Coparceners, there muſt be moꝛe balls accoꝛding to the number of the Parceners.

## *Sect.* 247.

ITem, un auter partition il y ad ſicome ſont quater Parceners, & ils ne voilent agreer a partition deſtre fait enter eur, donque iun poit aver bꝛe De partitione facienda, envers les auꝛs trois: ou deux ō eur poient aver bꝛe De partitione facienda envers les autres deux: ou trois de eur poient aver bꝛe De partitione facienda envers le quart, a lour election.

ALſo, there is another Partition. As if there be four Parceners, and they will not agree to a Partition to be made between them, then the one may have a Writ of *Partitione facienda* againſt the other three, or two of them may have a Writ of *Partitione facienda* againſt the other two: or three of them may have a Writ of *Partitione facienda* againſt the fourth, at their election.

HEre followeth the fourth Partition in Deed. Littleton having ſpoken of voluntary partitions, oꝛ partitions by conſent: now he ſpeaks of a Partition by the compulſary means of Law, where no Partition can be had by conſent. Now of what inheritance partition may be made by the Wꝛit of Partitione facienda, may partly appear by that which hath been ſaid. Moꝛeover, it is to be obſerved, that the woꝛds of the Wꝛit De partitione facienda, be, † Quod cum eædem A. & B. inſimul & pro indiviſo teneant tres acras terræ cum pertinen' &c. And note, that this woꝛd (Tenet) in a wꝛit, doth alwayes imply a Tenant of a Freehold. And therefoꝛe (g) if one Coparcener maketh a Leaſe foꝛ years, yet a Wꝛit of Partition doth lye. But if one oꝛ both make a Leaſe foꝛ life, a wꝛit of Partition doth not lye between them, becauſe Non inſimul & pro indiviſo tenent, they do not hold the freehold together, and the wꝛit of partition muſt be againſt the Tenant of the freehold. (h) If one Coparcener diſſeiſe another, during this diſſeiſin a wꝛit of partition doth not lye between them, foꝛ that Non tenent inſimul & pro indiviſo.

† 3 E. 3. 47. 48.

(g) 21 E. 2. 57. F.N.B. 62. g. 28 H. 6. 2. 11 H. 4. 3. 4 H. 7. 10. b.

(h) 4 H. 7. 9. 11 Aſſ. 23.

But there be other partitions in deed than here have been mentioned. (i) Foꝛ a Partition made between two Coparceners, that the one ſhall have and occupy the land from Eaſter, untill the firſt of Auguſt only in ſeverality by himſelf, and that the other ſhall have and occupy the land from the firſt of Auguſt untill the Feaſt of Eaſter, yearly to them and their heirs, this is a good partition. Alſo if two Coparceners have two Mannoꝛs by deſcent and

(i) Temps, E. 1. Partic. 215. F.N.B. 62. I.

and they make partition, that the one ſhall have the one Mannor for one year, and the other the other Mannor for this year, and ſo alternis vicibus to them and their heirs, this is a good Partition. The ſame Law is if the partition be made in form aforeſaid, for 2. or more years, and each Coparcener have an eſtate of Inheritance, and no Chattel, albeit either of them alternis vicibus have the occupation but for a certain term of years.

Of Partitions in Law, ſome be by act in Law without judgment, and ſome be by judgment, and not in a writ de partitione facienda. And of theſe in order.

(k) 36 H.6.7.

(k) If there be Lord, three Coparceners Meſnes, and Tenant, and one Coparcener purchaſe the Tenancy, this is not only a partition of the Mſnalty, being extinct for a third part but a diviſion of the Seigniory paramount, for now he muſt make ſeverall avowries.

(l) 37 H.6.8. 43 E.3.1.

(l) If one Coparcener make a Feoffment in fee of her part, this is a ſeverance of the Feoffee.

(m) 17 E. 14. 15.

(m) If two Coparceners be, and each of them taketh husband and have iſſue, the wives by the Coparcenary is divided, and here is a partition in Law.

(n) 12 E.3. Judgm.162. 7 Aſſ.10. 7 E.3.49. 10 Aſſ.17. 12 Aſſ.5.17. 10 E.3.40.43. 28 Aſſ.35. 23 Aſſ.18.20 E.3.Aſſ.12. 3 E.3.28.b. 19 H.6.45. 7 H.6.43 E.4.10.

(n) If two Coparceners be, and one diſſeiſe the other, and the Diſſeiſee bringeth an Aſſiſe, and recover, it hath been ſaid, That ſhe ſhall have judgment to hold her moity in ſeverality. And this ſeemeth (ſay they) very ancient, and thereupon vouch Bracton, (o) Si res fuerit communis locum habere poterit communi dividendo judicium. And (p) ſo (ſay they) if the one coparcener recover againſt another in a Nuper obiit, or a Rationabili parte, the judgment ſhall be, That the Demandant ſhall recover and hold in ſeverality. But Britton is to the contrary, for he ſaith, (q) Et ſi aſcun des Parceners ſoit enger ou diſturbe de ſa ſeiſin per ſes auters Parceners, un, ou pluſors, al diſſeiſee viendra aſſiſe per ſeveral pleint ſur les Parceners & recovera, mes, nemy a tener en ſeveralty, mes en common ſolonque ceo que avant le fiſt, &c. (r) And this ſeemeth reaſonable, for he muſt have his judgment according to his Plaint, and that was of a moity, and not of any thing in ſeverality, and the Sheriff cannot have any warrant to make any partition in ſeverality or by Metes and Bounds.

(o) Bract.l.4. fol.216.b.
(p) 3 E.3.28. 21 R.2.tit. Nuper ob.22.24 H.7.10. 30 E.1. Nup.ob.18. F.N.B.9.b.
(q) Britton fol. 71. a.
(r) Lib.6.fol.12.& 13. Morris's caſe accorde.

## *Sect.* 248.

Bract.fo.66,&c.Brit.71. &c. Brit. cap.72. Fleta lib.5. cap.9.

NOte the firſt judgement in a Writ of Partition, whereof Littleton here ſpeaketh is, Quod partitio fiat inter partes prædictas de tenementis prædictis, cum pertinentiis, after which Judgment, by this &c. viz. Tenements, &c. is implyed, That a Writ ſhall be awarded to the Sheriff, Quod aſſumptis recũ 12, liberis & legalibus hominibus de Viceneto tuo, per quos rei veritas melius ſciri poterit, in propria perſona tua accedas ad tenementa prædicta cum pertinentiis & ibidem per eorum ſacrament' in præſentia partium prædictarũ per te præmuniend' ſi intereſſe voluerint, prædicta tenementa cum pertinen' per ſacrament' bonorum & legalium hominum prædictorum habito reſpectu ad verum valorem earundem in duas partes æquales partiri & dividi, unam partem partium illarum, &c.

This laſt, &c. in this Section is evident.

Ockam ca. Quid ſit liber judiciarius. 40 E.3.45. 9 Aſſ.2. 8 Aſſ. 45.49 E.3.2. Regiſt. F.N.B. 16.

¶ *Judgement.* Di-

ET quant judgment ſerra done ſur tiel brief, le judgment ſerra tiel, q̃ partition ſerra fait enter les parties, & que le Vicount en ſon proper perſon alera a les terres & tenements, &c. & que il per l'ſerement de xii. loyalx homes de ſon Bayliwicke, &c. ſerra partition enter les parties, & que lun part de meſmes les Terres & Tenements ſoyent Aſſignes al plaintif, ou a lun des plaintifs, & un auter part a un auter Parcener, &c. nient ſea-

AND when Judgement ſhal be given upon this Writ, the judgment ſhal be thus, That partition ſhall be made betweene the parties, and that the Sheriffe in his proper perſon ſhall go to the lands & tenemẽts, &c. and that he by the oath of 12. lawful men of his Bailiwick, &c. ſhall make partition between the parties, and that one part of the lands & tenements ſhal be aſſigned to the pl', or to one of the plaintifs, and another part to another Parcener, &c. not making mention in

ſant

ſant mention en le judgement de leigne ſoer pluis q̄ ō puiſſ. the judgement of the eldeſt ſiſter, more than of the youngeſt.

cium eſt quaſi juris dictum, ſo called, becauſe ſo long as it ſtands in force, pro veritate accipitur, and cannot be contradicted: And thereupon antiquity called that excellent Book in the Exchequer, Domeſday, Dies Judicii, Sicut enim diſtricti & terribilis examinis illa noviſſima ſententia nulla tergiverſationis arte valet eludi, &c. ſic ſententia ejuſdem libri inficiari non poteſt, vel impune declinari, ob hoc nos eundem librum judiciarium nominamus, &c. quod ab eo ſicut à prædicto judicio non licet ulla ratione diſcedere. By Littleton it appeareth, That the forms of Judgments, Pleas, and other legal proceedings, do conduce much to the right underſtanding of the Law, and of the reaſon thereof, as here Littleton rightly collecteth, upon the form of the judgment that the Sheriff ſhall deliver to them ſuch parts to them as he thinks good, and that the eldeſt Coparcener ſhall have no election when partition is made by the Sheriff. And it is to be obſerved, that there be two Judgments in a writ of Partition: Of the former, Littleton ſpeaketh in this place. And when partition is made by the oath of twelve men, and aſſignment and allotment thereof, and ſo returned by the Sheriff, then the latter judgment is, Ideo conſideratum eſt, quod partitio prædicta firma & ſtabilis imperpetuum teneatur, and this is the principal judgment. (q) And of the other, before this be given, no Writ of Error doth lie.

(q) Lib. 11. fol. 40. Hill. 39 Eliz. Rot. 327 in Banke le Roy inter An Counteſſe de War. & le Seignior Berkley.

¶ *Shireve.* Is a word compounded of two Saxon words, viz. Shire, and Reve. Shire, Satrapia, or Comitatus, commeth out of the Saxon Verb Shiram, i. Partiri, for that the whole Realm is parted and divided into Shires: And Reve is præfectus or præpoſitus; ſo as Shireve is the Reve of the Shire, præfectus Satrapiæ, Provinciæ, or Comitatus. And he is called Præfectus, becauſe he is the chief Officer to the King within the Shire; for the words of his Patent be, Commiſimus vobis cuſtodiam Comitatus noſtri de &c. And he hath a threefold cuſtody, triplicem cuſtodiam, viz. Firſt, Vitæ Juſtitiæ, for no ſuit begins, and no proceſſe is ſerved but by the Sheriffe. Alſo he is to return indifferent Juries for the tryal of mens lives, liberties, lands, goods, &c. Secondly, Vitæ legis, he is after long ſuits, and chargeable, to make execution, which is the life and fruit of the Law. Thirdly, Vitæ Reipublicæ, he is principalis conſervator pacis within the County, which is the life of the Commonwealth, Vita Reipublicæ pax.

He is called before, Sect. 234. Viſcount, in Latine Vicecomes, i. Vice comitis, that is, inſtead of the Earl of that County, who in ancient time had the regiment of the County under the King. For it is ſaid in the Mirror, † That it appeareth by the ordinance of ancient Kings before the Conqueſt, That the Earls of the Counties had the cuſtody or guard of the Counties; and when the Earls left their cuſtodies or guards, then was the cuſtody of Counties committed to Viſcounts, who therefore (as it hath been ſaid) are called Vicecomites, and Ockam, cap. Quid centur, &c. Porro Vicecomes dicitur, quod vicem Comitis ſuppleat.

Vid. the ſecond part of the Inſtitutes, W. 1. c. 10. † Mirror cap. 1. Sect. 3.

Ockam cap. Quid Centur, &c. Forteſcue cap. 24. 12 R. 2. cap.

Marculphus ſaith, This Office is, Judiciaria dignitas. Lampridius, That it is Officium dignitatis. Forteſcue ſaith, Quod Vicecomes eſt nobilis officiarius. And ſee there and obſerve well his honourable & ſolemn election and creation at this day. But to confirm all that hath been ſaid touching this point, and to conclude the ſame, among the Lawes of Edward the Confeſſor, I find it thus recorded, Verum quod modo vocatur Comitatus, olim apud Britones temporibus Romanorum in Regno iſto Britanniæ vocabantur conſulatus, & qui modo vocantur Vicecomites, tunc temporis Viceconſules vocabantur; ille vero dicebatur Viceconſul qui conſule abſente ipſius vices ſupplebat in jure & in foro. Herein many things are worthy of obſervation: Firſt, for the antiquity of Counties. Secondly, That which we called Comitatum, the Romans more Latinely called Conſulatum. Thirdly, whom the Saxons afterwards called (as hath been ſaid) Shreve or Earle, the Romanes called Conſul. Fourthly, That the Sherife was deputy of the Conſul or Earle, and therefore the Romanes called him Viceconſul, as we at this day call him Vicecomes. Fifthly, That the Sherife in the Romanes time, and before, was a miniſter to the Kings Courts of Law and Juſtice, and had then a Court of his own, which was the County Court, then called Curia Conſulatus, as appeareth by theſe words, Ipſius vices ſupplebat in jure & in foro. Sixthly, that this Realm was divided into Shires and Counties, and thoſe Shires into Cities, Boroughs, and Towns, by the Brittains: So that King Ælfreds diviſion of Shires & Counties, was but a renovation or more exact deſcription of the ſame. Laſtly, the conſequence that will follow upon theſe things, being ſo ancient (as til the time of and before the Romans), the ſtudious Reader will eaſily collect. And afterwards, fol. 135. amongſt the Laws of the ſame King, it appeareth, That thoſe whom the Saxons ſometimes called (and now we call) Ældermen, or Earles, the Romans called Senatores, Et ſimiliter olim apud Britones temporibus Romanorum in Regno iſto Britanniæ vocabantur Senatores qui poſtea temporibus Saxonum vocabantur Aldermani, non propter ætatem, ſed propter ſapientiam & dignitatem, cum quidam adoleſcentes eſſent, juriſperiti tamen & ſuper hoc experti.

Lambert fol. 129. 12.

Cæſar. Polichro Huntingdon Polidor. inter leges Malm. c. i. Hooks lib. 2.

¶ *De*

*De ſon bayliwicke.* It appeareth before, that the Enqueſt muſt be De vicineto, of the place where the lands do lye, and not generally De Baliva tua. By this it appeareth that the Sheriff is Balivus, and his County called Baliva, and therefore it is good to be ſeen what Balivus originally ſignified, and whereof it is derived.

Fleta.lib.2.cap.67. Baylife is a French word, and ſignifies an Officer concerning the adminiſtration of Juſtice of a certain Province: and becauſe a Sheriff hath an office concerning the adminiſtration of Juſtice within his County or Bayliwike, therefore he calleth his County Baliva ſua: for example, when he cannot find the Defendant, &c. he returneth, Non eſt inventus in Baliva mea, I have heard great queſtion made, what is true expoſition of this word Balivus is. In the ſtatute of Magna Charta cap.28. the letter of the ſtatute is, Nullus Balivus de cætero ponat aliquem ad legem manifeſtam nec ad juramentum ſimplici loquela ſua teſtibus fidelibus ad hoc inductis. And ſome have ſaid, That Balivus in this ſtatute ſignifieth any Judg, for the Law muſt be waged and made before the Judg: And this ſtatute (ſay they) extends to the Courts of Common Pleas, Kings Bench, &c. For they muſt bring with them Fideles teſtes, &c. and ſo hath been the uſage to this day.

Bract.li.3, tract.2. ca.33. nu.3. Idem l.3. fol.121.b.

Bract.li.3,156.b. Brit.fo. 56. Fleta lib.2.cap.63.

But I have peruſed a very ancient and learned reading upon this ſtatute, and the Reader taketh it, That at the Common Law before this ſtatute, he that would make his Law in any Court of Record, muſt bring with him Fideles teſtes. And this opinion herein is warranted by Glanvil, who wrote in the Reign of Henry the ſecond. But the Reader holdeth, That in the Courts which were not of Record, as the County Court, the Hundred Court, the Court baron, &c. there the Defendant without any faithful witneſſes, might before this ſtatute have made his Law, for remedy whereof this act was made: and therefore (ſaith he) the ſtatute extendeth to the Judges of ſuch Courts as are not of Record. In 10 H.4. it is holden, That if a Lord that hath a Franchiſe in Lét, doth not enquire of things enquirable, & puniſh them, the Sheriff ſhall enquire in his Turne, Et ſi le Vicount ne faire, en ſon Torne, Baylie le Roy, enquirer' quant il vient, ou autrement ſerra enquiſe per Juſtice in Eire. Where by Baylie le Roy is underſtood Juſtice le Roy: And in the Mirror † it is holden, That the ſtatute doth extend to every Juſtice, Miniſter of the King, Steward, &c. and all comprehended under this word Baylie.

Glanv.lib.1.cap.9.

10 H.4. 41

† Mirror cap.5. Sect.2. Vide Bract.fol.409. Fleta lib.2.cap. 63.56.

The chief Magiſtrates in divers ancient Corporations are called Baylifs, as in Ipſwich, Yarmouth, Colcheſter, &c. And Baylife in French is Diœceſes, Nomarcha, in Engliſh a Bayliff or Governour. But of this thus much ſhall ſuffice.

## *Sect. 249.*

Brit.fol.185.b.acc.Bract. l.2.fo.91.&c.Fleta.l.5.c.7

¶ *South ſon Seale, &c.* Note, the Partition made and delivered by the Sheriff and Jurors ought to be returned into the Court under the Seal of the Sheriff and the ſeals of the twelve Jurors, for the words of the Judicial Writ of Partition, which doth command the Sheriff to make partition, are, Aſſumptis tecum 12. &c. (ſo as there muſt be 12) & partitionem inde, &c. ſcire facias Juſticiariis, &c. ſub ſigillo tuo, & ſigillis eorum per quorum Sacramentum partitionem illam feceris, &c.

¶ Et de la partition que l'Vicount ad iſſint fait il ſerra notice ad Juſtices ſouth ſon Seale, & les Seales, de cheſcun de les 12. &c. Et iſſint en ẽ caſe poies veier q̃ leigne ſoer avera my la primer election, mes le Vicount luy aſſignera ſa part que el avera, &c. Et poit eſtr̃ que le Vicount doit aſſigner̃ primerñt un part a le plus puiſñ &c. & darreinement al eigne, &c.

And of the partition which the Sheriff hath made, he ſhall give notice to the Juſtices under his Seal, and the Seals of every of the 12. &c. And ſo in this caſe you may ſee, that the eldeſt ſiſter ſhall not have the firſt election, but the Sheriff ſhall aſſigne to her her part which ſhe ſhall have, &c. And it may be that the Sheriff will aſſigne firſt one part to the youngeſt, &c. and laſt to the eldeſt, &c.

And this is the reaſon wherefore in this caſe the partition which they make upon oath, ought to be returned under their ſeals: and the reaſon of it is for the more ſtrengthning of the partition

tition by the 12, and that the Sheriff ſhould not return what partition he would. Now after all this, this (&c.) viz. 12, &c. doth imply, that the principal judgment upon the partition ſo returned is, Ideo conſideratum eſt per Curiam quod partitio firma & ſtabilis imperpetuum teneatur, the latter two (&c.) are evident.

Lib. 11. fol. 40. in Medchalls caſe.

## *Sect.* 250.

¶ ET nota q̃ partition per agreement per enter parceners, poit eſtre fait per la ley enter eux auri bien per baral ſans fait, come per fait.

AND note, that partition by agreement between Parceners may be made by Law between them, as well by paroll without Deed, as by Deed.

¶ HEre it appeareth that (r) not only Lands and other things that may paſs by Livery without Deed, but things alſo that do lye in grant, as Rents, Commons, Advowſons, and the like, that cannot paſs by grant without deed, whether they be in one County or in ſeverall Counties, may be parted and divided by Paroll without Deed.

(r) 3 E. 4. 9. 10. 9 E. 4. 28. 11 H. 4. 3. 9 H. 4. partition 13. 21 E. 3. 38.

(ſ) But a partition between Joyntenants is not good without Deed, albeit it be of Lands, and that they be compellable to make partition by the ſtatutes of 31 H. 8. cap. 10. and 32 H. 8. cap. 32. becauſe they muſt purſue that Act by writ de partitione facienda, and a partition between Joyntenants without writ remains at the Common Law which could not be done by Paroll. And ſo it is, and for the ſame reaſon of Tenants in Common. But if two Tenants in Common be, and they make partition by Paroll, and execute the ſame in ſeverality by Livery, this is good and ſufficient in Law. And therefore where Books ſay that Joyntenants made partition without Deed, it muſt be intended of Tenants in Common, and executed by Livery.

(ſ) Sect. 290. 3 H. 4. 1. 19 H. 6. 25. 28 H. 6. 2. 3 E. 4. 9, 10. 47 E. 3. 22. 47 Aſſ. 8. 19 H. 6. 1. 17 E. 3. 46. 30 Aſſ. 8. Lib. 4. fol. 73. li. 6. fol. 10, 13. 2 H. 7. 5. Dyer. 18 Eliz. 358. 31 H. 8. Dyer 46. 2 Eliz. Dyer 179. 26 H. 8. Dyer 29. 1 Mar. Dyer 98.

Nota, between Joyntenants there is a two-fold privity, viz. in eſtate and in poſſeſſion: between Tenants in Common there is privity only in poſſeſſion, and not in eſtate: but Parceners have a threefold privity, viz. in eſtate, in perſon, and in poſſeſſion.

## *Sect.* 251, & 252.

¶ ITem ſi deux meaſes deſcendont a deux Parceners, & l'un meaſe vault per an 20. ſ. lauter forſque 10. ſ. per an, en ceſt cas partition poit eſtre fait enter eux en tiel forme, ceſtaſcavoir que ſi parcener avera lun meaſe, & que lauter parcener avera lauter meaſe, & celuy q̃ aver le meaſe que eſt de value de 20. ſ. & ſes heires, payeront un annuall rẽt

ALſo if two Meſes deſcend to two Parceners, and the one Meaſe is worth twenty ſhillings *per annum*, and the other but tenne ſhillings *per annum*, In this caſe partition may bee made betweene them in this manner, to wit, the one Parcener to have the one Meaſe, and the other Parcener the other Meaſe. And ſhe which hath the Meaſe worth 20. ſhillings *per annum*, and her heires, ſhall pay

¶ *Per Paroll.* Nota, Here (t) a Rent may be granted for oweltie of partition without Deed, even as a Rent in caſe of a Leaſe for yeares, for life, or a gift in Tail may be reſerved without Deed, and ſo may a Rent be aſſigned to a woman out of the land whereof ſhe is Dowable, &c. without Deed, but albeit an exchange for Lands in the ſame County may be without Deed; yet (u) a Rent granted for egality of the ſame exchange cannot be without Deed: and the cauſe of the difference is apparent, for Coparceners are in by deſcent, and compellable to make partition.

(t) 8 E. 3. 16. 21 Aſſ. p. 1. 21 E. 3. 38. 11 H. 43. 61. 45 E. 3. 21. 2 H. 6. 14. 21 H. 6. 11. 1 Mar. Dyer 94.

¶ *Le Rent, &c.* The ſame Law is of Common of Eſtovers, or a Colody, or a Common of

of paſture, &c. or a way granted upon the partition by the one Coparcener to the other. All which, and the like, albeit they lie in grant, yet upon the partition may they be granted without deed.

¶ *Iſſuant hors de meſme le meaſe, &c.* (x) For if it be granted out of other Lands than deſcended to the coparceners, then there muſt be a Deed. (z) But if the Rent be granted generally (out of no land in certain) for owelty of partition, pro reſiduo terræ, it ſhall be intended out of the purparty of her that granteth it.

(x) 1 Mariæ Dyer 91.

(z) 29 Aſſ. 23. 29 E. 3. 9. b. Pl. Com. 34.

(a) 15 H. 7. 14. 29 Aſſ. 23. 29 E. 3. 9. b.

(a) If there be three Coparceners, and they make partition, & one of them grant twenty ſhillings per annum out of her part to her 2 ſiſters, and their heirs, for Egalty of partition, the grantees are not joyntenants of this Rent; but the Rent is in nature of coparcenary, and after the death of the one Grantee, the moity of the Rent ſhall deſcend to her iſſue in courſe of coparcenary, and not ſurvive to the other, for that the rent doth come in recompence of the Land, and therefore ſhall enſue the nature thereof, and if the grant had been made to them two of a Rent of twenty ſhillings, viz. to the one ten ſhillings, and to the other ten ſhillings, yet ſhall they have the Rent in courſe of Caparcenary, and joyn in action for the ſame.

(b) 29 Aſſ. 23. 29 E. 3. 9. 17 E. 3. 10.

(b) If one Coparcener be married, and for owelty of partition the husband and wife grant a rent to the other two out of the part of the Feme Covert, this partition being equal, ſhall charge the part of the Feme Covert for ever.

(c) 38 E. 26. b.

(c) If two Coparceners by Deed indented alien both their parts to another in fee rendring to them two and their heirs a Rent out of the Land; they are not joyntenants of this rent, but they ſhall have the rent in courſe of coparcenary, becauſe their right in the land out of which the rent is reſerved, was in Caparcenary.

(d) 1 Mariæ Dyer 91. 8 E. 3. 16. and other the books aboveſaid.

¶ *Purront diſtrainer de common droit, &c.* That is, (d) in this caſe the Law doth give a diſtreſſe, leſt the Grantee ſhould be without remedy, for the which upon the partition ſhe hath given a valuable recompence in Land, which deſcended, &c. And ſo in the caſe of Dower above mentioned.

## Sect. 253.

¶ *Terres & Tenements, &c.* Here (&c.) implyeth a Caution viz. that they be ſuch Lands

¶ *En meſm̃ l' maner eſt, de touts maners de tres & tene-*

IN the ſame manner it is of all manner of Lands and Tene-

ments

ments, &c. lou tiel rent eſt reſerve a un, ou a divers Parceners ſur tiel partition, &c. Mes tiel rent neſt pas rent ſervice, mes eſt rent charge de cõmon droit ewe & reſerve pur egaltie de partition.

ments, &c. where ſuch Rent is reſerved to one or to divers parceners upon ſuch partition, &c. But ſuch Rent is not Rent ſervice, but a Rent charge of common right, had and reſerved for equality of partition.

¶ *Reſerve al un.* Here reſervation is taken for a grant, and if it be uſed upon the partition, doth amount in this caſe to a grant, which is worthy the obſervation.

## Sect. 254.

¶ ET nota que nulles ſont appelles parcenes p le common ley, mes females, ou les heires de females que veignont a terres & tenemẽts p deſcent. Car ſi ſoers purchaſe terres ou tenements, de ceo ils ſant appelles joyntenants, & nemy parceners.

AND note, That none are called Parceners by the Common Law, but females or the heires of females which come to Lands or tenements by deſcent: for if ſiſters purchaſe lands or tenements, of this they are called Joyntenants, and not Parceners.

This needs no explanation.

## Sect. 255.

¶ ITẽ ſi deux Parceners de terr en fee ſimple, font partition enter eux, & la part de un vault pluis q̃ le part d̃ lauter, ſi els fueront al temps de la partition de pleine age, ſ̃. de 21. ans, donqz la partition, touts dits demurrera, & ne ſerra, unques defeat. Mes ſi les Tenements (dont els font partition) ſoyent a eux en fee taile, & le part que lun ad eſt

ALſo if two Parceners of Land in fee ſimple make partition between themſelves, and the part of the one valueth more than the part of the other, if they were at the time of the partition of full age, s. of 21. yeares, then the partition ſhall alway remaine and bee never defeated. But if the Tenements (whereof they make partition) be to them in fee taile, and the part of the one

¶ *Donques le partition touts dits demurrera, &c.* Hereby it appeareth, that the inequality of the value ſhall not impeach a partition made of lands in fee ſimple between coparceners of full age, no more than it ſhall do in caſe of an exchange. 9 H. 5. and other the Books aboveſaid.

¶ *Ils ſont concludes durant lour vies.* This inequal partition doth ſo conclude the parceners themſelves, as the that hath the unequal part, ſhall not avoid it during her life.

¶ *Concludes.* This word is derived of Con, and Claudo, and in this ſenſe ſignifieth to cloſe or ſhut up her mouth that ſhe cannot ſpeake to the contrary.

11 Aſſ. p. 23.

Husband and wife tenants in ſpeciall taile of certaine Lands in fee have iſſue a daughter, the wife dyeth, the Husband by a ſecond Wife hath iſſue another daughter, both the Daughters enter (where the eldeſt is onely inheritable) and make partition, the eldeſt daugher is concluded during her life to impeach the partition, or to ſay that the youngeſt is not heir, and yet ſhe is a ſtranger to the tail, but in reſpect of privity in their perſons, the partition ſhall conclude; for a partition between meer ſtrangers in that caſe is void, but the iſſue of the eldeſt ſhall avoid this partition as iſſue in tail.

See after the Chapter of Garr.

(g) 11 E. 3. 34, 35. 2 E. 2. Baſtardy 19. 11 Aſſ. 23. 30 Aſſ. 7. 17 E. 3. 59.

(g) J. S. ſeiſed of lands in fee hath iſſue two daughters, Roſe and Anne, baſtards eigne, and Mulier puiſne, and dyeth. Roſe and Anne do enter and make partition, Anne and her heirs are concluded for ever.

melieur en annual value, que eſt la part le lauter, coment q̄ els ſont concludes durant lour vies a defeater la partitiō, uncore ſi le parcener q̄ ad le meinder part en value ad iſſue ad devy, iſſue poit diſagreer a la partition, & enter & occupier en common lauter part que fuit allotte a ſa Aunt, & iſſint lauter poit enter & occupier en common lauter part allotte a ſa ſoer, &c. ſi come nul partitiō uſt eſte fait.

is better in yearly value than the part of the other, albeit they be concluded during their lives, to defeat the partition, yet if the parcener which hath the leſſer part in value, hath iſſue and dye, the iſſue may diſagree to the partition; and enter and occupy in common the other part which was allotted to her Aunt, and ſo the other may enter and occupy in common the other part allotted to her ſiſter, &c. as if no partition had beene made.

## *Sect.* 256.

¶ *Els et lour barons.* Here it appeareth, that the wife muſt be party to the partition, and ſo are the Books to be intended that ſpeak of this matter.

42 Aſſ. 22. 8 E. 4. 4. 9 E. 3. 38. 15 E. 4. 20. F. N. B. 62. 29 Aſſ. 23. 9 H. 6. 5. 43 Aſſ. 14. 14.

¶ *Et defeatera la partition.* Note, the partition ſhall not be defeated for the ſurpluſage onely to make the partition equal, but here it appeareth, that it ſhall be avoyded for the whole. But of this more ſhall be ſaid hereafter in this Chapter, Sectione 264. (h) And though the partition be unequal, yet is not the partition voyd, but voydable; for if after the deceaſe of the Huſband, the wife entreth into the unequall part, and agreeth thereunto, this ſhall bind, and therefore Littleton

(h) Vide 2 E. 2. Cui in vita 17.

¶ Item ſi deux parceners de tenements en fee pleigne barons, & els & lour barons ſont partition enter eux, ſi la part lun eſt meinder en annual value q̄ la part lauter, durant les vies lour barons la partition eſtoyera en ſa force. Mes coment que il eſtoyera durant les vies les barons, uncore apres la mort le baron, celuy feme q̄ ad le meinder part poit enter en le part ſa

ALſo if two Parceners of Lands in fee take husbands, and they and their Huſbands make partition between them, if the part of the one bee leſſe in value than the part of the other, during the lives of their husbands, the partition ſhall ſtand in its force. But albeit it ſhall ſtand during the lives of their Husbands, yet after the death of the Husband, that woman which hath the leſſer part may enter into

ſoer

ſoer come eſt avantdit, & defeatera la partition.

her ſiſters part as is aforeſaid, and ſhall defeat the partition.

uſeth the word (Defeatera,) which proveth it to be voydable.

## *Sect.* 257.

¶ MEs ſi l' partition fait penter les barons fuit tiel, que cheſcun part al temps dallotment fait, fuit de egal annual value, donque il ne poit apres eſtre defeat en tiels caſes.

But if the partition made between the Husbands were thus, that each part at the time of the allotment made, was of equall yearly value, then it cannot afterwards be defeated in ſuch caſes.

¶ *Perenter les barons.* This is miſtaken, for the original is Perenter eux, that is, between the Barons and Femes, and not as this here, between the Barons, therefore this error would be hereafter reformed.

¶ *Al temps del allotment.* Hereby it appeareth, that if the parts at the time of the partition be of equall yearly value, neither the wives nor their heirs ſhall ever avoid the ſame, and the reaſon hereof is, for that the husbands and wives were compellable by Law to make partition, and that which they are compellable to do in this caſe by Law, they may do by agreement without proceſs of Law. If the annual value of the land be equal at the time of ꝫ partition, and after become unequal by any matter ſubſequent, as by ſurrounding, ill husbandry, or ſuch like, yet the partition remains good. 9 H.6. 5. and other the books aboveſaid.

Judicis officium eſt, ut res, ita tempora rerum
Quærere, quæſito tempore tutus eris.

But if the partition be made by force of the Kings writ, and judgment thereof given, it ſhall bind the Feme-coverts for ever, albeit the parts be not of equall annual value, becauſe it is made by the Sheriff by the oath of twelve men by authority of Law. And the judgement is, that partition ſhall remain firm and ſtable for ever, as hath been ſaid. (a) But a partition in the Chancery, where one Coparcener is of full age, and ſueth Livery, and one other is within age and hath an unequal part allotted to her, this ſhall not bind her at full age, for in a writ directed to the Eſcheator to make partition, there is a Salvo jure; And there is no judgment upon ſuch a partition. But if ſuch a partition be equall, it ſhall bind, ſo that a part of the land holden in Capite be allotted to every of the Coparceners, for to that end there is an expreſs Proviſo in the writ. (b) And this partition may be avoided either by Scire fac' in the Chancery, or by a writ De partitione facienda at the Common Law at her full age.

(a) F.N.B.256.259.260. 25.192.263. 9 H.6.6. 21 E. 3. 31.

(b) Vide 21 E. 3. 31.

## *Sect.* 258.

¶ ITem ſi deux parceners ſont, &c. le puiſne eſtant deins age de 21. ans, & partition eſt fait enter eux, iſſint que la purparty que eſt allot al puiſn ē ō meindre value q̄ la purparty lauter, en ceſt caſe le

ALſo if two Coparceners be, and the youngeſt being within the age of twenty one years, partition is made betweene them, ſo as the part which is allotted to the youngeſt, is of leſſe value then the part of the

¶ AS before in the caſe of ꝫ Feme Coverts, (c) ſo it is in the caſe of the Enfant, for if the partition be equall at the time of the allotment, it ſhall bind him for ever, becauſe he is compellable by Law to make partition, and he ſhall not have his age in a Partitione faciendâ,

(c) 43 Aſſ. 14. 9 H.6. 5. 7 E. 3. 13. 8 E 3. 34. 10. H. 42 5. 31 Aſſ. 16. 21 H.6. 25.

da, and though the partition be unequall, and the Infant hath the leſſer part, yet is not the partition void, but voidable by his entry, for if hee take the whole profits of the unequal part, after his full age, the partition is made good for ever. And therefore Littleton here giveth him a caveat, That in that caſe he take not the whole profits of his unequal part, neither ſhall an unequall partition in the Chancery binde an Infant, as appeareth before. But a partition made by the Kings Writ De partitione facienda, by the Sheriffe by the oath of twelve men, and judgement thereupon given, ſhall binde the Infant, though his part be unequal, Cauſa qua ſupra.

le puiſne durant l'temps de ſon nonage, & auxy quaunt el vient a pleine age, ſ. de 21. ans, poit enter en la purparty a ſa ſoer allot & defeatera la partition. Mes bien ſoy gard tiel Parcener quant el viēt a ſa plein age, que el ne preign a ſon uſe demeſne touts les profits des terres ou tenements que a luy fueſ allots. Car donques el ſoy agreea a la partition a tiel age, en quel caſe la partition eſtoyera & demurrā en ſa force: Mes paraventure les profits de la moitie el poit prender, relinquiſant les profits de lauter moitie a ſa ſoer.

other; in this caſe the youngeſt during the time of her nonage, and alſo when ſhe cometh to full age, s. of 21. years, may enter into the part allotted to her ſiſter, and ſhall defeat the partition: but let ſuch Parcener take heed when ſhe comes to her full age, that ſhe taketh not to her own uſe all the profits of the lāds or tenements which were allotted unto her: for then ſhe agrees to the partition at ſuch age, in which caſe the partition ſhall ſtand and remain in its force: but peradventure ſhe may take the profits of the moity, leaving the profits of the other moity to her ſiſter.

## *Sect.* 259.

† Vide ſect. 402,403.

THe Law hath provided for the ſafety of a mans or womans eſtate, that † before their age of twenty one yeares they cannot bind themſelves by any Deed, or alien any Land, Goods, or Chattels.

¶ *Age de* 21. *ans.* Before this age, a man or woman is called an Enfant.

Britton f.65,66. & 101. Fleta, lib.3. cap. 14.

¶ *Fait.* Factum, Anglicè, a Deed, and ſignifieth in the Common Law, an Inſtrument conſiſting on three things, viz. Writing, Sealing, and Delivery, comprehending a bargain or contract between party and party, man or woman. It is called of the Civilians, Literarum obligatio.

¶ *Feoffement.* Of this word, ſufficient hath been

¶ ET eſt aſcavoir que quant il eſt dit, que males ou females ſont de pleine age, ceo ſerra entendue ō age de 21. ans, car ſi devāt tiel age, aſcun fait ou feoffment, grant, releaſe, confirmation, obligation, ou auter ſcripture ſoit fait per aſcun de eux, &c. ou ſi aſcun deins tiel age, ſoit Baylife ou receiver a aſcun home, &c. tout ſerve pur nient, & poit eſte avoyde

AND it is to be underſtood, that when it is ſaid, That males or females be of full age, this ſhall be intended of the age of 21 years, for if before ſuch age any deed or feoffement, grant, releaſe, confirmation, Obligation, or other writing be made by any of them, &c. or if any within ſuch age bee Baylife or receiver to any man, &c. all ſerve for nothing, and may be avoyded. Al-

Aury

Aury home devāt le dit age, ne serra my jure en un Enquest, &c.

so a man before the said age shall not be sworn in an Enquest, &c.

said before in the first Chapter of the first Book.

¶ *Grant.* Concessio is in the Common Law a conveyance of a thing that lies in grant, and not in Livery, which cannot passe without Deed, as Advowsons, Services, Rents, Commons, Reversions, and such like. Of this also, sufficient likewise hath been said in the first Chapter of the first Book. Lib. 3. fol. 63. in Lincoln Colledge case. 8 E. a.

¶ *Release, Confirmation, &c.* Of these shall be spoken hereafter in their proper places and Chapters.

*Obligation* is a word of his own nature, of a large extent, but it is commonly taken in the Common Law, for a Bond containing a penalty, with condition for payment of money, or to do, or suffer some act or thing, &c. and a Bill is most commonly taken for a single Bond without condition.

¶ *Ou auter scripture soit fait per ascun de eux, &c.* Here by this (&c.) is implied, some exceptions out of this generality, (d) as an Infant may bind himself to pay for his necessary meat, drink, apparell, necessary physick, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himself afterwards: but if he bind himself in an obligation, or other writing, with a penalty for the payment of any of these, that Obligation shall not bind him. (e) Also other things of necessity shall bind them, as a presentation to a Benefice, for otherwise the Laps shall incur against him. Also if an Infant, be an Executor, upon payment of any debt due to the Testator, he may make an acquittance, but in that case a release without payment is void; and generally whatsoever an Infant is bound to do by Law, the same shall bind him, albeit he doth it without suit of Law. But of this common learning this little taste shall suffice. (d) 18 E. 4. 2. 21 H. 6. 31. Lib. 9. fol. 87. Pinchons case. (e) 8 E. 4. 4. 9 H. 6. 5. 17 E. 3. 9. 29 Ass. 25. 2 Mar. Dyer 104, 105.

¶ *Bayliff ou receiver al ascun home, &c.* By this (&c.) many things are implyed, as that by Bayliff is understood a servant that hath administration and charge of lands, goods, and Chattels, to make the best benefit for the owner, against whom an action of Account doth lye for the profits which he hath raised or made, or might by his industry or care have reasonably raised or made, his reasonable charges and expences deducted. (f) But one under the age of 21 years shall not be charged in any such account, because by intendment of Law, before his full age he hath not skill and ability to raise or make any such improvement and profit. Fleta li. 2. ca. 64. & ca. 67. Brit. fol. 62. 70. Fleta lib. 2. cap. 64. 41 E. 3. 39. 46 E. 3. Account 40. 2 R. 2. ib. 45. 6 R. 2. ibid. 3 E. 3. 10. (f) 13 E. 3. Infant 9, 17 E. 2. Account 121, 21 E. 3. 8. 10 H. 4. 14. 2 H. 4. 13. Regist. 135.

In account against a Receiver, is when one receiveth mony to the use of another, to render an account; but upon his account he shall not be allowed his expences and charges. (g) And therefore a man cannot charge a Bayliff as a Receiver, because then the Bayliff should lose his expences and charges. (g) 42 E. 3. 31, 46 E. 3. b. 4 H. 6. 27.

In an account against a Receiver, the Plaintiff must declare by whose hands the Defendant received the mony, which he shall not do in the case of a Bayliff. (h) But in some case in an action of Account against one as Receptor denariorum, he shall have allowance of his expences and charges, and also shall account for the profit he received, or might reasonably receive; and this was provided by Law in favour of Merchants, and for advancement of Trade and Trafficke. (e) 30 E. 1. Account 127. 47 E. 3. 22. 10 H. 7. 16. Bract. li. 5. fo. 334. Brit. fol. 62. Fleta li. 2. c. 64. & 51. 5 E. 2. 1. Lib. Intrat. 17, 18, 19.

As if two joynt Merchants occupy their stock, goods, and merchandizes in common to their common profit, one of them naming himself a Merchant, shall have an account against the other naming him a Merchant, and shall charge him as Receptor denariorum ipsius B. ex quacunque causa & contractu ad communem utilitatem ipsorum A. & B. provenien' sicut per legem mercatoriam rationabiliter monstrare poterit.

(i) If there be two Joyntenants or Tenants in Common of lands, and the one make the other his Bayliff of his moity, he shall have an action of Account against him as Bayliff: & so are the books to be intended, that speak of an action of Account in that case. (i) 45 E. 3. 10. 3 E. 3. 17. 39 E. 3. 27. 47 E. 3. 22. F. N. B. 118.

So as there be but three kinds of writs of Account, viz. against one as Gardian, whereof Littleton hath spoken before in the Chapter of Socage. The second against one as Bayliff: And the third as Receiver, as here it appeareth (k) For a man shall not be charged in an Account as Surveyor, Controuler, Apprentice, Reve, or Heyward. And to maintain an Action of Account, there must be either privity in deed by the consent of the party; for (l) against a Disseisor or other wrong doer no account doth lye, or a privity in Law ex provisione legis, made by the Law, as against a Gardian, &c. whereof sufficient hath been spoken in y Chapter of Socage. (k) 13 E. 3. Account 76. 41 E. 3. ibidem 34. 8 E. 3. 46. 8 E. 4. 6. b. F. N. B. 119. d. (l) 2 Mar. B. Account 89, F. N. B. 117. Pl. Com. 542. 2 H. 3. 12. 33 H. 6. 2. 4 H. 7. 6. &c.

¶ *Ne*

¶ *Ne ſerra jure en un Enqueſt, &c.* By this (&c.) is implyed a maxim in Law, (m) quod minor jurare non poteſt. For example, (n) An Infant cannot make his Law of Non ſummons: (o) And therefore the default ſhall not grieve him, for ſeeing the mean to excuſe the default is taken away by Law, the default it ſelf ſhall not prejudice him. But yet this rule hath an exception, That (p) an Infant when he is of the age of 12 years, ſhall take the Oath of Allegiance to the King: and this was, as Bracton ſaith, Secundum leges Sancti Edwardi. But indeed ſuch was the Law in the time of King Arthur, (q) An Infant cannot upon his oath make his Law in an action of debt. (r) And the husband and wife of full age for the debt of the wife, before the coverture ſhall make their Law.

(m) Bract. l. 5. fo. 340. b.
(n) 13 E. 3. Ley 50.
(o) 26 E. 3. 63. 2 Mariæ Dyer 104, 105.
(p) Vide devant Cap. de Homage & Cap. de Fealty, Sect. 85. 91. Bract. l. 2. fo. 124. Brit. fo. 73, 74. & fol. 19. Fleta lib. 1. cap. 17.
(q) 11 H. 6. 40. 1 H. 7. 25. 15 E. 4. 2.
(r) 46 E. 3. 10. 9 E. 4. 24. 15 E. 4. 2. 21 H. 3. 23.

## *Sect.* 260.

¶ *A terre en fee ſimple eſt allot a la file puiſne.* It is firſt to be obſerved upon this whole caſe, that the fee ſimple land is allotted to the youngeſt daughter, and the land entailed to the eldeſt. This partition prima facie is good, and herein the partition differeth from the exchange, where in the exchange the eſtates muſt be equal.

But yet this partition by matter ſubſequent may become voydable, (as Littleton here puts the caſe) the eldeſt coparcener hath by the partition and the matter ſubſequent barred her ſelf of the right in the fee ſimple lands, inſomuch as when the youngeſt ſiſter alieneth the fee ſimple lands, and dyeth, and her iſſue entreth into half the Lands entailed; yet ſhall not the eldeſt enter into half of the Lands in fee ſimple upon the Alienee; for by the alienation, the privity of the ſtate is deſtroyed.

¶ *Le puiſne file alien la terre en fee ſimple, &c.*

The ſame Law it is of the youngeſt Daugh-

¶ Item ſi terres ou Tenements ſoyent dones a un home en le taile, quel ad tant des terres en fee ſimple, et ad iſſue deux files, & devie, & ſes deux files tōt partition enter eux, iſſint que la terre en fee ſimple eſt allot a le file puiſne en allowance ds terres & tenements tailes allottes a le file eigne, ſi apres tiel partition fait, la puiſne file alienaſt ſa terre en fee ſimple a un auter en fee, & ad iſſue fits ou file & devie, iſſue poit bien entrer en les Tenemēts tailes & eux tener & occupier en purparty ovesque ſon Aunt. Et ceo eſt pur deux cauſes: un eſt, pur ceo que iſſue ne poit aver aſcun remedie de laterre aliē p ſa mere, pur ceo que la terre fuit a luy en fee ſimple, & pur tant que il eſt un de les heires en taile, & nad ny aſcun recompence de ceo que a luy affiert de les Tenements tailes, ſi eſt

ALſo if Lands or tenements be given to a man in taile, who hath as much land in fee ſimple, and hath iſſue two daughters, & die, and his two daughters make partition between them, ſo as the Land in Fee-ſimple is allotted to the younger daughter, in allowance for the Lands and Tenements in Taile allotted to the elder daughter, if after ſuch partition made, the younger daughter alieneth her land in fee ſimple, to another in fee, & hath iſſue a ſon or daughter & dies, the iſſue may enter into the lands in tail, and hold and occupy them in purparty with her aunt. And this is for 2. cauſes: one is, for that the iſſue can have no remedy for the land ſold by the mother, becauſe the lād was to her in fee ſimple, & in as much as ſhe is one of the heirs in tail, & hath no recompēce of that which belongeth to her of the lands in taile, it is reaſon.

reaſon

reason que el eit sa purparty ō les tenūts tailes, & nosmemēt quant tiel partition ne fait ascun discontinuance.

¶ Mes le contrary est tenus M. 10 H. 6 s. que le heire ne poit enter sur l'Parcener que ad la terre taile, mes est mis a Formedon. *

that shee hath her portion of the Lands tailed, and namely when such partition doth not make any discontinuance.

¶ But the contrary is holden *M.* 10 *H.* 6. s. that the heir may not enter upon the parcener who hath the intailed land, but is put to a *Formedon*.*

ter had a gift in tail, for the Reversion expectant upon an estate taile is of no account in Law, for that it may be cut off by the Tenant in taile. Otherwise it is of an estate for life or years. If in this case the youngest Daughter alien part of the Land in fee-simple, and dieth, so as full recompence for the land entailed descends not to her issue, she may waive the taking of any profits thereof, and enter into the Land entailed, for the issue in tail shall never be barred without a ful recompence, though there be a warranty in Deed or in Law descended. If on the other side the eldest Coparcener alien the land entailed and dyeth, her Issue shall have a Formedon alone for the whole land entailed; for so long as the partition continueth in force, she is only inheritable to the whole land in tail.

¶ *Et nad my ascun recompence.* This is intended, as it appeareth, of a full Recompence.

¶ *Tiel partition ne fait ascun discontinuance.* And the reason thereof is, for ꝑ it passeth not by Livery of seisin, but the partition is in truth less than a grant, for that it maketh no degree, but each Coparcener is in by descent from the common Ancestor.

See more of this in the Chapter of discontinuance. Section.

¶ *Mes le contrary est tenus, &c.* This is no part of Littleton, and is contrary to Law, as appeareth by Littleton himself, and besides, the case intended is not truly vouched, for it is not in 10 H.6. but in 20 H.6. and yet there it is but the opinion of Newton, obiter, by the way. Vide F.tit.part 1.

20 H.6.14.

## *Sect.* 261.

UN auter cause est, pur ceo q̄ il serra retē la folly del eign soer que il voit suffer ou agree a tiel partition, ou el puissoit aver si el voile, la moitie de la terre en fee simple, & son moitie des tenements en le taile, pur sa purparty, & issint estre sur sans damage.

ANother reason is, for that it shall be accounted the folly of the eldest sister that she would suffer or agree to such a partition, where she might if shee would have had the moity of the Land in Fee Simple, and a moity of lands entailed for her part, and so to be sure without losse.

¶ *UN auter cause, &c.* This is another reason to prove ꝑ by the partition the eldest daughter hath concluded her self as is aforesaid.

¶ *Son moitie des terres en le tail.* For if a writ of Partition had bin brought, the eldest should not have bin compelled to take the whole estate in tail, for ꝑ prejudice that might after ensue, but might have challenged the one moity of the Lands in tail, and another moity of the Lands in Fee simple, & this she might do ex provisione legis. But when she will not submit her to the policy, and provision of the Law, but betake her self to her own policy and provision, there the Law will not aid her, as here Littleton it manifestly appeareth. And so it is in the other case. (†) As if a man be seised of three Mannors of equal value in fee, and taketh wife, and chargeth one of the Mannors with a Rent charge, and dyeth, she may by the provision of ꝑ Law take a third part of all the Mannors and hold them discharged, but if she will accept the entire Manor charged, it is holden that she shall hold it charged.

(†) 26 E.3. dower 133. 17 E.2.tit. dower 164. 18 H.6.27.

Dyer 1 Mar. 98.

A partition of lands intailed between Parceners, if it be equal at the time of the partition ſhall bind the iſſues in tail for ever, albeit the one do alien her part.

But here it may be demanded, that ſeeing Littleton ſaith, that it ſhall be taken to be the folly of the eldeſt Parcener, &c. what if ſo be the eldeſt did not know of the eſtate tail either in reſpect of the antiquity thereof, or for want of having of the evidence, or for any other cauſe, what folly can be imputed to her?

The anſwer is, That it is preſumed in Law, that every one is conuſant of her right and title to her own land, and on the other ſide it ſhould be arrected great folly in her to be ignorant of her own title. And therefore the reaſon of Littleton doth firmly hold.

## *Sect.* 262.

BEfore it appeareth that when the privity of the eſtate is deſtroyed by the feoffment of one Coparcener, that upon eviction of a moity by force of an entail againſt the other, ſhe ſhall not enter upon the alienee. But in this caſe that Littleton here putteth, when the privity of the ſtate remaineth, and the part of the one is evicted, (†) ſhe ſhall enter and hold in Coparcenary with her other coparcener, and ſo it is in the caſe of an exchange. By reaſon of the (&c.) in the end of this Section, there may two queſtions be juſtly demanded; What if the whole eſtate in part of the purparty of one Parcener be evicted by a title paramount? whether is the whole partition avoided, for that Littleton here putteth the caſe, that the whole purparty of the one is defeated?

(†) 15 E. 4. 3. a. per Littleton fi. 4. fol. 121, 122. Baids caſe.

The ſecond queſtion is, whether if but part of the ſtate of one Coparcener be evicted, as an eſtate in tail, or for life, leaving a Reverſion in the coparcener, whether that ſhall avoyd the partition in the whole?

To the firſt it is anſwered, that if the whole eſtate in part of the purparty be evicted, that ſhall avoid the partition in the whole, be it of a Mannor, that is entire, or of acres of ground, or the like, that be ſeverall; (n) for the partition in that caſe implyeth, for this purpoſe both a warranty and a condition in Law, and either of them is entire, and giveth an entire in this caſe into the whole. And ſo hath

(n) 13 E. 4. 3. 42. Aſſ. 22.

CAry ſi home ſoit ſeiſe en fee dun carve de terre per juſt title, & diſſeiſiſt un enfant deins age dun auter carve, & ad iſſue deux files, & mozuſt ſeiſie dambideux carves, lenf. adonqz eſteant deins age, & les files entront & font partition, iſſint q̄ lun carve eſt allotte al purparty lun, come per caſe al puiſne en allowāce dauter carve que eſt allotte a le purparty de lauter, ſi puis lenf. enter en le carve dont il fuit diſſeiſiſt ſur l'poſſeſſion la Parcener que ad meſme le carve, donqz m̄ le Parcener poit entrer en lauter carve que ſa ſoer ad, & tener en Parcenary ovelqz luy: Mes ſi le puiſne aliena m̄ la carve a un auter en fee ſimple devant lentrie lenf. & puis lenf. enter ſur le poſſeſſion lalienee, don-

ALſo if a man bee ſeiſed in fee of a carve of land by juſt title, and hee diſſeiſe an Infant within age of another Carve, and hath iſſue two daughters, and dyeth ſeiſed of both Carves, the Infant being then within age, and the daughters enter and make partition, ſo as the one Carve is allotted for the part of the one (as per caſe to the youngeſt in allowance of the other Carve which is allotted to the purparty of the other) if afterward the Infant enter into the Carve whereof he was diſſeiſed upon the poſſeſſion of the Parcener which hath the ſame Carve, then the ſame parcener may enter into the other Carve which her ſiſter hath, and hold in Parcenary with her. But if the yongeſt alien the ſame Carve to another in fee before the entry of

que

que el ne poit enter en lauter carve, pur ceo que per ſon alienation el ad luy tout ouſterment diſmiſſe. daver aſcun part de les tenements come parcener. Mes ſi le puiſne devant lentrie lenfant fait de ceo un leaſe pur terme dans, ou pur terme de vie ou en fee tayle, ſavant la reverſion a luy, & puis lenfãt enter, la peradventure auterment eſt, pur ceo que el ne ſoy diſmiſſe de tout ceo que fuit en luy, mes ad reſerve a luy le Reverſion et le fee, &c.

the Infant, and after the Infant enter upon the poſſeſſion of the Alienee, then ſhe cannot enter into the other carve, becauſe by her alienation ſhe hath altogether diſmiſſed her ſelfe to have any part of the Tenements as Parcener. But if the youngeſt before the entry of the Infant make a Leaſe of this for terme of years, or for terme of life, or in Fee Tayle, ſaving the reverſion to her and after the Infant enter, there peradventure otherwiſe it is, becauſe ſhe hath not diſmiſſed her ſelf of all which was in her, but hath reſerved to her the reverſion, and the fee, &c.

it bẽn lately reſolved (o) both in the caſe of exchange and of the partition.

(o) Baſtards caſe. Lib. 4. fol. 121.

To the ſecond, if any eſtate of freehold be evicted from the Coparcener in all or part of her purparty, it ſhall be aboyded in the whole. As if A. be ſeiſed in fee of one acre of land in poſſeſſion, and of the reverſion of another expectant upon an eſtate for life, and he diſſeiſe the Leſſee for life, who makes continuall claim. A. dyeth ſeiſed of both Acres, and hath Iſſue two Daughters, partition is made, ſo as the one Acre is allotted to the one, and the other Acre to the other, the Leſſees enter, the partition is aboided for the whole, and ſo likewiſe hath (p) it bẽn lately reſolved.

(p) Baſtards caſe, ubi ſupra.

(q) Yet there is a diverſity betwẽn the warranty, and the condition which the Law createth upon the partition, where one Coparcener taketh benefit of the condition in law ſhe defeateth the partition in the whole.

(q) Vid. 5 E. 3. tit. vouch. 249.

But when ſhe voucheth by force of the warranty in Law for part, the partition ſhall not be defeated in the whole, but ſhe ſhall recover recompence for that part. And therein alſo there is another diverſity betwẽn a recovery in value by force of the warranty upon the exchange, and upon the partition: for upon the exchange he ſhall recover a full recompence for all that he loſeth: But upon the partition ſhe ſhall recover but the moity, or half that which is loſt, to the end, that the loſſe may be equal.

Many other diverſities there be betwẽn exchanges and partitions, for there are more and greater nicities in caſe of partition in perſons, blood, and eſtates, than there is in exchanges, all which were too tedious to rehearſe in this place, ſeeing ſo much as hath bẽn ſaid herein is ſufficient for the explanation of the caſes of partition which Littleton hath put.

18 E. 2. tit. aid 171. 19 H. 6. 26.

¶ *Donques el ne poet enter en lauter carve, &c.* By this is alſo approved, that which hath bẽn often ſaid before, that when the whole nicity betwẽn Coparceners is deſtroyed, there ceaſeth any recompence to be expected either upon the condition in Law, or warranty in Law by force of the partition.

¶ *Per ſon alienation el ad luy tout ouſterment diſmiſſe daver aſcun part de les tenements come parcener.* Hereupon it followeth, that if one Parcener maketh a feoffment in fee, and after her feoffee is impleaded and voucheth the Feoffor, (r) ſhe may have ayd of her Coparcener to deraign a warranty Paramount, but never to recover pro rata againſt her by force of the warranty in Law upon the partition; for here Littleton ſaith, that by her alienation ſhe hath diſmiſſed her ſelf to have any part of the Land as Parcener. And without queſtion as Parcener ſhe muſt recover pro rata, upon the warranty in Law againſt the other Parcener.

(r) 41 E. 3. 24. 11 H. 4. 22, 23. 14 E. 3. aid 24.

And yet in ſome caſe the Feoffee of one Coparcener ſhall have aid of the other Parceners to deraign the warranty paramount; and therefore (a) if there be two Coparceners, and they make partition, and the one of them infeoffs her ſonne and heir apparant, and dieth, the ſonne is impleaded, albeit he be in by the feoffment of his mother; yet ſhall he pray in aid of the

(a) 43 E. 3. 23. Pl. Com. 4 E. 3. 15. 5 E. 3. 7. 38 E. 3. 17. &c.

(b) 32 E 1 tit Aid.178. 3 E.2. ibid.163. the other Coparcener to have the warranty Paramount; and the reaſon (b) of the granting of this aid is, for that the warranty betwixt the mother and the ſon is by Law annulled, and therefore the Law giveth the ſon, albeit he be in by feoffment to pray in aid of the other parcener, to deraign the Warranty Paramount, wherein is to be obſerved the great equity of the Common Law in this caſe.

Ipſæ etenim leges cupiunt ut jure regantur.

(†) 2 H.6.16. (†) But if a man be ſeiſed of lands in fée and hath iſſue two daughters, and make a gift in Tail to one of them, and dy ſeiſed of the reverſion in fée which deſcends to both ſiſters, and the Donée or her iſſue is impleaded, ſhe ſhall not pray in-ayd of the other Coparcener either to recover Pro rata, or to deraigne the warranty Paramount, for that the other ſiſter is a ſtranger to the ſtate Tail, whereof the eldeſt was ſole Tenant, and never partition was or could be thereof made.

¶ *Mes ſi le puiſne devant lentrie lenfant fait de ceo un leaſe,&c. ou en fee taile ſavant le reverſion a luy,&c.* This (upon that which hath bin ſaid) needeth no explanation. Only this is to be obſerved, that albeit it is in the power of Tenant en tail to cut off the reverſion, yet if the infant enter before it be cut off, the Law hath ſuch conſideration of this reverſion, that ſhe that loſeth it ſhall enter into her ſiſters part, and hold with her in Coparcenary, for that the privity betwixt them was not wholly deſtroyed.

## *Sect.* 263.

¶ ITem ſi ſoient trois ou quater parceners, &c. q̃ font partition enter eux, ſi le part dun parcener ſoit defeat p̃ tiel loyal entrie, el poit enk̃ & occupier lauter terres oveſq̃ touts les auters parceners, & eux compell' de fair novel partition de lauters terres, enter eux, &c.

ALſo if there be three or four Coparceners, &c. which make partition between them, if the part of the one Parcener be defeated by ſuch lawfull entry, ſhe may enter and occupy the other lands with all the other Parceners, and compel them to make new partition between them of the other lands, &c.

¶ INter eux,&c. This (&c.) implyeth, that ſo it is betwixt the ſurviving parceners, and the heirs of the other, or betwixt the heirs of Parceners, all being dead.

## *Sect.* 264.

¶ LE *Baron ſoy tient eins come tenant per le curteſie.*

This is no ſeverance of the ſtate in Coparcenary, (b) for the other Coparcener and the Tenant by the Courteſy ſhall be joyntly impleaded, for he doth continue the ſtate of Coparcenary, as the other Parcener did.

(b) 24 E.3.29. 31 E.3. Briefe 339. 9 E.4.13. 19 H.6.26. 3 H.6. Aſſ.1.37 H.6.8.21 E.3.11.

¶ *Vers le tenant*

¶ ITem ſi ſont deux parceners, & lun prent baron, & le baron & ſa feme ont iſſue enter eux, & la feme devy, & le baron ſoy tient eins en le moity com̃ tenãt per le curteſie, en ceo cas le parcener q̃ ſurveſquiſt, & le tenant per le curteſie bien poiẽt faire par-

ALſo if there bee two parceners, and the one taketh husband, and the Husband and Wife have Iſſue between them, and his wife dieth, and the husband keepes himſelfe in as Tenant by the curteſie, In this caſe the parcener which ſurvi-

tition

tition enter eux, &c. Et ſi le tenant per le curteſie ne voit agrear al partition deſire fait, donques le parcener que ſurvelquiſt poit aver envers le Tenant per le curteſie, briefe De partitione facienda &c. q̄ luy compeller de faire partition. Mes ſi le tenant per le curteſie voile aver partition enter eux deſire fait, & le parcener que ſurvelquiſt ne voit ceo aver, donque le Tenant per le curteſie navera alcū remedy pur aver partition, &c. Car il ne poit aver briefe De partitione facienda, pur ceo que il nest parcener, car tiel briefe gist pur Parceners tantſolement. Et iſſint poyes veyer que briefe De Partitione facienda gist envers tenant per le curteſie, & uncore il meſme ne poit aver tiel briefe.

veth, and the Tenant by the courteſie may well make partition between them, *&c.* And if the Tenant by the courteſie will not agree to make partition, then the parcener which ſurviveth may have againſt the tenant by the courteſie a writ *De partitione facienda, &c.* and compel him to make partition. But if the tenant by the courteſie would have partition to be made between them, and the parcener which ſurviveth will not have this, then the tenant by the courteſie cannot have any remedy to have partition, *&c.* For he cannot have a Writ of *partitione facienda*, becauſe he is no parcener. For ſuch a Writ lieth for parceners only. And ſo you may ſee that a Writ of *partitione facienda* lyeth againſt Tenant by the courteſie, and yet he himſelf cannot have the like Writ.

*per le curteſie briefe de partitione faciendâ, &c.* Here by the &c. is implied, that albeit the Tenant by the courteſie be an eſtranger in blood; yet the (c) writ De partitione fac' clearly lies againſt the tenant by the curteſie, becauſe he continueth the eſtate of coparcenary. (c) 3.E.3.47 9.E.5.13. 15.E.3.Aid.129.19.E.3 ib.144.

If two Coparceners be, and one doth alien in fee, they are tenants in common, and ſeveral writs of Præcipe muſt bee brought againſt them: and yet the parcener ſhall have a writ of partition againſt the alienæ at the common Law, which is a farre ſtronger caſe then the caſe put of Tenant by the Curteſie. 28.E.3.5.

¶ *Tiel briefe giſt pur Parceners tantſolement.* Hereby it appeareth, that neither the Tenant by the courteſie, nor (much leſſe) the Alienee of a Coparcener ſhall have a writ of Partitione fac' at the Common Law; for Littleton ſaith here, that ſuch a writ lyeth onely for Parceners, * but it may be brought by a Parcener againſt ſtrangers, as it appeareth before. (*)3.E.47.48.

But a Nuper obiit and a Rationabili parte doth lie only between two Coparceners on both ſides.

If three Coparceners be, and the eldeſt doth purchaſe the part of the youngeſt, the eldeſt having one part by deſcent, and the other by purchaſe, ſhall have a writ of Partition at the Common Law againſt the other middle ſiſter, Et ſic de ſimilibus. And ſo it is in a far ſtronger caſe, if there be three Coparceners, and the eldeſt taketh husband, and the husband purchaſe the part of the youngeſt, the husband for his part is a ſtranger and no Parcener; and yet he and his wife ſhall have a writ of Partition againſt the middle ſiſter at the Common Law, becauſe he is ſeiſed of one part in the right of his wife who is Parcener. Dyer.1.Mariæ 49. F.N.B.52.Regiſt.

¶ *Pur aver partition, &c.* Here by this (&c.) is included all others that be ſtrangers in blood, whether they come to their eſtates by purchaſe or by act in Law. Since Littleton wrote, by the Statutes (d) one Joyntenant or Tenant in common may have a writ of Partition againſt the other; and therefore at this day the Alienee of one Parcener may have a writ of Partition againſt the other Parcener, becauſe they are Tenants in common; and the like had been attempted in former Parliaments, (*) but prevailed not until theſe latter Statutes. (d)31.H.8.cap.1. 32.H.8.cap.32. Vide Sect.290. (*)Rot.Parl.1.R.2.nu. 81.

(e) The Tenant by the Courteſie ſhall have a writ of partition upon the Statute of 32.H. (e)Brook.tit.Partition 31.

(b) 32 E 1 tit Aid. 178. 3 E.2. ibid. 163.

the other Coparcener to have the warranty Paramount; and the reason (b) of the granting of this aid is, for that the warranty betwen the mother and the son is by Law annulled, and therefore the Law giveth the son, albeit he be in by feoffment to pray in aid of the other parcener, to deraign the Warranty Paramount, wherein is to be observed the great equity of the Common Law in this case.

Ipsæ etenim leges cupiunt ut jure regantur.

(†) 2 H.6.16.

(†) But if a man be seised of lands in fee and hath issue two daughters, and make a gift in Tail to one of them, and by seised of the reversion in fee which descends to both sisters, and the Donée or her issue is impleaded, she shall not pray in ayd of the other Coparcener either to recover Pro rata, or to deraigne the warranty Paramount, for that the other sister is a stranger to the state Tail, whereof the eldest was sole Tenant, and never partition was or could be thereof made.

¶ *Mes si le puisne devant lentrie lenfant fait de ceo un lease,&c. ou en fee taile savant le reversion a luy,&c.* This (upon that which hath ben said) needeth no explanation. Only this is to be observed, that albeit it is in the power of Tenant en tail to cut off the reversion, yet if the infant enter before it be cut off, the Law hath such consideration of this reversion, that she that loseth it shall enter into her sisters part, and hold with her in Coparcenary, for that the privity betwen them was not wholly destroyed.

## *Sect.* 263.

¶ Item si soient trois ou quater parceners, &c. q̄ font partition enter eux, si le part dun parcener soit defeat p̄ tiel loyal entrie, el poit enē & occupier lauter terres ovesq̄ touts les auters parceners, & eux compell' de fair novel partition de lauters terres, enter eux, &c.

ALso if there be three or four Coparceners, &c. which make partition between them, if the part of the one Parcener be defeated by such lawfull entry, she may enter and occupy the other lands with all the other Parceners, and compel them to make new partition between them of the other lands, &c.

¶ *Inter eux,&c.* This (&c.) implyeth, that so it is betwen the surviving parceners, and the heirs of the other, or betwen the heirs of Parceners, all being dead.

## *Sect.* 264.

¶ *Le Baron soy tient eins come tenant per le curtesie.*

This is no severance of the state in Coparcenary, (b) for the other Coparcener and the Tenant by the Courtesy shall be joyntly impleaded, for he doth continue the state of Coparcenary, as the other Parcener did.

(b) 24 E.3.29. 31 E.3. Briefe 339. 9 E.4.13. 19 H.6.26. 3 H.6.26 3 H.6. Ass.1.37 H.6.8.21 E.3.11.

¶ *Vers le tenant*

¶ Item si sont deux parceners, & lun prent baron, & le baron & sa feme ont issue enter eux, & la feme devy, & le baron soy tient eins en le moity com̄ tenāt per le curtesie, en ceo cas le parcener q̄ survesquist, & le tenant per le curtesie bien poiēt faire par-

ALso if there bee two parceners, and the one taketh husband, and the Husband and Wife have Issue betwen them, and his wife dieth, and the husband keepes himselfe in as Tenant by the curtesie, In this case the parcener which survi-

tition

tition enter eux, &c. Et ſi le tenant per le curteſie ne voit agréer al partition deſire fait, donques le parcener que ſurveſquiſt poit aver envers le Tenant per le curteſie, briefe De partitione facienda &c. & luy compeller de faire partition. Mes ſi le tenant per le curteſie voile aver partition enter eux deſire fait, & le parcener que ſurveſquiſt ne voit ceo aver, donque le Tenant per le curteſie navera alcũ remedy pur aver partition, &c. Car il ne poit aver briefe De partitione facienda, pur ceo que il nest parcener, car tiel briefe giſt pur Parceners tantſolement. Et iſſint poyes veyer que briefe De Partitione facienda giſt envers tenant per le curteſie, & uncore il meſme ne poit aver tiel briefe.

veth, and the Tenant by the courteſie may well make partition between them, *&c.* And if the Tenant by the courteſie will not agree to make partition, then the parcener which ſurviveth may have againſt the tenant by the courteſie a writ *De partitione facienda, &c.* and compel him to make partition. But if the tenant by the courteſie would have partition to be made between them, and the parcener which ſurviveth will not have this, then the tenant by the courteſie cannot have any remedy to have partition, *&c.* For he cannot have a Writ of *partitione facienda*, becauſe he is no parcener. For ſuch a Writ lieth for parceners only. And ſo you may ſee that a Writ of *partitione facienda* lyeth againſt Tenant by the courteſie, and yet he himſelf cannot have the like Writ.

*per le curteſie briefe de partitione faciendâ, &c.* Here by the &c. is implied, that albeit the Tenant by the courteſie be an eſtranger in blood; yet the (c) writ De partitione fac' clearly lies againſt the tenant by the courteſie, becauſe he continueth the eſtate of coparcenary. (c) 3.E.3.47 9.E.5.13. 16.E.3.Aid.129. 19.E.3 ib.144.

If two Coparceners be, and one doth alien in fee, they are tenants in common, and ſeveral writs of Præcipe muſt bee brought againſt them: and yet the parcener ſhall have a writ of partition againſt the alienee at the common Law, which is a farre ſtronger caſe then the caſe put of Tenant by the Curteſie. 28.E.3.5.

¶ *Tiel briefe giſt pur Parceners tantſolement.* Hereby it appeareth, that neither the Tenant by the courteſie, nor (much leſſe) the Alienee of a Coparcener ſhall have a writ of Partitione fac' at the Common Law; for Littleton ſaith here, that ſuch a writ lyeth onely for Parceners, * but it may be brought by a Parcener againſt ſtrangers, as it appeareth before. But a Nuper obiit and a Rationabili parte doth lie only between two Coparceners on both ſides. (*) 3.E.47.48.

If three Coparceners be, and the eldeſt doth purchaſe the part of the youngeſt, the eldeſt having one part by deſcent, and the other by purchaſe, ſhall have a writ of Partition at the Common Law againſt the other middle ſiſter, Et ſic de ſimilibus. And ſo it is in a far ſtronger caſe, if there be three Coparceners, and the eldeſt taketh husband, and the husband purchaſe the part of the youngeſt, the husband for his part is a ſtranger and no Parcener; and yet he and his wife ſhall have a writ of Partition againſt the middle ſiſter at the Common Law, becauſe he is ſeiſed of one part in the right of his wife who is Parcener. Dyer.1.Mariæ 49. F.N.B.52.Regiſt.

¶ *Pur aver partition, &c.* Here by this (&c.) is included all others that be ſtrangers in blood, whether they come to their eſtates by purchaſe or by act in Law. Since Littleton wrote, by the Statutes (d) one Joyntenant or Tenant in common may have a writ of Partition againſt the other; and therefore at this day the Alienee of one Parcener may have a writ of Partition againſt the other Parcener, becauſe they are Tenants in common; and the like had been attempted in former Parliaments, (*) but prevailed not until theſe latter Statutes. (d) 31.H.8.cap.1. 32.H.8.cap.32. Vide *Sect.* 290. (*) Rot.Parl.1.R.2.nu. 81.

(e) The Tenant by the Courteſie ſhall have a writ of partition upon the Statute of (e) Brook.tit.Partition 31.

32.H.8.cap.32.for albeit he is neither Joyntenant nor Tenant in Common,for that a Præcipe lyeth against the Parcener and Tenant by the Courtesie, as hath been said, yet he is in equal mischief as another Tenant for life.

(f) Mich.7.& Eli. Bendloes,inter Wotton and Cook. Dyer 3.Mariæ.128.A.& 7.Eliz.243.

(f) If there be three Coparceners, and a stranger purchase the part of one of them,he and one other of the Coparceners shall not joyn in a Writ of Partition,neither by the Common Law,nor by force of the Statute;for the words of the Preamble of the Statute be (And none of them by the Law doth or may know their several parts, *&c.* and cannot by the Laws of this Realm make partition thereof, without other of their mutual assents, *&c.*)

Now in this case the one of the Plaintiffs, viz. the Parcener may have a Writ of Partition at the Common Law, and the other Parcener being a purchaser may have it by the Statute; and therefore they shall not joyn in one Writ.

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## CHAP. 2. Parceners by Custom. *Sect.265.*

¶ *MEs il covient en le Declaration de faire mention de le custome.*

See before all the antient Authors of the Law concerning Gavelkind, ubi supra. Lambert verbo Terra exscript.

Well said Littleton,(g)That he in his Declaration must make mention of the Custome, as to say, That the Land is of the Custome of Gavelkind, but he shall not prescribe in it. And so is it of Burgh English,and these two vary in that point from other customes; for the Law, when they are generally alledged, taketh knowledge of these two.

(g)5.E.4.8.b.21.E.4. 55.b.Pl.Com.129.b. in Buckleys case. Vide Sect.8.versus finem.

In (h) Domesday it is thus said, Duo fratres tenuerunt in paragio, quisque habuit aulam suam, & potuerint ire quo voluerint:

(h) Herocheſcire Hereford.

¶ *Auxy tiel custome est en auters lieux Angleterre.* Of this sufficient hath been said before.

¶ *North Gales.*

Wales, Wallis, It commeth (i) of the Saxon word Weals, which signifieth peregrinus, or exterus, for the Saxons so called them, because in troth they were strangers to them,being the remain of the old and antient Britains, a wise and warlike Nation, inhabiting in the west part of England. These men have kept their proper language for above these thousand yeers past, and they to this day call us Englishmen, Saisons, (that is) Saxons. And the like Custom, as our Author here saith,was in North-Wales, was also in Ireland, for there the Lands also (which is one mark of the antient Britains) were of the nature of Gavelkind: but where by their Brehon Law the Bastards,

(i) Lamb.verb.Welchmen Silvester Giraldus.

¶ PArceners per le custome sont lou home seisie ẽ fee simple, ou ẽ fee taile d̃ terr̃s ou tenemẽts q̃ sont d̃ tenur̃ appel Gavelkinde deins l'Coũty de Kẽt, & ad issue divers fits & devie,tiels terr̃s du tẽements discenderõt a touts les fits per le custome & obelment enheriterõt & ferront ptition enter eux per le custome, sicome females ferront, & hee de Partitione facienda gist en ceo cas, sicome enter females, mes il covient en la declaration de faire mention de l'custom. Auxy tiel custome est en auters lieux Dẽgleterr̃. Et auxy tiel custome est North Gales, &c.

PAarceners by the Custom are,where a man seised in Fee simple, or in fee taile, of Lands or Tenements which are of the Tenure called *Gavelkinde* within the County of *Kent*, and hath issue divers sons and dye, such Lands or Tenements shall descend to all the sons by the Custom, and shall equally inherit and make partition by the custom, as females shall do, and a writ of Partition lieth in this case as between females, but it behooveth in the Declaration to make mention of the Custome. Also such Custom is in other places of *England*, and also such custom is in *North Wales*, *&c.*

ſtards inherited with their legitimate ſons, as to the Baſtards that cuſtom was aboliſhed. And agreeing with Littleton in this point, ſee an old Statute. * Aliter uſitatum eſt in Wallia, quam in Anglia, quoad ſucceſſionem hæreditaris, eo quod hæreditas partibilis eſt inter hæredes maſculos, a tempore cujus non extitit memoria, partibilis extitit, Dominus Rex non vult quòd conſuetudo illa abrogetur, ſed quòd hæreditates remaneant partibiles inter conſimiles hæredes ſicut fieri conſuevit, & fiat partitio illius ſicut fieri conſuevit. Vide *Sect.* 212. * Stat. walliæ, an. 12. E. 2

¶ *Parceners per le Cuſtom, &c.* Well ſaid Littleton, By the Cuſtom, for ſons are Parceners in reſpect of the cuſtom of the Fee or Inheritance, and not in reſpect of their perſons, as daughters and ſiſters, &c. be. (h) Et ſunt participes quaſi partem capientes, &c. ratione ipſius rei quæ partibilis eſt, & non ratione perſonarum, quæ non ſunt quaſi unus hæres, & unum corpus, ſed diverſi hæredes, ubi tenementum partibile eſt inter plures cohæredes petentes qui deſcendunt de eodem ſtipite, & ſemper ſolent dividi ab antiquo. (h) Bract. li. 5. fol. 428. Brit. cap. 71. Fleta, lib. 5. cap. 9.

## *Sect.* 266.

¶ Item, il y ad auſ partiē quel eſt dauter nature & dauter form que aſcuns des partitiōs avañt-dits ſons. Sicome home ſeiſie de certain Terres en fée ſimple, ad iſſue deux files & leigne eſt mary, & le piere dona parcel de ſes terres a le baron oue ſa file en Frankmarriage, & mozuſt ſeiſin d̄ le remnant, le quel remnant eſt de pluis greinder value per an. q̄ ſont les terres dones en Frankmarriage.

Alſo, there is another partition which is of another nature, and of another form, then any of the partitions aforeſaid be. As if a man ſeiſed of certain Lands in Fee ſimple, hath iſſue two daughters, and the eldeſt is married, and the father giveth part of his Land to the Husband with his Daughter in Frankmarriage, and dieth ſeiſed of the remnant, the which remnant is of a greater yearly value then the lands given in Frankmarriage.

¶ *Dona parcel de ſes terres a le baron oue ſa file en frankmariage.*

Here it appeareth, that a gift in Frankmarriage may bee made after marriage; as hath been ſaid in the Chapter of Fee tail.

¶ *Le quel remnant eſt de plus greinder value per an. &c.*

Admit that the lands given in Frankmarriage are of greater value then the lands deſcended in Fee ſimple, ſhall the other ſiſter have any remedy againſt the Donees? it is plaine ſhe ſhall not, becauſe it is lawful for a man to diſpoſe of his own lands, at his will and pleaſure.

## *Sect.* 267.

¶ En ceſt caſe le baron ne le femē avera reins pur lour purpartie de le dit remnant, ſinon que ils voile mitter lour fres dones en frankmarriage en Hotchpot, quelque le rem-

IN this caſe neither the husband nor wife ſhall have any thing for their purparty of the ſaid Remnant, unleſſe they will put their lands given in Frankmarriage, in *Hotchpot*, with the remnant of the

¶ *En ceſt caſe le Baron ne le Feme avera riens pur lour purpartie, &c.* (i) This gift in Frankmariage ſhall prima facie be intended a ſufficient advancement; and therefore the remnant ſhall deſcend to the other Coparcener only, with this proviſion & Law tacite annexed, that if the Donees (i) 8. H. 3. breve 880. 34. E. 1. nuper oblit 15. adjudge 4. E. 3. 49. 10. Aſſ. p. 14. Vide 10. E. 3. 38 & 30. Aſſ. 7. Bracton lib. 2. fol. 77. Lib. 5. fol. 428. Brit. c. 72. Fleta, lib. 6. cap. 47.

nees will put the Land into Hotchpot, then she shall out of the remnant make up her part equal, but the Donees must do the first act, and in the mean time the whole fee simple land descends to the other. And this is warranted here by Littleton, viz. That the Donees shall have nothing for the purparty of the remnant, unlesse they will put their Lands given in Frankmarriage in Hotchpot, so as the Donees must do the first act; and more expresly after in this Chapter, where he directly saith, That the other sister shall enter into the remnant, and then to occupy to her own use, unlesse the husband and wife will put the lands given in Frankmariage into Hotchpot. And herewith agreeth Fleta, who saith, Cum dicat tenens excipiendo, quòd non tenetur petenti respondere, quia A. participem habet, &c. replicari poterit à petente quòd prædict. A. tenet quandam partem in maritagium de communi hæredit. nec vult illud in partem ponere. And here are three things (that I may speak once for all,) to be observed. First, That in this spectall case, where there be two daughters, one of them only shall inherit the lands in fee simple. Secondly, that in this case there lyeth no writ of Partition, because non tenent in simul & pro indiviso. Thirdly, if the Parcener to whom the land in fee simple descended, will not put the lands in Hotchpot, then may the Donees enter into the fee simple lands, and hold them in Coparcenary with her.

nant de la terre ouesq; la soer. Et si issint ils ne voilent faire, donq; puisne poit tener & occupier in le remnande, & prendra a luy les profits tantsolement. Et il semble que cest parol (Hotchpot) est en English, A Pudding; car en tiel Pudding nest communement mies un chose tantsolemt, mes un chose ouesq; auks choses ensemble. Et pur ceo il covient en tiel case de mitter les Terres dones en frankmariage ouesque les auters terres en Hotchpot, si le Baron & sa Feme voilent aver ascun pt en les auks tres.

land with her sister. And if they will not do so, then the youngest may hold and occupy the same remnant, and take the profits only to her self. And it seemeth that this word (*Hotchpot*) is in English, *A Pudding*; for in this *Pudding* is not commonly put one thing alone, but one thing with other things together. And therefore it behooveth in this case to put the Lands given in frankmarriage with the other Lands in *Hotchpot*, if the husband and wife will have any part in the other Lands.

(k) Glanvil.lib.7.cap.5 Bract.li 2.fol.60. Fleta lib.2.cap 5. Magna Carta cap. 18. F.N.B.222.30.E.3.25. 31.E.3.Resp.60.31.Ass. 14.17.E.2.Detinue.17. E.3.17.1.E.2 Detinue. 56.31.H.8.tit. rationabili parte bonorum,6. * Lam.fol.119.68.

(k) And it seemeth by our old books, (k) That by the antient Law there was a kind of resemblance here of concerning goods. Si autem post debita deducta, & post deductionem expensarum quæ necessariæ erunt, id totum quod tunc superfuerit dividatur in tres partes, quarum una pars relinquatur pueris si pueros habuerit defunctus. Secunda Uxori, si superstes fuerit; & de tertia parte habeat testator liberam disponendi facultatem: si autem liberos non habeat, tunc medietas defuncto, & alia medietas uxori: si autem sine uxore decesserit liberis existentibus, tunc medietas defuncto, & alia medietas liberis tribuatur: si autem sine uxore & liberis, tunc id totum defuncto remanebit. And by the Law before the * Conquest it was thus provided, Sive quis in curia, sive morte repentina fuerit intestatus mortuus, dominus tamen nullam rerum suarum partem (præter eam quæ jure debetur) herioti nomine sibi assumito, verum eas judicio suo uxori, liberis, & cognatione proximis, juste pro suo cuique jure distribuito.

(l) Regist.142. 34.E.1. Detinue 60 1.E.4.6.7. E.4.21.43.E.3.38. (m) 3.E 3.Detinue,156 40.E.3.18.

But it appeareth by the Register, (l) and many of our Books, that there must be a custom alledged in some County, &c. to inable the wife or children to the writ de rationabili parte bonorum; and so hath it been resolved in Parliament. (m) But such children as be reasonably advanced by the father in his life time with any part of his goods, shall have no further part of his goods; for the words of the writ be, Nec in vita patris promoti fuerunt.

Note, the custom of London is, That if the Father advance any of his children with any part of his goods, that shall bar them to demand any further part, unlesse the father under his hand, or in his last will do expresse or declare, That it was but in part of advancement; and then that child so partly advanced shall put his part in Hotchpot, with the Executors and Widow, and have a full third part of the whole, accounting that which was formerly given unto him as part thereof. And this is that in effect, which the Civilians call Collatio bonorum.

¶ *Et il ſemble que ceſt Parol* (Hotchpot) *eſt en Engliſh*, a Pudding, *&c.* Littleton both here and in other places ſearcheth for the ſignification of words, in all Arts a thing moſt neceſſary, for ignoratis terminis ignoratur & ars. Vide for Etymologies, Sect. 95, 119, 135, 154, 164, 204, 3', &c.

¶ *Hutſpot* or *Hotſpot*, is an old Saxon word, and ſignifieth ſo much as Littleton here ſpeaks. And the French uſe Hotchpot for a commixtion of divers things together. It ſignifieth here metaphorically in partem poſitio. In Engliſh we uſe to ſay Hodge-podge, in Latine Farrago, or Miſcellaneum. Vide Brit. cap. 72. 4. E. 3. 49. 6. E. 3. 30. 10. E. 3. 38. 24. E. 3. 27. F. N. B. 262. Regiſt. 320. Fleta lib. 6. cap. 47. Mich. 10. E. 1. coram Rege Hereford in Theſaur.

The reſidue of this Section needeth no explication.

## *Sect.* 268.

¶ ET teſt terme (Hotchpot) neſt forſqz un terme ſimilitudinarie, & eſt a tant adire, teſtalcaboir, de mitter les terres en Frankmariage, & le auters terres en fee ſimple enſemble, & ceo eſt a tiel etent de conuſſer le value de touts les terres, ſ. de les terres dones en Frankmariage, & de le remnant que ne fueront dones, & donqz partitiõ ſerra fait en le forme que enſuit. Sicome, mittomus que home ſoit ſeiſie de 30. acres de terre en fee ſimple, chelcun acre de value de 12. d. per an. & que il ad iſſue deux files, & lun eſt covert de baron, le pier dona 10. acres de les 30. acres a le baron, ove ſa file en Frankmariage, & moruſt ſeiſie de l'remnant, dõques lauter ſoer entra en le remnant, ſ. en les 20. acres & eux occupier, a ſon uſe demeſn, ſi non que le baron & la feme voil mitter les 10. acres dones en Frankmariage, ove les 20. acres en Hotchpot, teſtalcaboir, enſemble, & donque quand le value de chelcun acre eſt conus, teſtalcaboir que chelcũ acre vault per an. & eſt aſſeſſe, ou enter eux agree, que chelcun acre vault p an. 12. d. donques le partition

AND this terme (*Hotchpot*) is but a term ſimilitudinary, and is as much to ſay, as to put the lands in Frankmarriage, and the other Lands in Fee ſimple together; and this is for this intent, to know the value of all the lands, *ſc.* of the Lands given in Frankmarriage, and of the remnant which were not given, and then partition ſhall be made in form following. As, put the caſe that a man be ſeiſed of 30. Acres of land in Fee ſimple, every Acre of the value of 12. pence by the year, and that he hath iſſue two Daughters, and the one is Covert baron, and the father gives ten Acres of the 30. Acres to the Huſband with the Daughter in Frankmarriage, and dyeth ſeiſed of the remnant, then the other ſiſter ſhall enter into the remnant, *viz.* into the 20. Acres, and ſhall occupy them to her own uſe, unleſſe the husband and his wife will put the ten acres given in Frankmarriage, with the twenty acres in *Hotchpot*, that is to ſay, together; and then when the value of every Acre is known, to wit, what every Acre valueth by the year, and is aſſeſſed or agreed between them, that every acre is worth by the year twelve pence; Then the partition ſhall be

ſerra fait en tiel ſorme, teſtaſcadoit le baron & la feme aberont oultre les 10. acres dones a eux en Frankmarriage 5. acres en ſeveraltie de les 20. acres, & lauter ſoer abera le remnant, ſ. 15. acres de les 20. acres pur la purpartie, iſſint que accomptãt les 10. acres que le baron & la feme ount per le done en Frankmarriage, & les auters 5. acres de les 20. acres, le baron & la feme ont autant en ãnual value, que lauter ſoer ad.

made in this manner, *viz.* the Husband and Wife ſhall have beſides the ten acres given to them in Frankmarriage five Acres in ſeveralty of the 20. Acres, and the other ſiſter ſhall have the remnant, *viz.* 15. Acres of the 20. Acres for her purparty, ſo as accounting the ten Acres which the Baron and Feme have by the gift in Frankmarriage, and the other five Acres of the 20. Acres, the husband and wife have as much in yearly value as the other ſiſter.

¶ AND herewith in expreſſe terms agreeth Bracton, Britton, and Fleta, and all the books abovesaid, and many others. And it is worthy the obſervation (n) that after this putting into Hotchpot, and partition made, the Lands given in Frankmarriage, are become as the other Lands which deſcended from the common Anceſtor; and of theſe lands if ſhe be impleaded (o) ſhe ſhall have aid of the other Parcener, as if the ſame Lands had deſcended. So the Coparcener that hath a Rent granted to her for dweity of partition, as is aforeſaid, hath the Rent, as if it had deſcended to her from the common Anceſtor.

Bract. li 2. fol. 77 lib. 5. fol. 428. Brit. cap. 72. & Fleta lib. 6. cap. 47. 4. E. 3. 49. 10. E. 3 37.
(n) 10. E. 3. 37, 10. Aſſ. 14. 4. E. 3. 49.
(o) 29. Aſſ. 23.

## Sect. 269.

ET iſſint touts foits ſur tiel partition, les terres dones en Frankmarriage demurgent a les donées & a lour heires ſolonqz le ſorme de le done. Car ũ lauter Parceñ aũoit riens de ceo que eſt done en Frankmarriage, de ceo enſueroit inconveniens, & choſe ecounter reaſõ, que la ley ne doit ſuffer. Et la cauſe pur que les terres dones en Frankmarriage ſerront mis & Hotchpot, eſt ceo, quãd home done terres ou tenements en Frankmarriage ove ſa file, ou ove auter coſin, il eſt entendus per la ley que tiel done fait per tiel Parol (Frankmarriage) eſt un abancement, & pur abantement de ſa file, ou de ſon auter coſin, & noſmement

AND ſo always upon ſuch partition, the lands given in Frankmarriage remain to the Donees and to their heires according to the forme of the gift: for if the other Parcener ſhould have any of that which is given in Frankmarriage, of this would enſue an inconvenience, and a thing againſt reaſon, which the Law will not ſuffer. And the reaſon why the Lands given in Frankmarriage ſhall be put in *Hotchpot*, is this, when a man giveth Lands or Tenements in Frankmarriage with his Daughter, or with his other Couſin, it is intended by the Law, that ſuch gift made by this word (Frankmarriage) is an advancement, and for advancement of his Daughter, or of his Couſin, and namely, when

quand

quand le donor & ſes heires naberont aſcun rent ne ſervice de eux, ſinon que ſoit fealty, tanque le quart degree ſoit paſſe, &c. Et pur tiel cauſe la ley eſt que el avera riens de les auters terres ou tenements diſcendus a lauter parcener, &c. ſinon que el voile mitter les terrs dones en frākmariage en Horchpor, come eſt dit. Et ſi il ne voil le mitter les terres dones en frankmariage en Hotchpot, donque el navera riens del remant put ceo que ſerra ētendu pur la ley que el eſt ſufficientment avance, a que avancement el ſoy agree & luy tient content.

the Donor and his heires ſhall have no Rent nor ſervice of them but fealty, untill the fourth degree be paſt. And for this cauſe the Law is, that ſhe ſhall have nothing of the other lands or Tenements deſcended to the other parcener, *&c.* unleſſe ſhe will put the lands given in Frankmarriage in *Hotchpot*, as is ſaid. And if ſhe will not put the lands given in frankmarriage in *Hotchpot*, then ſhe ſhall have nothing of the remnant, becauſe it ſhall be intended by the Law, that ſhe is ſufficiently advanced, to which advancement ſhe agreeth and holds her ſelf content.

¶ *De ceo enſueroit enconvenience & choſe enconuner reaſon que la ley ne voit ſuffer.*

Quod eſt inconveniens aut contra rationem, non permittun eſt in lege. Hereby it appeareth, as it hath been often noted, (*) that an argument ab inconvenienti, aut ab eo quod eſt contra rationem, is forcible in Law. (p) Nihil enim quod eſt inconveniens, eſt licitum. Regula. (*) Vide Sect. 138, 139, 231, 440, 478, 488, 722. (p) 40. Aſſ. 27.

¶ *Tanque le 4 degree ſoit paſſ, &c.* Here by (&c.) is implyed how the degree muſt be accounted, whereof ſufficient hath been ſaid before. Sect. 20.

*Sect.* 270.

¶ Meſm la ley eſt parenter les heires de les donées en frankmariage, & les auters parteners, &c. ſi les donées en frākmariage debiōt devant lour anceſſer, ou devant tiel partition, &c. quant a mitter en Hotchpot, &c.

THe ſame Law is between the heirs of the donees in frankmarriage, and the other parceners, *&c.* if the donees in frankmarriage die before their Anceſtor, or before ſuch partition, *&c.* as to put in *Hotchpot*, *&c.*

*Sect.* 271.

¶ Et nota que dones en frāmariage fuerōt per

ANd note, that gifts in Frankmarriage were by the Common

¶ By theſe three, (&c.) in this Section, is implyed, that if either the Donees die before the Anceſtor, or ſurvive the Anceſtor and die before ſuch a partition, or if the Donees and all the Parceners die before ſuch partition upon the putting into Hotchpot, their iſſues ſhall have the ſame benefit to put the Lands into Hotchpot, for that benefit is heritable and deſcendible to the iſſues.

¶ Continue, &c. By this (&c.) is to be underſtood that before the ſtatute it was a fee ſimple, and ſince

ſince the ſtatute of fee taile. So as it is true, that (q) the gifts do continue (as our Author here ſaith) but not the eſtates. For the eſtate is changed, as at large appears in the Chapter of eſtates in taile. And albeit our Author here ſaith that ſuch gifts have been always ſince uſed and continued; yet now they be almoſt grown out of uſe, and ſerve now principally for Moote-caſes and queſtions in law that thereupon were wont to riſe.

(q) 12 H.4. 11. 31 E.3. Gard. 116.

le common ley devant le Statute de Weſtm. ſecond, & tout temps puis ad eſte uſe & continue, &c.

Law before the Statute of *Weſtm.* ſecond, and have been always ſince uſed and continued, *&c.*

## *Sect.* 272.

¶ The Lands given in frankmarriage, and the lands in fee ſimple muſt move from one and the ſame Anceſtor; for the lands given in Frankmarriage are in reſpect of the advancement accounted in Law, as hath been ſaid, as if the ſame had deſcended from the ſame Anceſtor who died ſeiſed of the fee ſimple lands; and there is no reaſon to barre the Donee of her full part of the fee ſimple lands that deſcended from another Anceſtour from whom ſhe had no ſuch advancement.

¶ *Item, tiel mitter en Hotchpot, &c.* eſt lou les auters terres ou tenemẽts q̃ ne fuer dones en frankmariage deſcẽdont de les donors en frankmariage tantſolement: car ſi les terres deſcenderont a les files per le pier le donor, ou per le mere le donor, ou per le fre l' donor, ou auter anceſtor, & nemy per le donor, &c. la auterment eſt, car en tiel cas el a quel tiel done en frankmariage eſt fait avera ſa part ſicome nul tiel done en frankmariage uſt eſte fait, pur ceo q̃ el ne fuit avance per eux, &c. eins per un auter, &c.

ALſo, ſuch putting in *Hotchpot, &c.* is where the other Lands or Tenements which were not given in frankmarriage, deſcend from the donors in frankmarriage only; for if the Lands ſhall deſcend to the daughters by the father of the donor, or by the mother of the donor, or by the brother of the donor, or other anceſtor; and not by the donor, *&c.* there it is otherwiſe; for in ſuch caſe, ſhe to whom ſuch gift in frankmarriage is made, ſhall have her part as if no gift in frankmarriage had been made, becauſe that ſhe was not advanced by them, *&c.* but by another, *&c.*

¶ *Nemy per le Donor, &c.* Here (&c.) implyeth no more but that Donors that made the gift of Frankmariage; the other two (&c.) in this Section need no explanation.

## *Sect.* 273.

¶ By this Sect. and the (&c.) herein, ſome have gathered that the value of the Lands ſhall be accounted as they were at the time of the gift in

¶ Item, ſi home ſeiſie de 30. acres de terre chelcun acre de obel annual value eiant iſſue deux files cõe eſt avantdit, & dona 15. acres de

ALſo, if a man be ſeiſed of 30. acres of Land, every acre of equal annuall value, and have iſſue two daughters as aforeſaid, and giveth fifteen acres

ceo

ceo a le baron oue ſa file en frankmariage, & moruſt ſeiſie de les auters 15. acres, en ceſt caſe lauter ſoer avera les 15. acres iſſint diſcēdus a luy ſole, & le baron & feme ne mitteront, en tiel cas les 15. acres a eux dones ē frākmariage en Horchpot put ceo q̄ les tenements dones en frankmariage ſont de auxy grand & de bone annual value come les auters terres diſcendus, &c. Car ſi les terres dones en frankmariage ſont de tant egal annual value, que le remnant ſont, ou de pluis value, en baine, & a nul entent tielx tenements dones en frankmariage ſerra mis en Horchpot, &c. put ceo que el ne poit reins aver de les auters terres diſcendus, &c. car ſi el aūoit aſcun parcel de les tenements diſcendus, donques el avera pluis de annual value que ſa ſoer, &c. que la ley ne voit, &c. Et ſicome eſt parle ē les caſes avantdits de deux files ou de deux parteners en m̄ le manner eſt ē ſemblabl' cas lou ſont pluſors ſoers ou pluſors parteners, ſolonq̄ ceo q̄ l'caſe & matter l'eſt, &c.

hereof to the Husband with his daughter in frankmarriage, and dies ſeiſed of the other 15. acres. In this caſe the other ſiſter ſhall have the 15. acres ſo deſcended to her alone, and the husband and wife ſhall not in this caſe put the 15. acres given to them in frankmarriage into *Hotchpot*, becauſe the tenements given in frankmarriage are of as great and good yearly value as the other lands deſcended, *&c.* for if the lands given in frankmarriage be of equal or of more yearly value then the remnant, in vain and to no purpoſe ſhall ſuch tenements given in frankmariage be put in *Hotchpot*, *&c.* for that ſhe cannot have any of the other lands deſcended, *&c.* for if ſhe ſhould have any parcel of the lands deſcended, then ſhe ſhal have more in yearly value then her ſiſter, *&c.* which the Law will no, *&c.* And it is ſpoken in the caſes aforeſaid of two daughters, or of two parceners; in the ſame manner is in the like caſe where there are more Siſters or more parceners according as the caſe and matter is, *&c.*

Frankmariage, but it is clear that the value ſhall bee accounted as it was at the time of the partition; for if the Donour purchaſe more land after the gift, or if the land given in frankmarriage be by the act of God decayed in value, or if the remnant of the lands in fee ſimple be improved after the gift, or è converſo, the Law ſhall adiudge of the value as it was at the time of the partition, (unleſſe it bee by the proper act or default of the parties) as hath been ſaid before in the former Chapter. And ſome have collected upon this Section, that the reverſion in fee of the lands given in frankmariage ſhall onely deſcend to the Donee; for otherwiſe the other ſiſter ſhall have more benefit then the Donee, which ſhould be againſt the reaſon of our Author.

¶ *In vaine et a nul entent, &c.* For it is a maxim in Law, Lex non præcipit inutilia, quia inutilis labor ſtultus. Regula. Vide Sect. 194, 578. Li. 5. fol. 89.

Sect.

## *Sect.* 274.

ET eſt aſcavoir, que Terres ou tenemts dones en frankmariage ne ſerra miſe ẽ Hotchpot, forſque ou Terres deſcende en fee ſimple, car de terre diſcẽdus en fee tail Parkition ſerra fait, ſicõe nul tiel done en frãkmarriage uſt eſſe fait.

AND it is to be underſtood, that Lands or Tenements given in Frankmarriage ſhall not be put in *Hotchpot*, but where Lands deſcend in fee ſimple; for of Lands deſcended in Fee tail partition ſhall be made, as if no ſuch gift in Frankmarriage had been made.

31.Aſſ.pla.14. ¶ FOr of Lands entailed the Donee in Frankmarriage ſhall have as much part as the other Coparcener, becauſe over and beſides the Land given in Frankmarriage, the Iſſue in Tail claimeth per formam doni; and both of the Parceners muſt equally inherit by force of the gift, & voluntas Donatoris, &c. obſervetur.

## *Sect.* 275.

¶ ITem, nuls Terres ſerra miſe en Hotchpot oue auters ſi non terres que fueront done ẽ frankmarriage tãtſolemẽt: Car ſi alcun Feme ad alcuns auters terres ou tenements per alcun auter done ẽ le taile, el ne unques mittera tiel terre iſſint done en Hotchpot, mes il avera ſa purparty de le remnãt diſcẽdus, &c. ſ̃, a tant que lauter Parcener avera d ñ l'remnant.

ALſo, no Lands ſhall be put in *Hotchpot* with other lands, but Lands given in Frankmarriage only: for if a woman have any other Lands or Tenements by any other gift in tail, ſhe ſhall never put ſuch Lands ſo given in *Hotchpot*; but ſhe ſhall have her purparty of the remnant deſcended, &c. (*videlicet*) as much as the other Parcener ſhall have of the ſame remnant.

13.F.2.tit.taile 26. 6.*E*.3.30.b.4.E.3.49.50 Bract.lib.2.fol. 77. ¶ FOr if the Anceſtor infeoffeth one of his Daughters of part of his Land, or purchaſe lands to him and her, and their heirs, or giveth to her part of his lands in tail ſpecial or general, ſhe, notwithſtanding this, ſhall have a full part in the remnant of the lands in fee ſimple; for the benefit of putting, &c. into Hotchpot, is only appropriated a gift in Frankmarriage, (quis maritagium cadit in partem) which ſhall be (as is aforeſaid) accounted as parcel of her advancement.

## *Sect.* 276.

¶ ITem, un auter Partition poit eſte fait enter parceñs que variall de les Partitions avantdits. Sicome y ſont trois Parceners, & le puiſn voit aver partitiõ, & les auters deux ne voillont, mes voillent tener ẽ parcenarie ceo que a eux affi-

ALſo, another partition may be made between Parceners, which varieth from the Partitions aforeſaid. As if there bee three Parceners, and the youngeſt will have partition, and the other two will not, but will hold in parcenary that which to them belonert

ert ſans partiſ en ce caſe ſi un pt ſoit alot en ſeũalty al puiſne ſoer ſolonqz ceo que el doit aver, donques les auters poient tener le remnant en parcenary, & occupier en common ſans partitiõ, ſi els voilent: & tiel partition eſt aſſets bone. Et ſi apres leign, ou le mulnes Parteners voile faire partition inter eux, õ ceo que ils teignont, ils poient ceo bien faire quant a eux pleiſt. Mes lou partition ſerra fait p:r force de Briefe de partitione facienda, la autermẽt eſt, car la covient que chelcun Parcener avera ſa part en ſeveraltie, &c.

¶ Pluis ſerũ dit des parteñs en le Chapter de Joyntenants, & auxy en le Chapter de Tenants in Common.

geth, without partition: in this caſe if one part be allotted in ſeveralty to the youngeſt ſiſter, according to that which ſhe ought to have, then the others may hold the remnant in parcenary, and occupy in Common without Partition, if they will, and ſuch partition is good enough. And if afterwards the eldeſt or middle parcener will make partition between them of that which they hold, they may well do this when they pleaſe. But where partition ſhall be made by force of a writ of *Partitione faciendâ*, there it is otherwiſe; for there it behoveth that every parcener have her part in ſeveralty, *&c.*

More ſhall be ſaid of parceners in the Chapter of Joyntenants, and alſo in the Chap. of Tenants in Common.

Here is to be obſerved. That this partition is good by conſent. for Conſenſus tollit errorem, but if it be by the Kings writ, then every Parcener muſt have his part. And here you may ſee that modus & conventio vincunt legem. 24.H.3.tit.Parric.13. Regula.

¶ *En ſeveraltie, &c.* Here by this (&c.) is implyed another kind of ſeveralty then our Author hath mentioned, and that is, That the one Parcener ſhall have the land in ſeveralty from the feaſt of Eaſter, until the gule of Auguſt, (that is, the firſt of Auguſt) and the other in ſeveralty from thence until the feaſt of Eaſter, or the like; & ſic alternis vicibus to them and their heirs in perpetuum, whereof ſufficient hath been ſpoken before.

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## Chap. 3. Of Joyntenants. *Sect.* 277.

¶ Joyntenãts ſont, ſicome home ſeiſie de certaine Terrs ou Tenements, &c. & feoffe deux, trois, quater, ou pluſors, a avera & tenã a eux pur term de lour vies, ou a terme dauter vie, p force de quel feoffemẽt ou leaſe ils ſont ſei-

Joyntenants are, as if a man be ſeiſed of certain Lands or Tenements, *&c.* and infeoffeth two, three, or four, or more, to have and to hold to them for terme of their lives, or for terme of anothers life, by force of which feoffement or

¶ This agreeth not with the original, for it ſhould be Joynt' ſont ſicome home ſeiſie de certeine terres ou tenements, &c. & enfeoffe deux, ou trois, ou quater, ou pluſors a avoir & tenir a eux & a lour heires, ou leſſa a eux pur terme de lour vies, ou pur terme dauter vie, per force de quel feoffements ou leaſe, &c. The error may eaſily be perceived by that which is in print, viz. By force of which feoffment or leaſe, &c. ergo, there muſt be Brac.li 4.fol.262. Brit.cap.35. & fol. 112. Fleta lib.3.cap.4.10. & lib.6.cap.47.

be feoffment and leaſe ſpoken of before.

There be alſo Joyntenants by other condeyances then Littleton here mentioneth, as by Fine, Recovery, Wargain and Sale, Releaſe, Confirmation, &c. So there be divers other limitations then Littleton here ſpeaketh of: As if a Rent charge of ten pounds be granted to A. and B. to have and to hold to them two, viz. to A. until he be married, and to B. until he be advanced to a Benefice, they be Joyntenants in the mean time, notwithſtanding the ſeveral limitations: and if A. dye before marriage, the rent ſhall ſurvive; but if A. had married, the rent ſhould have ceaſed for a moity, & ſic è converſo, on the other ſide.

ſies, tiels ſont Joyntenants.

leaſe they are ſeiſed, theſe are Joyntenants.

5.E.4.29.11.H.4 26.

Littleton having ſpoken of one kind of Tenants pro indiviſo, viz. of Parceners, cometh now to another, viz. Joyntenants; and firſt of Joyntenants of Freehold. If an Alien and a Subject purchaſe lands in fee, they are Joyntenants, and the ſurvivorſhip ſhall hold place. Et nullum tempus occurrit regi, upon an office found.

¶ *Joyntenants.* So called, becauſe the lands or tenements, &c. are conveyed to them joyntly, conjunctim feoffati, &c. or qui conjunctim tenent, and are diſtinguiſhed from ſole or ſeveral Tenants, from Parceners and from Tenants in Common, &c. and antiently they were called Participes, & non hæredes. And theſe Joyntenants muſt joyntly implead and joyntly be impleaded by others; which property is common between them and Coparceners; but Joyntenants have a ſole quality of ſurvivorſhip, which Coparceners have not. Littleton having now ſpoken of Parceners and of Joyntenants of right, doth next ſpeak of Joyntenants by wrong.

Fleta, lib.6.cap.47. Bract.lib.5.fol.455.2.

## Sect. 278.

¶ IT is to be obſerved, That ſome Diſſeiſors be Tenants of the Land, and ſome be not Tenants of the Land; and of both theſe kinds Littleton here ſpeaketh.

50.E.3.2.17. Aſſ.14 14. Aſſ.12.8 Aſſ.p.30.10.E. 3.47.13.Aſſ.2.23.H.8. tit.Diſſeiſ.b. 77.28.Aſſ. 21.27. Aſſ.30.12.E.9.7. E.4.7.b.38. Aſſ.7.21.H. 7.35.29 Aſſ. 50.21.H.8. 25 35.H.6.61.21.E.4.46 15.E.4.15.F.N.B. 179 g.

¶ *&c.* In the firſt &c. nothing is implied, but four or five, or more; but in the latter &c. many things be to be underſtood, as of Diſſeiſors that be no Tenants, ſome are Coadjutors, whereof Littleton here ſpeaketh, ſome Counſellors, Commanders, &c. when the diſſeiſin is not to be done to any of their uſes. Alſo if A. diſſeiſe one to the uſe of B. who knoweth not of it, and B. aſſent to it, in this caſe, till the agreement, A. was Tenant of the land, and after agreement B. is tenant of the land, but both of them be Diſſeiſors: for omnis ratihabitio retrotrahitur & mandato æquiparatur. And it is worthy of the obſervation, & implyed alſo in the latter (&c.) that ſeeing Coadjutors, Counſellors, Commanders, &c. are all Diſſeiſors, that albeit the Diſſeiſor which is Tenant dieth, yet the Aſſiſe lieth againſt the Coadjutor, Counſellor, Commander, &c. and the Tenant of the land, though he be no diſſeiſor.

ITem ſi deux, ou trois, &c. diſſeiſont un auter daſcũ terres ou Tenemẽts a lour uſe demeſne: donques les Diſſeiſours ſont Joyntenants. Mes ſils diſſeiſõt un auter al uſe dun de eux, donques ils ne ſont Joyntenants, mes celuy a que uſe le diſſeiſin eſt fait eſt ſole tenant, & les auters nont riẽs en le tenancie, mes ſont appels coadjutors a le diſſeiſin, &c.

ALſo if two or three *&c.* diſſeiſe another of any lands or tenements to their own uſe, then the diſſeiſors are Joyntenants. But if they diſſeiſe another to the uſe of one of them, then they are not Joyntenants, but he to whoſe uſe the Diſſeiſin is made, is ſole Tenant, and the others having nothing in the Tenancy, but are called Coadjutors to the Diſſeiſin, *&c.*

(a) The Demandant and others in a Præcipe did diſſeiſe the Tenant to the uſe of the others, and the Writ did not abate; for the Demandant was a Diſſeiſor, but gained no tenancy in the land, for that he was but a Coadjutor.

(a) 50 E.3.2.

A man diſſeiſeth Tenant for life to the uſe of him in the reverſion, and after he in the reverſion agreeth to the diſſeiſin, it is ſaid, That he in the reverſion is a diſſeiſor in fee; for by the Diſſeiſin made by the ſtranger the reverſion was diveſted, which (ſay they) cannot be

reveſted

vested by the agreement of him in the reversion, for that it maketh it him a wrong doer, and therefore no relation of an estate by wrong can help him.

¶ *Coadjutor.* Coadjutor est, qui auxiliatur alteri, and is derived a coadjuvando. Anglicè a fellow-helper.

## *Sect.* 279.

¶ ET nota q̄ disseisin̄ est p̄per mēt lou un home entra en alcū terres ou tenements lou sō entre nest pas congeable, & ousta celuy que ad Franktenement, &c.

AND note that disseisin is properly where a man entreth into any Lands or Tenements where his entry is not congeable, and ousteth him which hath the Freehold, *&c.*

¶ THis description of a disseisin and the (&c.) in this place is understood onely of such Lands and Tenements whereinto an entry may be made, and not of rents Commons, &c. whereof sufficient hath been said before, in the Chapter of Rents; and so in effect Littleton described it before the edition of his book. And note here, that every entry is no disseisin, unlesse there be an ouster also of the Freehold. And therefore Littleton doth not set down an entry onely, but an ouster also, as an entry, and a claimer, or taking of profits &c.

9.E.4.2.34.Ass.11,12. 26.Ass.17.41.Ass.10.24. E.3.31.Pl.Com.89.Parson de Hony Lane. 7.Ass.10.11.Ass.25.12. E.3 tit.Ass.83.45.Ass. 7.9.Ass.19.39.Ass.21.r. 18.E.2.Ass.374.

Now as there be Joyntenants by disseisin, so are there Joyntenants by Abatements, Intrusion, and Usurpation, all which are included in the latter &c.

## *Sect.* 280.

¶ ET est assavoir, que la nature de joyntenancie est, q̄ celuy que survesquist avera solement lentier tenancie solonqz tiel estate que il ad, si le joynture soit continue, &c. Sicome si trois Joyntenants sont en Fee simple, & lun ad issue, & dedie, uncore ceux que survesquont avont les tenements entier, & lissue navera riens. Et si le 2. joyntenant ad issue & dedie, uncore le tierce que survesquist avera les tenements entier, & eux avera a luy & a les

AND it is to be understood, that the nature of joyntenancie is, that he which surviveth shall have onely the entire tenancy according to such estate as he hath, if the joynture be continued, *&c.* As if three Joyntenants be in Fee Simple, and the one hath issue, and dieth, yet they which survive shall have the whole Tenements, and their issue shall have nothing. And if the second Joyntenant hath issue and dye, yet the third which surviveth shall have the whole Teme-

¶ *Si le joynture soit continue*, &c.

Here by this (&c.) many poynts of Learning are to be observed, as that it is proper to joyntenants onely to have Lands by Survivor; for no Survivor of other Tenants pro indiviso shall have the whole by Survivor, but only Joyntenants, and this is called in Law Jus accrescendi. Omnes feoffati sunt simul habendi & tenendi, nec totum, nec partem separatam, nec per se, sed ut quilibet eorum totum habeat cum aliis in communi, & cum unus moriatur non descendit aliqua pars heredi morientis, nec separata, nec in communi ante mortem omnium, sed pars illa communis per jus accrescendi accrescit superstitibus de persona ad personam usque ad ultimum superstitem. But although Survivorship be proper to Joyntenants, yet it is not proper quarto modo (that is) omni, soli, & semper, for there may be

Bract.lib.4.fol.262.b. Britton cap.35. Flet.l. 2 cap.4.& c. 10.49.E.3. f.5.6.

Joyntenants, though there be not equall benefit of Survivor on both sides. As if a man letteth lands to A. and B. during the life of A. if B. dyeth, A. shall have all by the Survivor, but if A. dieth, B. shall have nothing.

Two or more may have a Trust or an Authority committed to them joyntly, & yet it shall not survive. But herein are divers diversities to be observed: First there is a diversitie between a naked Trust or an Authority, and a Trust or Authority joyned to an estate or interest. Secondly, there is a diversitie between authorities created by the party for private causes, and Authority created by law, for execution of Justice. As for example, (b) If a man devise that his two executors shall sell his land, if one of them die, the survivor shall not sell it; but if he had devised his lands to his Executors to be sold, there the survivor shall sell it; which diversity is implied by our Author, for he saith, that he that surviveth shall have the entire tenancie.

heires a touts jours. Mes auterment est de Parceners. Car si trois parceners sont & devant ascun partition fait, lun ad issue, & devie, ceo que a luy affiert discendra a son issu. Et si tiel parcener morust sans sue, donques ceo que a luy affiert discendra a ses coheirs issint q̄ ils averont ceo per discent, & nemy per survivor, come joyntenants averont, &c.

ments to him and to his heires for ever, but otherwise it is of Parceners. For if three Parcener be, and before any partition made the one hath issue and dyeth, that which to him belongeth shall descend to his issue: and if such parcener die without issue, that which belongs to her shall descend to her coheirs, so as they shall have this by descent, and not by survivor, as Joyntenants shall have, &c.

(b) 39.Ass.p.17.30.H.8.tit.devise B.Dyer 3.Eliz.190.49.E.3.16.2.Eliz.Dyer 177.23.Eliz.Dyer 371.4.Eliz.Dyer 210,10.H.4.2.&.3.14.H.4.34.39.H.6.42.31.Ass.20.33.H.8.joynt.Br.62.30.H.8.condition Br.190.

If a man make a letter of Atturney to two, to do any act, if one of them die, the Survivor shall not do it: but if a Venire facias be awarded to foure Coroners to impannel, and return a Jury, and one of them die, yet the other shall execute and return the same.

If a charter of feoffment (c) be made, and a letter of Attorney to four or three joyntly, and severally, to deliver seisin, two of them cannot make livery; because it is neither by them four or three joyntly, nor any of them severally: But if the Sheriff upon a Capias directed to him make a warrant to four or three joyntly, or severally, to arrest the defendant, two of them may arrest him; because it is for the execution of Justice (d) which is pro bono publico, and therefore shall be more favourably expounded, than when it is only for private; and so hath it been adjudged. Jura publica ex privato promiscue decidi non debent.

(c) 38.H.8.Dyer 62.27.H.8.fol.6.

(d) Pasch.45.Eliz in the Kings bench, between Kingand Hobbs.

¶ *Et devie.* Note there is a natural death, and a civil death; and Littletons case is to be intended of both; and therefore (e) if two Joyntenants be, and one of them entreth into Religion, the Survivor shall have the whole.

(e) 21.R.2.judgm.263.

## *Sect.* 281.

¶ ET come le survivor tient lieu enter Joyntenants, en meisme le maner il tient lieu enter eux queux ont joynt estate ou possession ove auter de chattel real ou personal. Sicome si leas de terres ou tenits soit fait a pluisors pur terme des ans, celuy q̄ survesquist de les lessees avera les tenements a luy entier, durant l'terme, per force de meisme le leas. Et si un chival ou un au-

AND as the Survivor holds place between Joyntenants, in the same manner it holdeth place between them which have joynt Estate or Possession with another of a Chattel, reall or personall. As if a Lease of Lands or Tenements be made to many for terme of yeares, he which survives of the Lessees shall have the Tenements to him onely during the terme by force of ter-

ter chattel perſonal ſont done a pluſoꝛs, celuy que ſurveſquiſt avera le thibal ſolement.

the ſame leaſe. And if a Horſe, or any other chattel perſonal be given to many, he which ſurviveth ſhall have the Horſe only.

¶ HEreby it is manifeſt, that Surviveꝛ holdeth place regularly, as well between Joyntenants of Goods and Chattels in poſſeſſion, oꝛ in right, as Joyntenants of Inheritance oꝛ Freehold.

¶ *Chattel*, oꝛ Catel, whereof cometh the woꝛd uſed in Law (t) Catalla, and is, as Littleton here teacheth, twofold, viz. real and perſonal, and putteth examples of both. (f) Regiſt. Orig. 139. 244 Bract. lib. 2. 39. *H.* 6. 35. Stanford. Pr. 45.

## *Sect.* 282.

¶ EN meſme le maneꝛ eſt de debts & duties, &c. car ſi un obligation ſoit fait a pluſoꝛs pur un debt, celuy q̃ ſurveſquiſt avera tout le debt ou dutie. Et illint eſt dauters Covenants & Contracts, &c.

IN the ſame manneꝛ it is of debts and duties, *&c.* for if an Obligation be made to many for one debt, he which ſurviveth ſhall have the whole debt oꝛ dutie. And ſo it is of other Covenants and Contracts, &c.

¶ NOw he ſpeaketh of debts, Duties, Covenants, Contracts, &c.

¶ *Debts and duties*, &c. Here by foꝛce of this (&c.) an exception is to be made of two joynt Merchants foꝛ the ſtates. Merchandizes, Debts, oꝛ Duties, that they have as joynt-Merchants oꝛ parceners, ſhall not ſurvive, but ſhall goe to the Executoꝛs of him that deceaſeth; and this is per legem Mercatoriam, which (as hath been ſaid) is part of the lawes of this Realm, foꝛ the advancement and continuance of Commerce and Trade, which is pro bono publico; foꝛ the rule is, That Jus accreſcendi inter Mercatores pro beneficio commercii locum non habet. F.N.B. 117. *E.* 38. *E.* 3. 7.

And to the latter (&c) in this Section the like exception muſt be made.

## *Sect.* 283.

¶ ITem aſcuns joint-tenants poient eſtre que poient aver joynt eſtate, & eſtre joyntenants pur terme de lour vies, & uncoꝛe ils ont ſeveral enheritances. Sicome terres ſoient dones a deux homes & a les heires de lour deux coꝛps engendꝛes, en ceſt caſe les donées ont joynt eſtates pur terme de lour deux vies, & uncoꝛe ils ont

ALſo there may be ſome joyntenants which may have a joynt eſtate, & be joyntenants for terme of their lives, and yet have ſeveral Inheritances. As if Lands be given to two men and to the heires of their two bodies begotten, in this caſe the Donees have a joynt eſtate for terme of their two lives, and yet they have ſeveral inheritances; foꝛ if one of

¶ *Ils ont joynt eſtate pur terme de lour deux vies*, &c. Vide Sect. 206.

Note, albeit they have ſeveral inheritances in tail, and a particular eſtate foꝛ their lives, yet the inheritance doth not execute and ſo breake the joyntenancy; but they are Joyntenants foꝛ life, and Tenants in common of the Inheritance in taile.

¶ *Sicome home & feme poient aver*, &c. Here a diverſity is implied, when the eſtate of Inheritance is limited by one conveyance, Vide Weſtcotes caſe, Lib. 2. fol. 60, 61.

as in this caſe it is, there are no ſeveral eſtates to drown one in another: But when the ſtates are divided in ſeveral conveyances, their particular eſtates are extinct and divided, & conſequently the one drowns the other: As if a leaſe be made to two men for term of their lives, and after the Leſſor granteth the reverſion to them two, and to the heires of their two bodies, the joynture is ſevered, and they are Tenants in common in poſſeſſion. And it is further implied, that in this caſe of Littleton there is no diviſion between the eſtate for lives, and the ſeveral inheritances; for in this caſe they cannot convey away the inheritances after their deceaſe; for it is divided onely in ſuppoſition and conſideration of Law; and to ſome purpoſes the inheritance is ſaid to be executed, as ſhall be ſaid hereafter.

Vid. 12.E.4.2.b.

If a man make a leaſe for (f) life, and after granteth the reverſion to the Tenant for life, and to a ſtranger and to their heires, they are not joyntenants of the reverſion, but the reverſion is by act of Law executed for the one moitie in the tenant for life, and for the other moitie he holdeth it ſtill for life, the reverſion of that moitie to the grantee.

(f) 39.H.6.2.b.

And ſo it is, if a man maketh a leaſe (g) to two for their lives, and after granteth the reverſion to one of them in fee, the joynture is ſevered, and the reverſion is executed for the one moitie, and for the other moitie there is tenant for life, the Reverſion to the Grantee.

(g) Weſtcots caſe, ubi ſupra.

Ibidem 7.H.6.

If Leſſee for life granteth his eſtate to him in the reverſion, and to a ſtranger, the joynture is ſevered, and the reverſion executed for the one moity by the act of Law.

ſeverall inheritances; car ſi un des donees, ad iſſue, & deby, lauter que ſurveſquiſt avera tout p le ſurviv̄or pur terme de ſa vie, & ſi celuy que ſurveſquiſt auxy ad iſſue & deby, donques l' iſſue del un avera lun moitie, & iſſue del auter avera lauter moitié d̄ la terre, & ils tiendr̄ont la terre enter eux ē common, & ne ſont pas joyntenants, mes ſont tenants en common. Et la cauſe pur q̄ tielx donées en tiel cas ont joynt eſtate pur terme de lour dies, eſt p̄ ceo que al commencement les fres fuerōt donees a eux deux, les queux parols ſans pluis dire font joynt eſtate a eux pur terme de lour dies. Car ſi home doit leſſer fre a un auter p fait ou ſans fait, nient ſeaſant mention q̄ leſtate il averoit, & de ceo fait liverie de ſeiſin, en ceo caſe le leſſee ad eſtate pur terme de ſa vie, & iſſint entant que les terres fueront dones a eux, ils ont joynt eſtate pur terme de lour dies: & la cauſe pur q̄ ils averont ſeveral enheritances eſt ceo, entant que ils ne poiēt aū p nul poſſibi-

the donees hath iſſue and die, the other which ſurviveth ſhall have the whole by the ſurvivor for terme of his life; and if he which ſurviveth hath alſo iſſue, and die, then the iſſue of the one ſhall have the one moity, & the iſſue of the other ſhall have the other moity of the land, and they ſhall hold the land between them in common, and they are not joyntenants, but are tenants in common. And the cauſe why ſuch Donees in ſuch caſe have a joynt eſtate for term of their lives, is, for that at the begining the lands were given to them two, which words without more ſaying make a joynt eſtate to them for term of their lives. For if a man will let land to another by deed or without deed, not making mention what eſtate he ſhall have, and of this make livery of ſeiſin, in this caſe the leſſee hath an eſtate for term of his life, and ſo inaſmuch as the lands were given to them they have a joynt eſtate for term of their lives, & the reaſon why they ſhall have ſeveral inhe-

lity

lity un heire enter eux engender, ſicome home & fem poient aver, &c. donqz la ley voit que lour eſtate & lour enheritance ſoit tiel come reaſon voit, ſolonqz la forme & effect des parols del done, & ceo eſt a les heires q̄ lun engendza de ſon corps p̄ alcun de les femes, & a les heirs q̄ lauter engendza de ſon corps p̄ alc̄ de les femes, &c. Iſſint il covient p̄ neceſſitie de reaſon que ils averont ſeverall inheritances. Et en tiel cas ſi iſſue dun des donées apres la mort des donees devie iſſint q̄ il nad alcun iſſue en vie de ſon corps engēdze, donqz le donor ou ſon heire poit enter en la moity come en ſon reverſion &c. coment q̄ laut des donées ad iſſue en vie &c. Et la cauſe eſt que entāt que les inheritāces ſont ſeveral, &c. le reverſion de eux en ley eſt ſeveral, &c. & le ſurvivor del iſſue del auter ne tiendza pas lieu daver lentier.

ritances is this, inaſmuch as they cannot by any poſſibility have an heire between them ingendred, as a man and woman may have, *&c.* the law will that their eſtate and inheritance be ſuch as is reaſonable, according to the forme and effect of the words of the gift, and this is to the heires which the one ſhall beget of his body by any of his Wives, and to the heirs which the other ſhall beget of his body by any of his wives, *&c.* So as it behooveth by neceſſitie of reaſon that they have ſeveral inheritances. And in this caſe, if the iſſue of one of the donees after the death of the donees die, ſo that he hath no iſſue alive of his body begotten, then the donor or his heire may enter into the moity as in his reverſion, *&c.* although the other donee hath iſſue alive, *&c.* and the reaſon is, toraſmuch as the inheritances be ſeveral, &c. the reverſion of them in law is ſeveral, &c. and the ſurvivor of the iſſue of the other ſhall hold no place to have the whole.

If a man maketh a leaſe for life, and granteth the reverſion to two in fee, the leſſe granteth his eſtate to one of them, they are not Joyntenants of the reverſion, for there is an execution of the eſtate for the one moity, and an eſtate for life, the reverſion to the other of the other moity.

Here Littleton hath well reſolved a doubt, for of ancient time it hath been ſaid, (h) That when lands have been given to two women, and to the heires of their two bodies begotten (which caſe our Author putteth in the next Section that the husband having iſſue ſhould be Tenant by the Curteſie, living the other ſiſter, for that as ſome held the inheritance was executed, and that the ſiſters were Tenant in Common in poſſeſſion, and conſequently the husband to be Tenant by the Curteſie, which he could not be if the woman had a joynt eſtate for terme of their lives: and likewiſe it was ſaid (i) that the iſſue of the one ſhould recover the moity in a Formedon living the other ſiſter. But, Verba ſunt hæc and Littleton grounding himſelfe upon good Authority in law hath clerred this doubt.

(h) 17.E.3.51.78.18.E. 3.39.50.E.3.Stathom. tit.done.50 E.3.Feoffements & faits 97.

(i) 44.E.3.tail.13.8.Aſſ. 33.24.E.3.29.7.H.4.16. Corbets caſe lib.1.fol. 8.846. 4.Mariæ Dyer 145. See before in the chapter of Ten by the curteſie Sectione.

¶ *Nient feaſant mention quel eſtate il averont.* Here Littleton adveth materially (not making mention of what eſtate (for (k) if in the premiſſes lands be letten, or a rent granted, the generall intendment is, that an eſtate for life paſſeth; but if the Habendum limit the ſame for yeers or at will, the Habendum doth qualifie the generall intendment of the premiſſes: And the reaſon of this is, for that it is a maxime in Law, That every mans grant ſhall be taken by conſtruction of Law moſt forcible againſt himſelf. Quælibet conceſſio fortiſſime contra donatorem interpretanda eſt, which is ſo to be underſtood, that no wrong be thereby donee; for it is another maxime in law, Quod legis conſtructio non facit injuriam: And therefore if Tenant for life maketh a leaſe generally, this ſhall be taken by conſtruction of Law,

(k) Pl. Com. in Throtmortons caſe.

Regula.

Law an eſtate for his own life that made the leaſe: for if it ſhould be a leaſe for the life of the Leſſee, it ſhould be a wrong to him in the reverſion. And ſo it is, if Tenant in tail make a leaſe generally, the law ſhall conſtrue this to be ſuch a leaſe as he may lawfully make, & that is for terme of his own life; for if it ſhould be for the life of the Leſſee, it ſhould be a diſcontinuance, & conſequently the ſtate which ſhould paſſe by conſtruction of Law ſhould work a wrong.

¶ *Et iſſint entant que les terres fuerent pones a eux ils ount joynt eſtate pur lour vies.* This is plaine, but with this exception, Unleſſe the Habendum doth otherwiſe limit the ſame. And therefore if a leaſe be made, (l) to two, Habendum to the one for life, the remainder to the other for life, this doth alter the generall intendment of the premiſſes, and ſo hath it been oftentimes reſolved. And ſo it is if a leaſe to two, Habendum the one moity to the one, and the other moity to the other, the Habendum doth make them tenants in common, and ſo one part of the deed doth explain the other, and no repugnancy between them. Et ſemper expreſſum facit ceſſare tacitum.

(l) 8.E.3.427.tit.Feoff. & Faits 73.30. *H.*8.tit. Joynt.Br.53. *Dyer* f. 361.Pl.Com.160.

Bracton.

¶ *Per mul Poſſibilitie.* Here it is to be obſerved, That where the grant is impoſſible to take effect according to the letter, there the Law ſhall make ſuch a conſtruction as the gift by poſſibility may take effect, which is worthy of obſervation, Benignæ faciendæ ſunt interpretationes cartarum propter ſimplicitatem Laicorum, ut res magis valeat quam pereat.

¶ *Iſſint il covient per neceſſitie de reaſon.* The reaſon of the Law is the life of the Law; for though a man can tell the law, yet if he know not the reaſon thereof, he ſhall ſoon forget his ſuperficial knowledg: but when he findeth the right reaſon of the law, and ſo bringeth it to his natural reaſon, that he comprehendeth it as his own, this will not only ſerve him for the underſtanding of that particular caſe, but of many other. For Cognitio legis eſt copulata & complicata: And this knowledg will long remain with him; all which is plainly implied by the words, and (&c.) of our Author in this Section.

¶ *Et en tiel c[a]ſe ſi liſſue dun des Donees apres la mort des Donees devie iſſint que il nad aſcun iſſue en vie de ſon corps engendres, donques le Donor ou ſon heire poit enter en le moitie.* This is miſtaken in the imprinting, and varieth from the original, which is, Si lun donee ou liſſue dun des donees apres la mort de Donees devie, iſſint que il nad aſcun iſſue, &c. For it is evident, that if the one Donee himſelfe dieth without iſſue, the Inheritance doth revert for a moitie, and after the deceaſe of the other Donee, the donor may enter into that moitie; and whether the iſſue of the one Donee dieth without iſſue at any time, either in the life of the other Donee, or after his deceaſe, it is not material; for whenſoever no iſſue is remaining of the one Donee, ſo as the ſtate tail is ſpent, the Donor may after the deceaſe of the ſurviving Donee, enter into that moitie.

Ariſt.1.Metaphyſ.

¶ *Et la cauſe eſt, que enant que les inheritances*, &c. Littleton in this Chapter hath often ſaid, Et la cauſe eſt, which is worthy of obſervation, for then we are truly ſaid to know any thing, when we know the true cauſe thereof: Tunc unumquodque ſcire dicimur, cum primam cauſam ſcire putamus: Scire autem proprie eſt rem ratione & per cauſam cognoſcere.

Virg.1.Georg.

Fœlix qui potuit rerum cognoſcere cauſas.

And therefore all Students of Law are to apply their principal endeavour to attaine thereunto, all which is implied by the words, and ſeveral, &c. in this Section.

Here the cauſe of the entry of the Donor into a moitie in this caſe is, That in as much as the inheritance is ſeveral, the reverſion is ſeveral. Therefore upon the ſeveral determination of the eſtate in taile, the Donor may enter; and the Law termeth a reverſion to be expectant upon the particular eſtate, becauſe the Donor or Leſſor or their heirs after every determination of any particular eſtate, doth expect or look for to enjoy the lands or tenements againe.

Dyer 14.El.309.

¶ *Le reverſion de eux en ley eſt ſeveral*, &c. Hereby, and by this (&c.) is implied, that upon one joynt or entire gift or leaſe, there is one joynt or entire reverſion, and upon ſeveral gifts or leaſes there be ſeveral reverſions. And this is to be underſtood of the reverſion in the Donor or his heires: But albeit the gifts or leaſes be ſeveral, yet if the Donors or Leſſors grant the reverſion to two or more perſons and their heires, they are joyntenants of the reverſion. And ſo it is of a remainder: and therefore if a gift be made to two men and the heirs of their two bodies begotten, the remainder to them two and their heirs, they are joyntenants for life, tenants in Common of the ſtate taile, and Joyntenants of the

fee

fee ſimple in remainder, for they are Joynt purchaſers of the Fee ſimple, and the remainder in fee is a new created eſtate, but the reverſion remaining in the Donor, or his heires, is a part of his ancient Fee ſimple.

## *Sect.* 284.

ET ſicome eſt dit de males, ẽ meſme le manner eſt lou terre eſt done a deux females, & a les hẽes de lour deux corps engendres.

AAd as it is ſaid of males, in the ſame manner it is where land is given to two females, and to the heires of their two bodies engendred.

IF a man giveth Lands to two men and one woman, and the heires of their three bodies begotten. In this caſe they have ſeveral Inheritances; for albeit it may be ſaid, that the woman may by poſſibility marry both the men one after another, yet firſt ſhe cannot marrie them both in præſenti, and the law will not ſuffer intend a poſſibility upon a poſſibility, as firſt to marry the one, and then to marry the other. Secondly, the forme of the gift is, To the heirs of their three bodies, which is not poſſible, and therefore they ſhall have ſeveral inheritances. And ſo it is, if a gift be made to one man and two women, mutatis mutandis. In the ſame manner, if a gift in taile be made to a man and his mother, (m) or to a man and his ſiſter, or to him and his Aunt, &c. in this and like caſes, albeit the gift is made to a man and a woman, yet they have ſeveral inheritances, becauſe they cannot marry together, and are within the rule and reaſon of our Author. 44.E.3.tit. Taile 13.

(m) 18.E.3.39.7.H.4. 16.

## *Sect.* 285.

ITem ſi terres ſoyent dones a deux & a les heirs de lũ de eux, ceo eſt bone Joynture & lũ ad fraktenemẽt, & lauter ad fee ſimple: Et ſi celuy que ad le fee debie, celuy que ad le franktenemẽt avera lẽtiertie per le ſurvivor pur terme de ſa vie. En meſme le manner eſt, lou tenements ſont dones a deux & les heirs del corps dun de eux ẽgendrs, lun ad fraktenemẽt, & lauter ad fee taile, &c.

ALſo if Lands be given to two and to the heires of one of them, this is a good Joynture, and the one hath a Freehold, and the other a fee ſimple: And if he which hath the fee dieth, he which hath the Freehold ſhall have the entierty by ſurvivour for terme of his life. In the ſame manner it is, where Tenements be given to two and the heirs of the body of one of them engendred, the one hath a freehold, and the other a fee taile, *&c.*

BY this Section, and the (&c.) in the end of it, they are Joyntenants for life, and the Fee-ſimple or eſtate taile is in one of them, and becauſe it is by one and the ſame conveyance, they are Joyntenants, and the fee ſimple is not executed to all purpoſes, as hath been ſaid before.

If a fine be levied to two (n) and to the heires of one of them, by force whereof he is ſeiſed, he that hath fee dieth, and after the Joyntenant for life dieth, and an ſtranger abates; in this caſe the heire may either ſuppoſe the fee ſimple executed, and have an aſſiſe of Mordaunceſter, the words of which writ be, Si R. pater fuit ſeiſitus die quo obiit in dominico ſuo ut de feodo, which cannot be ſaid of him that hath but a remainder expectant upon an eſtate for life, but in reſpect that he is ſeiſed of a fee ſimple, and of a joynt eſtate in poſſeſſion, the words in the writ be true. That he was ſeiſed in Dominico ſuo ut de feodo. Likewiſe the heir may have a writ of right, which alſo in ſome ſort proves the fee ſimple executed, or the heir may have a Scire facias to execute the fine, by which the heir ſuppoſeth that

(n) 42.E.3.9, 10, 11. H. 4.55.31. E.3. Scire facias 19.29.H.8. Mordt. b.59.4. E.3.37. F.N.B.196.& 219. 4.E.3.Itinere *Derby.* 24.E.3 70.

that the fee was not executed, or he may maintaine a writ of intruſion where the heire maketh the like ſuppoſition, and ſhall terme it a remainder. And yet when land is given to two and to the heires of one of them, he in the remainder cannot grant away his fee ſimple, as hath been ſaid.

## Sect. 286.

¶ *Laimer riens per diſcent de ſon compagnion*, &c. By which (&c.) is implied, That ſo it is if one Ioyntenant acknowledge a Recognizance or a ſtatute, or ſuffereth a judgment in an action of debt, &c. & dieth before execution had, it ſhall not be executed afterwards. But if execution be ſued in the life of the Conuſor, it ſhall bind the ſurvivor: and it is further implied, That both in the caſe of the Charge and of the Recogniſance, ſtatute, and Judgement, if he that chargeth, &c. ſurvive, it is good for ever.

F.N.B.204.F.197. 7.H.6.2.13.H.7.22. 10.E.3.34.17.R.2.tit. Charge 15.5.H.5 8. Vide Sect.289.

(o) 9.H.6.52.

And ſo it is (o) if a man be poſſeſſed of certain lands for term of yeeres in the right of his wife, and granteth a Rent charge, and dieth, the Wife ſhall avoid the charge; but if the husband had ſurvived, the charge is good during the term.

(p) 8.E.3.tit. Execution Statham.

If a Villeine purchaſe lands, and binde himſelf in a Recognizance, if the Lord enter before execution, the lord ſhal avoid the ſame, as it hath been ſaid.

But otherwiſe it is if he had made a leaſe for years, for the reaſon that Littleton here yieldeth in this Section.

(q) 14.H.8.22.Pl.Com. 263.b. in Dame Hales Caſe.

If two Ioyntenants be of a terme, (q) and the one of them grant to I.S. that

¶ Item ſi deux joyntenants ſont ſeiſies deſtate en fee ſimple, & lun graunt un rent charge pur ſon fait a un auter hors de ceo, que a luy affiert, en ceſt caſe durant la vie le Grantor, le rent charge eſt effectual: Mes apres ſon deceſſe l'grant de l'rent charge eſt void, quant a charger la fee, car celuy que ad la terre per le ſurviror tiendra tout la terre diſcharge. Et la cauſe eſt, pur ceo que celuy que ſurveſquiſt clayma & ad la fee per le ſurviror, & nemy ad ne poit de ceo clayme rien per diſcent de ſon compagnion, &c. Mes auterment eſt de Parceners: car ſi ſoyent deux Parceners des tenemẽts en fee ſimple, & devant aſcun partition fait, lun charge ceo que a luy affiert per ſon fait, dun rent charge, &c. & puis morust ſans iſſue, pur que ceo, que a luy affiert diſcend a lauter Partener, en ceſt caſe lauter parcener tiendra la terre charge, &c. pur ceo que il vient a cel moitie per diſcent, come heire, &c.

ALſo if two Ioyntenant be ſeiſed of an eſtate in fee ſimple, and the one grants a Rent charge by his Deed to another out of that which belongeth to him: in this caſe during the life of the Grantor, the Rent charge is effectual, but after his deceaſe the grant of the Rent charge is void, as to charge the Land; for he which hath the land by ſurvivor ſhall hold the whole land diſcharged. And the cauſe is, for that he which ſurviveth claimeth and hath the land by the ſurvivor, and hath not, nor can claime any thing by deſcent from his companion, *&c.* But otherwiſe it is of Parceners, for if there be two Parceners of Tenements in fee ſimple, and before any partition made the one chargeth that which to her belongeth by her Deed, with a Rent charge, *&c.* and after dieth without iſſue, by which that which belongeth to her deſcends to the other parcener, in this caſe the other parcener ſhall hold the land charged, *&c.* becauſe ſhe came to this moity by deſcent, as heire, &c.

if

if he pay to him ten pound before Michaelmas, that then he shall have his terme, the Grantor dieth before the day, I. S. payes the summe to his Executors at the day, yet he shall not have the terme, but the Survivor shall hold place: for it was but in nature of a communication; but if he had made a lease for years to begin at Michaelmas, it should have bound the Survivor.

And where Littleton putteth the case of a rent charge; It is so likewise implied, that if one Joyntenant granteth a Common of Pasture, or of Turbary, or of Estovers, or a Corody, or such like, out of his part, or away over the land, this shall not binde the Survivor: for it is a maxime in law, that Jus accrescendi præfertur oneribus; and there is another maxime, that Alienatio rei præfertur juri accrescendi. 45.E.3.13. Vide Sect. 289.

If one Joyntenant in Fee-simple be indebted to the King, and dieth, (r) after his decease no extent shall be made upon the land in the hands of the Survivor. (r) 40.Ass.36.50.Ass.5. F.N.B.149.q.Pl. Com. 321.

If a recovery be had against one Joyntenant, who dieth before execution, the Survivor shall not avoid this recovery, because that the right of the moity is bound by it.

If one Joyntenant in fee take a lease for years of an estranger by Deed indented, and dieth, the Survivor shall not be bound by the Conclusion, because he claimes above it, and not under it.

¶ *Et la cause est, pur ceo que celuy que survesquist claime & ad la terre per survivour*, &c. Here again Littleton sheweth the reason: and the cause wherefore the Survivor shall not hold the land charged, is, for that he claimeth the land from the first feoffor, and not by his companion, which is Littletons meaning, when he saith, (that he claimeth by Survivor.) For (t) the Surviving Feoffee may plead a feoffment to himselfe without any mention of his joynt Feoffee. And this is the reason, that if two Joyntenants be in fee, and the one maketh a lease for years, reserving a Rent, and dieth, the surviving Feoffee (u) shall have the Reversion by Survivor, but he shall not have the Rent, because he claimeth in from the first Feoffor, which is paramount the rent. If there be two Jointenants in Fee, and the one Joyntenant granteth a rent charge out of his part, and after releaseth to his joynt companion and dieth, he shall hold the land charged, for that he is out of the reason and cause set down by Littleton, because he claimeth not by survivor, in as much as the release prevented the same. And of this opinion was Littleton himselfe (u) before the Edition of his Book. But all men agree, that if A. B. & C. be Joyntenants in fee, and A. chargeth his part, and then releaseth to B. and his heires, and dieth, that the * charge is good for ever, because in that case B. cannot be in from the first Feoffor, because he hath a joynt companion at the time of the release made, and several Writs of Præcipe must be brought against them. And albeit the release of one joyntenant to the residue of the joyntenants makes no degree in supposition of law, neither is there any several estate between them, but the estate of him that releaseth is as it were extinguished and drowned in their estate and possession, so as one Præcipe lieth against them, yet shall they hold the land charged, as is aforesaid. As if tenant for life grant a rent charge, and after surrendreth his estate to the lessor, albeit the estate charged be drowned, and the lessor is not in by him, yet he shall hold it charged. (t) 33.H.6.5,a.9. Eliz. Dyer 263. (u) 37 H.8.tit. alienation Br. 31.20. E.3.b.40. E.3.41.b.33. H.6.5.22. H.6.42.b. per Pole 35. E.3. release 43.33.E.3. avowry 195.14.H.8.2. Vide Lib.6.fol.78.79.

¶ *Mes auterment est de Parceners, Car si sont deux Parceners*, &c. This is to be intended as well of Parceners by custome, as of Parceners by the common Law; and here is implied the reason of the diversity, for that the survivor doth claime above the charge, and the heir by descent under the charge.

## Sect. 287.

¶ Item ſi ſõt deux jointenants des terres en Fee ſimple deins un burgh, lou les terres & tenemẽts ſont deviſables per teſtament, & ſi lun de les dits deux joyntenants deviſe ceo que a luy affiert pur ſon

ALſo if there be two Joyntenants of Land in Fee ſimple within a Borough, where Lands and Tenements are deviſable by teſtament, & if the one of the ſaid two Joyntenants deviſeth that which to him be-

¶ *Per ſon teſtament*, &c. Either in writing or nuncupative, according to the custome.

¶ *Et la cauſe eſt pur ceo que nul deviſe, poit prender effect mes apres le mort le deviſor, & per ſa mort tout la terre maintenant devient per la ley a ſon compagnion*, &c.

&c. Here both their claims commence at one inſtant; and although an Inſtant Eſt unum indiviſibile tempore quod non eſt temp' nec pars temporis, ad quod tamen partes temporis connectuntur; and that, Inſtans eſt finis unius temporis, & principium alterius: Yet in conſideration of Law, there is a priority of time in an inſtant; as here the Surviuor is preferred before the deviſe; for Littleton ſaith, that the cauſe is, that no deviſe can take effect till after the death of the Deviſor; and by his death all the land preſently cometh by the law, to his companion. Whereby it appeareth, that Littleton by theſe words, Poſt mortem, & per mortem, though they jump at one inſtant, yet alloweth priority of time, in the inſtant, which he diſtinguiſheth by per and poſt. And the reaſon of this priority is, that the Surviuor claimeth by the firſt Feoffor (as hath been ſaid) and therefore in judgement of Law, his title is Paramount, the title of the Deviſee; and conſequently the deviſe void; and the rule of Law is, that, Jus accreſcendi præfertur ultimæ voluntati.

Pl.Com.in Fulmerſtons. caſe.

teſtament, &c. & moruſt, ceo deviſe eſt voide. Et la cauſe eſt, pur ceo que nul deviſe poit prender effect, mes apres la mort le deviſor, & per ſa mort tout la terre maintenant devient per la ley a ſon companion que ſurveſquiſt per le ſurviuor; le quel il ne claim, ne ad riens en la terre per my le deviſor, mes en ſon droit demeſme p le ſurviuor, ſolonque le courſe de ley, &c. & pur cel cauſe tiel deviſe eſt voide. Mes auterment eſt de Parceners ſeiſies des tenements deviſables en tiel caſe de deviſe, &c. Cauſa qua ſupra.

longeth by his Teſtament, *&c.* and dieth, this deviſe is void. And the cauſe is, for that no deviſe can take effect till after the death of the Deviſor: and by his death all the Land preſently cometh by the Law to his companion which ſurviveth by the Survivor, the which he doth not claime, nor hath any thing in the land by the Deviſor, but in his own right by the Survivor according to the courſe of Law, *&c.* and for this cauſe ſuch deviſe is void. But otherwiſe it is of Parceners ſeiſed of tenements deviſable in like caſe of deviſe, *&c. Cauſa qua ſupra.*

Two Femes, Joyntenants of a Leaſe for years, one of them taketh Husband and dieth; yet the terme ſhall ſurvive; for though all Chattels reals are given to the husband, if he ſurvive, yet the ſurviuor between the Joyntenants is the elder title; and after the marriage the feme continued ſole poſſeſſed; for if the husband dieth, the feme ſhall have it, and not the Executors of the husband; but otherwiſe it is of perſonal goods.

1.H.5.executors 108.

If a man be ſeiſed of a houſe, and poſſeſſed of divers heirlomes, that by cuſtome have gone with the houſe from heire to heire, and by his Will deviſeth away the heirlomes, this deviſe is void; for as Littleton here ſaith, the Will taketh effect after his death; and by his death the heirlomes by ancient cuſtome are veſted in the heir, and the law preferreth the cuſtome before the deviſe. And ſo it is, if the Lord ought to have a Herriot when his tenant dieth, and the tenant deviſeth away all his goods, yet the Lord ſhall have his Herriot, for the reaſon aforeſaid. And it hath been anciently ſaid, that the Herriot ſhall be paid before the Mortuary. (x) Imprimis autem debet quilibet qui teſtaverit, dominum ſuum de meliore re quam habuerit recognoſcere, & poſtea Eccleſiam de alia meliore, &c. wherein the Lord is preferred, for that the tenure is of him. This duty to the Lord is very ancient; for in the lawes before the Conqueſt it is ſaid, Sive quis in curia, ſive morte repentina fuerit inteſtat' mortuus, dominus tamen nullam rerum ſuarum partem (præter eam quæ jure debetur herioti nomine) ſibi aſſumito.

(x) Fleta lib 2.cap.50. Bract.lib.2.fol.60. Britton fol.178. Lamb.fol.119.58.

In the Saxon tongue it is called Heregeat, as much to ſay (as I take it) as the Lords beſt, for Here is Lord; and geat is beſt. But let us return to Littleton.

¶ *Mes auterment eſt de parceners ſeiſies des tenements deviſable en tiel caſe del deviſe*, &c. Cauſa qua ſupra.

The reaſon is evident, for that there is no ſurviuor between Coparceners; but the part of the one is deſcendible, and conſequently may be deviſed.

Sect.

## *Sect.* 288.

¶ Item il ẽ comũement dit, q̃ chelc joyntenant eſt ſeiſie ð la terr q̃ il tient joyntment, per my & per tout, & ceo eſt autant adire, & il eſt ſeiſie per chelcun parcel, & per tout, &c. & ceo eſt voier; car en chelcun parcel, & per chelcun parcel, & per touts les terres et tenements, il eſt joyntment ſeiſie obelq; ſon companion.

ALſo it is commonly ſaid, that every joyntenant is ſeiſed of the Land which he holdeth joyntly *Per my & per tout*, and this is as much to ſay, as he is ſeiſed by every parcel, and by the whole, *&c.* and this is true; for in every parcel, and by every parcel, and by all Lands and Tenements, he is joyntly ſeiſed with his companion.

¶ *Item eſt communement dit, &c.* That is, It is the common opinion, and Communis opinio is of good authority in Law, A communi obſervantia non eſt recedendum, which appeareth here by Littleton. Vide Sect. 697.

¶ *Per my & per tout.* Et ſic totum tenet & nihil tenet, s. totum conjunctim, & nihil per ſe ſeparatim. And albeit they are ſo ſeiſed (as for example, where there be two joyntenants in fee) yet to divers purpoſes each of them hath but a right to a moitie, as to enfeoff, give, or demiſe, or to forfeit or loſe by default in a Præcipe. If my Millein, (y) and another purchaſe lands to them two, and their heires, I may enter into a moitie. Vide Bracton li. 5. 430. Britton cap. 35. Fleta lib. 3. cap. 4. 40. E. 3. 40. 18. E. 2. Bre. 831. 35. H. 6. 39. Vid. the ſecond part of the Inſtitutes upon the ſixt chapter of the Statute de Bigamis. Flet. lib. 1. cap. 28. 40. Aſſ. 79. 48. E. 3. 16. (y) Vide 6. E. 3. 4. 7. E. 4. 29. 11. El. Dier 283.

And where all the joyntenants joyne in a feoffement, every of them in judgement of law do give but his part. If an Alien and a ſubject purchaſe lands joyntly, the King upon office found ſhall have but a moitie. And Littleton afterwards in this chapter ſaith, that one joyntenant hath one moitie in Law, the other the other moity. And therefore if two joyntenants bar (z) and both they make a feoffment in fee upon condition, and that for breach thereof one of them ſhall enter in the whole, yet he ſhall enter but into a moity, becauſe no more in judgment of law paſſed from him: and ſo it is of a gift in taile or a leaſe for life, &c. (z) Pl. Com. in Brownings caſe fol.

Yet every Joyntenants may warrant the whole, (a) becauſe a man may warrant more than paſſeth from him. (a) Vid. the ſecond part of the Inſtitutes upon the ſixt chapter of the Statute de Bigamis.

If two Joyntenants make a feoffment in fee (b) and one of the Feoffors die, the Feoffee cannot plead a feoffment from the ſurvivor of the whole, becauſe each of them gave but his part; but otherwiſe it is on the part of the Feoffees, as hath been ſaid before. (b) 14. E. 4. 5. and the other books aboveſaid.

And where two joyntenants be, the one of them (c) may make the other his Bayliff of his moity, and have an Action of account againſt him. And one joyntenant (d) may let his part for years, or at will, to his companion. (c) 21 E. 3. 60. (d) 11. H. 3. 60. 33.

If two joyntenants be of certain lands, and the one of them by Deed indented (e) bargaineth and ſelleth the lands, and the other joyntenant dieth, and then the deed is inrolled; there ſhall paſſe nothing, but the moity which the bargainer had, at the time of the bargain. (e) 27. E. 3. tit. Faits inrol 9. Br.

## *Sect.* 289.

¶ Item ſi deux joyntenants ſont ſeiſiez ð certain terres en fee ſimple, & lun deſſa ceo que a luy affert a un eſtranger pur terme de 40. ans, & deydebant le terme com-

ALſo if two joyntenants be ſeiſed of certaine lands in Fee-ſimple, and the one letteth that to him belongeth to a ſtranger for terme of forty years, and dyeth before the

¶ *Per force de meſme le dit leaſe &c.* By this (&c.) is implied, That where our Author ſpeaketh of Joyntenants ſeiſed in fee, that ſo it is if two be ſeiſed for life, and one make a Leaſe to begin preſently, or in (f) Vid. ſect. 286. & 666. & Sect. 2.

in futuro, and dieth; this Leaſe ſhall binde the Surviboꝛ, as it hath bẽn adjudged.

(g) And if one joyntenant grant veſturam terræ, oꝛ herbagium terræ, foꝛ years, and dyeth, this ſhall bind the ſurviboꝛ; foꝛ ſuch a Leſſee hath right in the Land. So it is if two Joyntenants be of a Water, and the one granteth the ſeveral Piſchary.

(g) 11.H.4.90 14.H.8. 6.17.E.4.6.a.9.H.6.52. 21.H.7.29.14.H.7.4.18. E.3 execution 56.11. El.Dier.285.Pl.Com. 160. a Temps E.1.Aſſ. 422.20.H.6.4,7.H.7. 13,10.H.7.24.

¶ *Lun leſſa.*

The one letteth. If two Joyntenants be of an advowſon, and (h) the one preſenteth to the Church, and his Clerk is admitted and inſtituted, this in reſpect of the priority ſhal not put the other out of poſſeſſion; but if that Joyntenant that preſenteth dieth, it ſhall ſerve foꝛ a title in a quar' impedit brought by the ſurviboꝛ. But yet if one joyntenant oꝛ tenant in Common preſent, oꝛ if they preſent ſeverally, the Oꝛdinary may either admit, oꝛ refuſe to admit ſuch a Preſentee, unleſſe they joyne in preſentation; and after the ſix moneths he may in that caſe preſent by Lapſe.

(h) 6.E.3.38.39.52.7. E. E.3.20,21.17. E.3. 37.b.22.E.3.9.30.E.3. 16.11.H.4.54.15.E.3. Darein preſentment. 11.10.E.4.94.1.H.7.1. b.2.R.3. Quare Imp. 102.9.El.Dyer 259. 36.w.8.Br, Preſent. 27. H.8.fo 11.5.H.7.8.6.E. 4.10.b.Doct. & Stud. 116.34.H.6.40.20.E.3. Quar.Imp.63.F.N.B. 34.V.

But if two oꝛ moꝛe Coparceners be, (i) and they cannot agree to preſent, the eldeſt ſhall preſent; and if her ſiſter doth diſturbe her, ſhe ſhall have a quare impedit againſt her, and ſo ſhall the iſſue and the Aſſignee of the eldeſt, and yet he is tenant in common with the youngeſt. And in the ſame manner the Tenant by the Curteſie of the eldeſt ſhall preſent: but if there be four Coparceners, and the eldeſt and the ſecond preſent, and the other two preſent joyntly oꝛ ſeverally, the Oꝛdinary may refuſe them all; foꝛ the eldeſt did not preſent alone, but ſhe and one other of her ſiſters. But now let us return to Littleton.

(i) Bract.l.4.fol.238. 245.247.Britton f.223. 45.Ed.3.Fines 41.18.E. 2.Quar.Imp.176.38.H. 6.9.19.E.3.ib.59.5.H.5. 10.F.N.B.34.V.

mence, ou deins le tẽme, en ceſt caſe apres ſon deceaſe le Leſſee poit enter & occupier la moitie a luy leſſe durant le terme, &c. coment que le Leſſee navoit unꝗs poſſeſſion de ceo en la vie Leſſoꝛ, per foꝛce de meſme l'leaſe, &c. Et le diverſitie perenter le caſe de grant de Rentcharge avantdit, & ceſt caſe eſt ceo, car ẽ grant de Rent charge p̃ joyntenant, &c. les Tenements demurgẽt touts foits come ils fueront adevant, ſans ceo que alcun ad alcun dꝛoit daver alcun parcel de les tenements foꝛſque eux meſmes, & les Tenements ſont en tiel plyte, cum ils fueront devant le charge, &c. Mes ou Leaſe eſt fait per un Joyntenant a un auter pur term des ans, &c. maintenant per foꝛce de le Leaſe le leſſee ad dꝛoit en meſm̃ la terre, ceſtaſcavoir, de tout ceo que a ſon leſſour affiert, & daver ceo per foꝛce de meſme le Leaſe durãt ſon terme: Et ceo eſt la diverſitie.

terme beginneth, or within the terme, in this caſe after his deceaſe the Leſſee may enter and occupie the moitie let unto him, during the terme, *&c.* although the leſſee had never the poſſeſſion thereof in the life of the Leſſor; by force of the ſame leaſe, *&c.* And the diverſitie between the caſe of a grant of a rent charge aforeſaid, and this caſe, is this; for in the grant of a Rent charge by a Joyntenant, *&c.* the Tenements remaine alwaies as they were before, without this that any hath any right to have any parcel of the tenements but they themſelves, and the Tenements are in the ſame plight as they were before the charge, *&c.* But where a leaſe is made by a joyntenant to another for terme of years, *&c.* preſently by force of the leaſe, the leſſee hath right in the ſame Land, (*videlicet*) of all that which to the Leſſor belongeth, and to have this by force of the ſame leaſe, during his terme: And this is the diverſitie.

*Sect.*

## *Sect.* 290.

¶ Item, joyntenãts (ſils voilent) poient faire partition enter eux, & la partition eſt aſſets bon, mes de ceo faire ils ne ſerront compels per la ley. Mes ſils voylent faire partition de lour propre volũt & agreement, le partition eſtoiera en ſa force.

Alſo, Joyntenants (if they will) may make partition between them, and the partition is good enough, but they ſhall not be compelled to do this by the Law; but if they will make partition of their own will and agreement, the partition ſhall ſtand in force.

¶ *Poyent faire partition.* But this partition muſt be (k) by Deed, as hath been ſaid before. But Joyntenants for years may (l) make partition without Deed.

(k) Vid. Sect. 259, 318.

(l) 18. El. Dyer 350.

¶ *Ils ne ſerra compel.* This is true regularly, but by the cuſtom of ſome Cities and Boroughs, one Joyntenant or tenant in common may compel his companion by writ of partition grounded upon the cuſtom to make partition. But ſince Littleton wrote, Joyntenants and Tenants in common generally are compellable to make partition by Writ framed upon the Statutes (m) of 31. & 32. H. 8. as before hath been ſaid. And albeit they be now compellable to make partition, yet ſeeing they are compellable by writ, they muſt purſue the Statutes, and cannot make partition by Parol, for that remains at the Common Law. And by Littletons Authority herein it ſeemeth to me, that if one Joyntenant or Tenant in Common diſſeiſe another, and the Diſſeiſee bring his aſſiſe for the moity, that in this caſe though the Plaintiff prayeth; yet no judgement ſhall be given to hold in ſeverality: for then at the Common Law there might not have been by compulſion of Law a partition between joyntenants and tenants in Common; and by rule of Law the Plaintiff muſt have judgement according to his plaint or demand.

F. N. B. 62. b.

(m) 31. H. 8. c. 1. 32. H. 8. c. 32. Vid. ſect. 264, 247, 259. Mich. 16. & 17. El. 1. 340. Inter Harris & Eden adjudge acc. 18. El. Dyer 350. b. Vide before in the chapter of Partition, many books cited concerning this matter. 3. E. 3. 48. F. N. B. 9. b. 7. Aſſ. 10. 7 E. 3. 29. 10. Aſſ. 17. 10. E. 3. 40. 43. 12. Aſſ. 15, 17. 12. E. 3. judgment 162. 20. E. Aſſ. 62. 28. Aſſ. 35. 23. Aſſ. 10. 7. H. 6. 6. 4. 19. H. 6. 45. 3. E. 4. 10. Vid. Sect. 247. Bri. f. 112. Lib. 6, fol. 12. & 13. Morrices caſe.

If two Joyntenants be (n) of land with Warranty, and they make partition by writing, the Warranty is deſtroyed; but if they make partition by writ of partition upon the Statute, the Warranty remains, becauſe they are compellable thereunto.

(n) 29. E. 3. tit. Garr.

## *Sect.* 291.

¶ Item, ſi un joynt eſtate ſoit fait de tre a le baron & a ſa feme & a un tierce perſon, en ceo cas le baron & ſa feme nont en ley en lour droit forſque le moity, &c. & le tierce perſõ avera tant come le baron & ſa feme ont, s. lauter moity, &c. Et la cauſe eſt, pur ceo que le baron & ſa feme ne ſont forſque un perſon en

Alſo, if a joynteſtate be made of Land to Husband and Wife, and to a third perſon, in this caſe the husband and wife have in law in their right but the moity, and the third perſon ſhall have as much as the huſband and wife, *viz.* the other moity, &c. And the cauſe is, for that the husband and wife are but one perſon in

¶ *Le baron et ſa feme nont en ley en lour droit forſque le moity*, &c. William Ocle and Joane his wife (o) purchaſed lands to them two and their heires, after William Ocle was attainted of high Treaſon for the murther of the Kings father, E. 2. and was executed, Joane his wife ſurvived him. E. 3. granted the Lands to Stephen de Bitterly and his heires. John Hawkins the heir of the ſaid Joane in a Petition to the King diſcloſeth this whole matter, and upon a Scir' facias againſt the Patentee, hath judgement to recover the lands

(o) Mich. 33. E. 3. Coram Rege Salop. in Theſaur.

lands, for the reason here yeelded by our Author.

Vide Sect. 665.

But if an estate be made to a man and a woman and their heires before marriage, and after they marry, the husband and wife have moities between them, which is implyed in these words of our Author, Baron & sa feme.

¶ *Forsque un person en ley.* Bracton saith, (p) vir & uxor sunt quasi unica persona, quia caro una & sanguis unus. It hath ben said, that if a reversion be granted to a man and a woman and their heirs, and before attornment they entermarry, and then attornment is made, That the husband and wife shall have no moities in this case, no more then if a Chapter of Feoffment be made to a man and a woman, with a Letter of Attorney to make Livery, they entermarry, and then Livery is made secundum formam chartæ, in which case it is said that they have no moities. But certain it is, that if a feoffement were made before the stat. of 27. H. 8. of uses to the use of a man (q) and a woman and their heirs, and they entermarry, and then the Statute is made, if the husband alien, it is good for a moity, for the Statute executes the possession according to such quality, manner, form, and condition, as they had in the use; so as though it rest during the coverture, yet the Act of Parliament executes several moities in them, seeing they had several moities in the use.

(p) Bract. li.5.fol.416. 20.H.3. Discent 52. Li. 4.fol.68. Tokers case. Pl.Co.483. Nichols case

(q) 4.Mar.Dyer.149. 8.Mar.Dyer.122.29.H. 8.Dyer.32.

If an estate be made to a Villein and his wife (r) being free, and to their heirs, albeit they have several capacities, viz. the Villein to purchase for the benefit of the Lord, and the wife for her own, yet if the Lord of the Villein enter, and the wife surviveth her husband, she shall enjoy the whole land, because there be no moities between them.

(r) 40.Ass.p.7.

A man makes a Lease to A. and to a Baron and Feme, viz. to A. for life, to the husband in tail, and to the feme for years, in this case it is said, That each of them hath a third part in respect of the severalty of their estates.

If a Feoffment be made to a man and a woman, and their heirs, with warranty, (f) and they entermarry, and after are impleaded, and vouch and recover in value, moities shall not be between them; for though they were sole when the warranty was made, notwithstanding at the time when they recovered and had execution they were husband and wife, in which time they cannot take by moities.

(f) Pl. Com. 483. Nichols case.

10 H.7.20.

Albeit Baron and Feme (as Littleton here saith) be one person in Law, so as neither of them can give any estate or interest to the other; yet if a charter of feoffment be made to the wife, the husband as Attorney to the feoffor may make livery to the wife; and so a feme covert that hath power to sell land by will, may sell the same to her husband, because they are but Instruments for others, and the state passeth from the Feoffor or Devisor.

(t) 11.E.3.Cui in vita 9.16.E.3.ibid. 36.E.3.ib. 20.35.Ass.Pl.15 31.H.6. tit.Ent.congeable 54 19.H.6.45.F.N.B.193.k

If a husband, wife, and a third person purchase lands to them and their heirs, (t) and the husband before the Statute of 27 H. 8. cap. 10. had alienes the whole land to a stranger in fee, and died, the wife and the other Joyntenant were Joyntenants of the right; and if the wife had

ley, & sont en semblable case, ticome estate soit fait a deux jointenants, ou lun ad per force de joynture un moity en ley, & lauter lauter moity, &c. En meisme le maner est lou estate est fait a le baron & a sa feme, & al auters deux homes, en tiel cas l'baron & sa feme nont forsq; la tierce part, & les auters deux homes les auters deux parts, &c. Causa qua supra.

law, and are in like case, as if an estate be made to two Joyntenants, where the one hath by force of the joynture the one moity in Law, and the other the other moity, &c. In the same manner it is where an estate is made to the husband and wife, and to two other men, in this case the husband and wife have but the third part, and the other two men the other two parts, &c. *Causa qua supra.*

¶ PLuis serra dit del matter touchant Joyntenancy en le Chapter de Tenants en common, & tenant per Elegit, & tenant per Statute Merchant.

MOre shall be said of the matter touching Joyntenancy in the Chapter of Tenants in Common, and tenant by Elegit, and tenant by Statute Merchant.

had died, the other Joyntenant should have had the whole right by survivor, for that they might have joyned in a Writ of Right, and the discontinuance should not have barred the entry of the survivor, for that he claimed not under the discontinuance, but by title paramount above the same by the first feoffment, which is worthy of observation. But if the husband had made a feoffment in fee but of the moity, and he and his wife had died, their moity should not have survived to the other.

And for the better understanding of this diversity, divers things are worthy of observation.

First, That a right of action, and a right of entry may stand in Joynture; for at the Common Law the alienation of the husband was a discontinuance to the wife of the one moity, and a disseisin of the other, so as after the death of the husband the wife hath a right of Action to the one moity, and the other Joyntenant a right of entry into the other; but they are Joyntenants of the right, because they may joyn in a Writ of Right. Vide Sect. 302.

Secondly, that a right of Action or a bare right of entry cannot stand in joynture with a Freehold or Inheritance in possession; and therefore if the husband make a feoffment of the moity, this was a discontinuance of that moity, * and the other Joyntenant remained in possession of the Freehold and Inheritance of the other moity, which for the time was of severance of the Joynture; and so are all the books which seemed to vary amongst themselves, clearly reconciled. * Vide the Statute of 32. H.8.c. it is no discontinuance at this day

If two Joyntenants be of a rent, and the one of them disseise the Tenant of the land, (u) this is a severance of the joynture for a time, for the moity of the rent is suspended by unity of possession; and therefore cannot stand in joynture with the other moity in possession. And this is to be observed, That there shall never be any survivor, unless the thing be in joynture at the instant of the death of him that first dieth: for the rule is, Nihil de re accrescit ei qui nihil in re quando jus accresceret, habet. (u) Pl. Com. 419. m. Bract, Bridges case.

Also if a man deviseth lands to two, to have and to hold, to the one for life, and the other for years, they are no Joyntenants, for a state of freehold cannot stand in joynture with a term for years: and a reversion upon a freehold cannot stand in joynture with a freehold and inheritance in possession, as shall be said in the next Chapter. Neither can a seisin in the right of a politick capacity stand in joynture with seisin in a natural capacity, as shall be said hereafter. 46. E. 3. 21. 19. H. 6. 45. 37. H. 8. 8. 3. E. 4. 10.

If two Femes be joyntly seised, and they take Barons, and the Barons joyn in an alienation and die, the wives are Joyntenants of the right, and may joyn in a writ of right: and yet they may have several writs of Cui in vita at their election: but when they have recovered in those several writs, they shall be Joyntenants again. But if the Barons had alienes severally, this had been a severance of the joynture for a time, for the reason aforesaid.

If two Joyntenants, the one for life, and the other in fee lose by default, the one shall have a writ of Right, and the other a Quod ei deforceat; and yet when they have severally recovered, they shall be Joyntenants again. So it is if two Joyntenants be disseised, and an Assise is brought, and the one is summoned and severed, and the other recover the moity, and after another Assise is brought, and he that recovereth is summoned and severed, and the other recover, albeit they severally recover, yet they are Joyntenants again.

And in all cases where the Joyntenants pursue one joynt remedy, and the one is summoned and severed, and the other recover, he that is summoned and severed shall enter with him: but where their remedies be several, there the one shall not enter with the other, till both have recovered, and the same Law is of Coparceners. If lands (w) be demised for life, the remainder to the right heirs of I.S. and of I.N. I.S. hath issue and dieth, and after I.N. hath issue and dyeth, the issues are not Joyntenants, because the one moity vested at one time, and the other moity vested at another time. And yet in some cases there may be Joyntenants, and yet the estate may vest in them at several times. Vid. Lit. cap. Remitter the last case. 10. H. 6. 10. 31. H. 6. tit. Entre congeable 46. E. 3. 21. b. 3. E. 4. 10. 37. H. 6 8. (w) 24. E. 3. 29. 18. E. 3. 28. 38. E. 3.

If a man (x) make a feoffment in fee to the use of himself and of such wife as he shall afterwards marry, for term of their lives, and after he taketh wife, they are Joyntenants, and yet they come to their estates at several times. (x) 17. El. Dyer Brenes case.

And so it is, if I disseise one to the use of two, and the one agrees at one time, and the other at another, yet they are Joyntenants.

And this Section are three (&c.) the first and second are at large explained before, the last is intended where more parties take then three.

## Chap. 4. Of Tenants in Common. *Sect.* 292.

¶ Tenants en Common ſont ceux, q̄ ont terres ou tenements en fée ſimple, fée taile, ou pur terme de vie, &c. les queux ont tielx terres ou Tenemēts per ſeveral titles, & nemy per joynt title, & nul de eux ſcavoit de ceo ſon ſeveral, mes ils doient per la Ley occupier tiels terres ou tenements en common & pro indiviſo a prender les profits en common. Et pur ceo que ils abiendront a tielx terres ou tenements per ſeveral titles & nemy per un joynt title, & lour occupation & poſſeſſion ſerra per la ley perenter eux en common, ils ſont appels Tenants en common. Sicome un hõme enfeoffa deux Joyntenants en fée, & lun de eux alien ceo que a luy affiert a un auter en fée, ore le alienee & lauter Joyntenant ſont Tenants en Common, pur ceo que ils ſont eins en tiels Tenemēts per ſeveral titles, car lalienee vient eins en la moitie per la feoffment dun des Joyntenants, & lauter Joyntenants ad lauter moitie, per force de le primer Feoffment fait a luy, & a ſon compagnion, &c. Et iſſint ils sõt eins per ſeveral titles, ceſt aſcavoir, per ſeveral ſeoffments, &c.

THEnants in Common are they which have lands or Tenements in Fee ſimple, fee tail, or for terme of life, *&c.* and they have ſuch Lands or Tenements by ſeveral Titles, and not by a joynt Title, and none of them know of this his ſeveral, but they ought by the Law to occupy theſe Lands or Tenements in common, and *pro indiviſo*, to take the profits in Common. And becauſe they come to ſuch lands or Tenements by ſeverall titles, and not by one joynt title, and their occupation and poſſeſſion ſhall be by Law between them in common, they are called Tenants in Common. As if a man infeoffe two Joyntenants in Fee, and the one of them alien that which to him belongeth, to another in Fee, now the Alienee and the other Joyntenant are Tenants in common, becauſe they are in ſuch Tenements by ſeverall titles, for the Alienee commeth to the moitie by the Feoffement of one of the joyntenants, and the other joyntenant hath the other moity by force of the firſt feoffement made to him and to his companion, *&c.* And ſo they are by ſeveral Titles, that is to ſay, by ſeveral Feoffments, *&c.*

Fleta lib. 3. cap. 4.

¶ Littleton having ſpoken of Parceners which are only by deſcent, and of Joyntenants which are only by purchaſe, and by joynt title, ſpeaketh now of Tenants in Common, which may be by three means, viz. by Purchaſe, by Deſcent, or by Preſcription, as hereafter in this Chapter ſhall appear.

¶ Ou-

¶ *Ou pur terme de vie, &c.* Here (&c.) implieth pur terme dauter vie, or for terme of years, or for any other fixed Estate in the Land.

And here it appeareth that the essential difference between Joyntenants and Tenants in Common, is, that Joyntenants have the Lands by one joynt Title, and in one Right, and Tenants in common by several titles, or by one Title and by several Rights, which is the reason that Joyntenants have one joynt Freehold, and Tenants in common have several Freeholds, only this property is common to them both, viz. that their occupation is undivided, and neither of them knoweth his part in several. Vide Sect. 296.

The Example that Littleton putteth in this Section is perspicuous, and needeth no explication.

## *Sect.* 293.

¶ Et est a scavoir, que quand il est dit en aucun Lieur, q̃ home est seisie ẽ fee sauns pluis dire, il serra entendue en fee simple; car il ne serra entendue per tiel parol (ẽ fee) que home est seisie en fee taile, sinon que soit mis a ceo tiel addition, fee taile, &c.

And it is to be understood, that when it is said in any book, that a man is seised in fee, without more saying, it shall be intended in fee simple; for it shall not be intended by this word (in fee) that a man is seised in fee taile, unlesse there be added to it this addition, fee taile, *&c.*

¶ This is evident, and secundùm excellentiam, it shall be taken for the highest and best fee, and that is fee simple. Vide devant. Sect. 99.

*Addition en fee taile*, &c. Here is implied a maxim in Law, viz. that Addicio probat minoritatem, as it is vulgarly said, the younger Son giveth the difference.

## *Sect.* 294.

¶ Item si 3. Joyntenants sont, & un de eux alien ceo que a luy affiert a un auter home en fee, en cest cas lalienée est tenant en common ouesque les auters deux joyntenants, mes uncore les auters 2. joyntenants sont seisies d'deux parts joyntment que remain, & de ceux deux parts le survivor enter eux deux tient lieu, &c.

Also, if three Joyntenants be, and one of them alien that which to him belongeth to another man in fee, In this case the alienee is Tenant in common with the other two Joyntenants; but yet the other two Joyntenants are seised of the two parts which remain joyntly; and of these two parts the Survivor between them two holdeth place, *&c.*

¶ This needeth no explication; only the (&c.) in the end of this Section implyeth that the same Law is where there be more Joyntenants then three.

## *Sect.* 295.

¶ Item, ſi ſoient deux Joyntenants en fee, & lun dona ceo que a luy affiert a un auter & le tayl & lauter done ceo que a luy affiert a un auter en le tail, les donées ſont tenants en common, &c.

ALſo, if there be two Joyntenants in fee, and the one giveth that to him belongeth to another in taile, and the other giveth that to him belongs to another in taile, the Donees are Tenants in common, *&c.*

Vide Sect. 300.

¶ The (&c.) in the end of this Section implyeth, that ſo it is when a Leaſe for life, or pur auter vie, is made; for in that caſe alſo the Leſſees are tenants in common.

## *Sect.* 296.

¶ *Si terres ſont dones a deux homes, &c.* Of this ſufficient hath been ſpoken in the Chapter (a) of Joyntenants.

(a) Sect. 283.

¶ *Mes ſi terres ſont dones a deux Abbes, &c.* In this caſe of the two Abbots in reſpect of their ſeveral capacities, albeit the words be joynt; yet the Law (b) doth adjudge them to be ſeverally ſeiſed.

(b) 7.H.7.9.b.16.H.7. 15.b.3.H.7.11.12.E.4. 16.b.5 H.7.25. 18.E.27. 49.E.3.25.b. Vide Sect.200.

(The (&c.) in the end of the Section implyeth, that ſo it is if any (c) body Politique or Corporate, be they Regular, as dead perſons in Law (whereof our author here ſpeaketh) or Secular: as if

(c) 4.H.7.15 18.E.3. 12.b.

¶ MEs ſi terres ſont dões a deux hoñs & a les heirs de lour deux corps engendrés, les donees aũt joynt eſtate pur terme de lour vies; & ſi chelcun de eux ad iſſue & devy, lour iſſues tiẽdront en common, &c. Mes ſi terres ſont dones a deux Abbes, ſicome al Abbe de Weſtminſt. & al Abbe de S. Albans, a aver & tener a eux & a lour ſucceſſors, & eſt cas ils ont maintenant al commencement eſtate & common, & nemy joynt eſtate. Et le cauſe eſt, pur ceo q̃ chelcun Abbe, ou auter Soveraign, de reaſon de Religiõ debãt que il fuit fait Abbe, ou Soveraign, &c. il fuit forſz come mort perſun en ley, & quand il eſt fait Abbe, il eſt come un hõe perſonable en Ley tantſoleñt a purchaſer & aver terres ou tenements, ou

BUt if Lands be given to two men, and to the heirs of their two bodies begotten, the Donees have a joynt Eſtate for terme of their lives; and if each of them hath iſſue, and die, their iſſues ſhall hold in Common, &c. But if lands be given to two Abbots, as to the Abbot of *Weſtminſter*, and to the Abbot of Saint *Albans*, to have and to hold to them and to their Succeſſors, In this caſe they have preſently at the beginning an eſtate in Common, and not a joynt eſtate. And the reaſon is, for that every Abbot or other Soveraigne of a houſe of religion, before that hee was made Abbot or Soveraigne, &c. was but as a dead perſon in Law, and when he is made Abbot, he is as a man perſonable in Law onely to purchaſe and have Lands or Tenements or other things to the uſe of his Houſe, and

auters

auters choſes al uſe de ſa meaſon, & nemy a ſõ pꝛo-per uſe, cõe auter ſecular home poit, & p̃ ceo al cõmẽcemẽt d̃ lour purchaſe ils ſõt tenãts ẽ common & ñ lũ de eux devie, Labbe que ſurveſquiſt naver-a my tout per le ſurviuoꝛ, mes le ſucceſſoꝛ de Labbe q̃ moꝛuſt tiendꝛa le moitie ẽ common oue Labbe que ſurveſquiſt, &c.

not to his own proper uſe, as ano her ſecular man may; and therefore at the beginning of their purchaſe they are Tenants in Common; and if one of them die, the Abbot which ſurviveth ſhall not have the whole by ſurvivor, but the Succeſſor of the Abbot which is dead ſhall hold the moity in common with the Abbot that ſurviveth, &c.

lands be given to two Biſhops, to have and to hold to them two and their Succeſſors: Albeit the Biſhops were never any dead perſons in law, but always of capacity to take, yet ſeeing they take this Purchaſe in their politick capacity, as Biſhops, they are preſently Tenants in common, becauſe they are ſeiſed in ſeveral rights; for the one Biſhop is ſeiſed in the right of his Biſhoprick of the one moity, and the other is ſeiſed in the right of his Biſhoprick of the other moity; and ſo by ſeveral titles and in ſeveral capacities; whereas Joyntenants ought to have it in one and the ſame right and capacity, and by one and the ſame joynt Title. The like Law is, if Lands be given to two Perſons and their Succeſſors, or to any other ſuch like Eccleſiaſtical bodies Politique or Incorporate, as hath been ſaid.

If a Corody be granted to two men and their heirs, in this caſe becauſe the Corodie is incertain, and cannot be ſevered, it ſhall amount to a ſeveral grant, to each of them one Corodie, for the perſons be ſeveral, and the Corodie is perſonal.

## *Sect.* 297.

ITem, ũ tꝛs ſoient dones a un Abbe, & a un Secular home, a aver & teñ a eux, s. al Abbe, & a ſes ſucceſſoꝛs, & al Secular home a luy & a ſes heires, donques il ount eſtate ẽ cõmon, Cauſa qua ſupra.

ALſo, if lands be given to an Abbot and a Secular man, to have and to hold to them, *viz.* to the Abbot and his Succeſſors, and to the Secular man, to him and his heires, they have an eſtate in common, *Cauſa qua ſupra.*

AND ſo it is if Lands be given to the Parſon of Dale, and to a Lay man, to have and to hold to them, that is to ſay, to the Parſon and his Succeſſors, and to the Layman and his heirs, they are preſently Tenants in Common, for the cauſes aboveſaid. So if a Biſhop, &c. Et ſic de ſimilibus. F.N.B.49.I.16.E.3. Joindre en action 27.16 Aſſ.p.1.2.R.3.16.7.H.7 9.13.H.8.14.

If Lands be given to the King and to a Subject, To have and to hold to them and to their heirs, yet they are Tenants in Common, and not Joyntenants; for the King is not ſeiſed in his natural Capacity, but in his Royal and politick Capacity, *in jure Coronæ*, which cannot ſtand in joynture with the ſeiſin of the ſubject in his natural Capacity. So likewiſe if there be two Joyntenants, and the Crown deſcend to one of them, the Joynture is ſevered, and they are become tenants in common. But if Lands be given to *A.* de B. Biſhop of N. and to a Secular man to have and to hold to them two, and to their heirs; In this caſe they are Joyntenants, for each of them take the lands in their natural capacity. Pl.Com.in Sheig.Bark. leys caſe fol.

If lands be given to John Biſhop of Norwich, and his Succeſſors, and to John Oteral Doctor of Divinity, and his heirs, being one and the ſame perſon, he is Tenant in Common (d) with himſelf. But our Authors rule doth not hold in Chattels reals, or perſonals: for if a leaſe for years be made, or a Ward granted to an Abbot and a ſecular man, or to a Biſhop and Secular man, or if goods be granted to them, they are Joyntenants, becauſe they take not in their Politick Capacity. (c) 13.H.8.14. 16.H.7. 15.9.H.6.25 45.E.3.25.

*Sect.*

## *Sect.* 298.

AND the reason is, because they have several Freholds and an occupation pro indiviso.

Here is to be observed, that the Habendum doth sever the premises, that Prima facie seemed to be joynt; for an expresse estate controls an implied estate, as hath been said.

ITem, ũ terres soient dones a deux a aver, & tener, s. lun moitie a lun & a ses heirs, & lauter moity a lauter & a ses heirs, ils sont tenants ẽ common.

ALso, if lands be given to two to have and to hold, s. the one moity to the one and to his heirs, and the other moity to the other and to his heirs, they are Tenants in Common.

## *Sect.* 299.

1.Ass.Pl.16.

45.E.3.12.44.Ass.11.

21.E.4.21.b.

AND the like Law is, if the feoffment be made of a third part or a fourth part, &c. And if there be an Advowson appendant, they are also Tenants in common of the Advowson. And albeit it is said that such a feoffment of a moity or third part, &c. is not good without writing, for that (as they say) a man cannot create an uncertain estate in land by Parol, yet is the Law clear, that such a feoffment is good by Parol without writing; and such an uncertain estate shall passe by Livery, and so it appeareth in our books.

ITem, ũ home seisie de certain terres enfeoffa un auter de le moity de melm̃ la terre sans aucun parlance de assignement ou limitation de melme la moitie en severalty al tẽps del feoffment, donq̃s le feoffee & le feoffor tiendront lour parts de la terre en common.

ALso, if a man seised of certain Lands infeoff another of the moity of the same land without any speech of assignement or limitation of the same moity in severalty at the time of the feoffment, then the Feoffee and the Feoffor shall hold their parts of the Land in common.

21.E.4.22.b.

If a verdict find that a man hath Duas partes manerii, &c. in tres partes divisas, this shall not be intended to be in common; but if Verdict be in tres partes dividendas, then it seemeth that they are Tenants in Common by the intendment of the Verdict.

5.E.3.23.67.Temps E.1 Feoffments 115.34.E.1. quar.imped.279.10. El. Dyer 28.22.E.3.6.Feoffments 116.6.E.3.56.29.E.3.38.9.E.3.16 17.E.3.3.18.E.3.43.43.E.3.26.23.Ass.8.33.H.6.5.a.

But if a man be seised of a Manor wherunto an Advowson is appendant, and maketh a feoffment of three Acres parcel of the Manor, together with the Advowson, to two, To have and to hold the one moity together with the moity of the Advowson to the one and his heirs, and the other moity together with the other moity of the Advowson to the other and his heirs, this cannot be good without deed; for the Feoffor cannot annex the Advowson to these three acres, and disannex it from the rest of the Manor without Deed.

## *Sect.* 300.

FEst alcaboir, que en melm̃ le maner come est avantdit de tenants en common, de terres ou tenits en fee simple, ou en fee taile, ẽ melme le maner poit estre

AND it is to be understood, that in the same manner as is aforesaid of tenants in common, of lands or tenements in fee simple, or in fee taile, in the same de-

de tenants a term de vie. Sicom̃ deux joyntenants ſont en fee, & lũ leſſa a un home ceo que a luy affiert pur term de vie, & lauter joyntenãt leſſa ceo que a luy affiert a un auter pur term de vie, &c. les deux leſſees ſont Tenants ẽ common pur lour vies, &c.

manner may it be of Tenants for term of life. As if two Joyntenants be in fee, and the one letteth to one man that which to him belongeth for term of life, and the other joyntenant letteth that which to him belongeth to another for term of life, *&c.* the ſaid two Leſſees are tenants in common for their lives, *&c.*

Vide Sect. 295. where this is ſufficiently explained before.

## *Sect.* 301.

¶ ITem, ſi home leſſa terres a deux homes pur terme de lour vies, & lun granta tout ſon eſtate de ceo que a luy affiert a un auter, donqs lauter tenant a terme de vie, & celuy a q̃ le grant eſt fait ſont tenants en common, durant le tẽps que ambideux les leſſees ſont ẽ vie.

¶ Et memorandum, que en touts auters tiels caſes, coment que ne ſont icy expreſſemẽt moves ou ſpecifies, ſi ſont en ſemblabl' reaſõ, ſont en ſemblable ley.

ALſo, if a man let lands to two men for term of their lives, and the one grants all his eſtate of that which belongeth to him to another, then the other tenant for term of life, and he to whom the grant is made, are Tenants in common during the time that both the leſſees be alive.

¶ And *memorandum*, that in all other ſuch like caſes, although it be not here expreſly moved or ſpecified, if they be in like reaſon, they are in the like law.

¶ AND ſo it is, if Lands be letten to two for terme of their lives. Et eorum alterius diutius viventi, and one of them granteth his part to a ſtranger, whereby the joynture is ſevered, and dyeth: here ſhall be no ſurviver, but the Leſſor ſhall enter into the moity, and the ſurviver ſhall have no advantage of thoſe words, Et eorum alterius diutius vivent, for two cauſes. Firſt, for that the joynture is ſevered. Secondly, for that thoſe words are no more then the Common Law would have implied without them: and Expreſſio eorum quæ tacitè inſunt nihil operatur. Hereby it appeareth that in caſe of Leaſes for life, it is more beneficial for the Leſſor to have the joynture ſevered, then to have it continue. 30. Aſſ. 18.

¶ *Si ſoient en ſemblable reaſon, ſont en ſemblable ley.* Vide Sect. 1.

Here Littleton citeth one of the Maxims of the Common Law. That wherſoever there is the like reaſon, there is the like Law. Ubi eadem ratio, ibi idem jus, or Ubi eadem ratio, ibi idem jus eſſe debet, for Ratio eſt anima legis. And therefore Ratio poteſt allegari deficiente lege. But it muſt be Ratio vera & legalis & non apparens. And here it appeareth that Argumentum à ſimili is good in Law. Sed ſimilitudo legalis eſt caſuum diverſorum inter ſe collatorum ſimilis ratio, quod in uno ſimilium valet, valebit in altero, diſſimilium diſſimilis eſt ratio.

*Sect.*

## *Sect.* 302.

¶ *Si deux Joyntenants en fee, &c.*

This needeth no explanation.

¶ *Et sur ceo case un question poit surder, &c.*

Vide 33.H.6.4.b.

Here Littleton maketh a question, and sheweth the reasons on both sides, and concludes with a Quære. When Littleton maketh a question, and sheweth the reason on both sides, the latter is ever his own, (a) and the better. But time hath made this question without question; for now all agree, that the joynture is severed for the time, according to the latter opinion here set down in Littleton, whose reasons are unanswerable: for many times the change of the freehold makes an alteration or change of the reversion. As if Tenant in Taile, or the husband seised in the right of his wife, or Tenant for life, make a Lease for life of the Lessee, in every of these cases the Lessor doth gain a new reversion by wrong, as shall be said more at large in the Chapter of Discontinuance; and if the elder brother grant the reversion (expectant upon a Freehold) for life, it shall cause possessio fratris, as hath beene said.

(2) Vide Sect.340,375, 439,440,462,463,464, 482,483,648,720,729, Vide Sect.170.

Vide Sect.8.7.H.5. *antea 14.*

¶ *Per mesme le reason le reversion que est dependant sur mesm le franktenement est sever de le Joynture, &c.*

7.H.7.9.

If two Joyntenants in fee be, and they both joyne in a Lease to an Abbot and a secular man for term of their lives, here the reversion that is dependant upon severall freeholds is severed. And so it is if they joyn in a lease to two secular men, to have and to hold the one moity to the

¶ Item, si deux Joyntenãts en fee sont, & lun lessa ceo q̃ a luy affiert a un auk pur terme de sa vie, le Tenant a term de vie durãt sa vie, & lauk Joyntenant que ne lessa pas, sont Tenants en cõmon. Et sur ceo case ũ question poit surder icome ẽ tiel case, mittõus que l' lessor ad issue & obvie, vivant lauter joyntenãt son companion, & vivant l' tenãt a term de vie, l' question poit estre tiel: Si le reversiõ de la moity que le lessor avoit dilcẽdra al issue le lessor, ou que lauk joyntenãt avera cel reversion per le survivor. Alcũs ont dit en cest case que lauk joyntenãt avera cel reversion p̃le survivor, & lour reason est tiel, ꝑ. que quand les joyntenants fuerõt joyntment seisies en fee simpl', &c. coment que lun de eux fist estate de ceo que a luy affiert pur terme de sa vie, & comment q̃ il ad sever le frãktenement de ceo que a luy

ALso, if there be two Joyntenants in fee, and the one letteth that to him belongeth to another for terme of his life, the Tenant for term of life during his life, and the other joyntenant which did not let, are Tenants in Common. And upon this case a question may arise, as in such case admit that the Lessor hath issue and die, living the other Joyntenant his companion, and living the Tenant for life, the question may be this, whether the reversion of the moity which the Lessor hath shall descend to the Issue of the Lessor, or that the other Joyntenant shall have this reversion by the survivor. Some have said in this case that the other Joyntenant shall have this reversion by the survivor: and their reason is this, *s.* That when the Joyntenants were joyntly seised in fee simple, *&c.* although that the one of them make an estate of that to him belongeth for terme of his life, and although that

affiert

affiert per l' leafe unque il nad lever l' fee ſimple, mes le fee ſimple demurt a eux joyntmẽt cõe il fuit adevant. Et iſſint ſemble a eux, que lauter Joyntenant que ſurvesquiſt, avera le reverſion per l' Survivour, &c. Et auters ont dit le contrary, & ceo eſt lour reaſon, ſ. que quant lun des Joyntenants leſſa ceo que a luy affiert a un auter pur termin de ſa vie, per tiel Leaſe le Franktenemẽt eſt ſever de le joynture. Et per meſme le reaſon le Reverſion que eſt dependont ſur meſme le Franktenemẽt, eſt ſever de le Joynture. Auxy ſi le Leſſour uſt reſerve a luy un annuall Rent ſur le Leas, le Leſſor ſolement averoit le Rent, &c. le quel eſt un proofe, q̃ le reverſion eſt ſolemẽt en luy, & que lauter nad riens en cel reverſion, &c. Auxy ſi le tenant a terme de vie ſuit implead, &c. & fait default apres default, donques le Leſſor ſerroit de ceo ſolemẽt receive a defender ſon droit, & hee hath ſevered the freehold of this which to him belongs by the leaſe, yet he hath not ſevered the fee ſimple, but the fee ſimple remains to them joyntly as it was before. And ſo it ſeemeth to them, that the other Joyntenant which ſurviveth ſhall have the reverſion by the ſurvivour, &c. And others have ſaid the contrary, and this is their reaſon, ſ. that when one of the Joyntenants leaſeth that to him belongeth to another for terme of his life, by ſuch Leaſe the freehold is ſevered from the joynture. And by the ſame reaſon the reverſion which is depending upon the ſame freehold is ſevered from the joynture. Alſo if the Leſſor had reſerved to him an annuall Rent upon the leaſe, the Leſſor only ſhould have had the Rent, *&c.* the which is a proofe, that the reverſion is onely in him, and that the other hath nothing in the reverſion, *&c.* Alſo if the Tenant for terme of life were impleaded, *&c.* and maketh default after default, the Leſſor ſhall be onely received for this, to defend one for life, and the other moity to the other for life; for both theſe caſes are warranted by the authority of Littleton.

If two Joyntenants be of a leaſe for twenty one years, and the one of them letteth his part for certain years, part of the term, the joynture is ſevered, and ſurvivor holdeth not place, for a term for a ſmall number of years is as high an intereſt, as for many more years, and ſo was it reſolved, Hill. 18. El. Reginæ, Communi Banco, * which I my ſelf heard. * Hill. 18. El.

If two Copartceners be in fee, and the one make a Leaſe for life, this is no ſeverance of the Copartcenary, for notwithſtanding the Lord ſhall make one avowry upon them both.

But if two Joyntenants be, and one maketh a Leaſe for life, this is a ſeverance of the joynture, as Littleton here taketh it, and ſeveral avowries ſhall be made upon them.

¶ *Auxy ſi le Leſſor uſt reſerve un annuall rent, le leſſor ſolement avera le rent, &c.* But if two Joyntenants make a leaſe for life, reſerving a rent to one of them, the rent ſhall enure to them both, becauſe the reverſion remains in joynture, unleſſe the reſervation be by deed indented, and then he onely to whom it is reſerved ſhall have it. But if they make a leaſe by Deed indented, reſerving or ſaving the reverſion to one of them, that is void, becauſe they had the reverſion before, but the rent is newly created. 5. E. 4. 4. a. 27. H. 8. 16. a. 7. E. 4. 25. 14. Ed. 3. Br. 282.

And ſo it is, if ſuch a Leſſee for life ſhould ſurrender to one of them, it ſhall enure to them both, for that they have a joynt reverſion. But if the Leſſee grant his eſtate to one of them, no part of it ſhall enure to his Companion, becauſe 5. E. 4. 4.

cauſe for the moity belonging to his companion, it is in eſſe in him to whom the grant is made, the reverſion to the other in fee.

38.H.6.24.b.2.R.3 tit. Extinguiſhment. If two joyntenants make a leaſe for life, the remainder to his companion in fee, this is a good remainder of his moity to his Companion.

¶ *Donques le feoffor ſerra de ceo ſolement receive, &c.*

¶ *Receive.* Receit, Receptio, is in many caſes where a perſon, party to a Writ or an eſtranger thereunto, to whom a reverſion or remainder appertaineth, ſhall in default of another perſon be received to defend his or her Freehold or inheritance, the Law ſaith, Admittatur, &c. And this admiſſion or receit, is given by ſundry ſtatutes, (f) (and this is that which the Civilians call Admiſſio tertiæ perſonæ pro intereſſe.) Et in caſibus prædictis duæ concurrunt Actiones: Una inter petentem & tenentem, & alia inter tenentem, jus ſuum oſtendentem, & petentem.

(f) W.2.cap.3.23 E.1. Statute de defenſione Juris.13.R.2.cap.16.

¶ *Pur ceo que un Franktenement ne poit per nature de Joynture eſtre annexe a un reverſion.* And this is the principall reaſon, and of this ſufficient hath been ſaid in the Chapter of Joyntenants, Sect. 291.

¶ *&c.* This &c. in the end of this Section implieth any other heir lineal or collateral.

ſon Compagnion en ceſt caſe en nul manner ſerroit receive, le quel prove le reverſion del moity deſtre tantſolement en le Leſſor: Et ſic per conſequens, ſi le Leſſour moruſt, vivant le Leſſee per term de vie, le reverſion diſcendra al heire de Leſſour, & nemy deviendra a lauter Joyntenant per le ſurvivor, Ideo quære. Mes en ceſt caſe, ſi celuy Joyntenant que ad l' franktenement ad iſſue & devie, vivant le leſſor & Leſſee, donques il ſemble, que meſme iſſue aura ceſt moity en demeſn, & en fee per diſcent, pur ceo que un Franktenemēt ne poit per nature de Joynture eſtre ānexe a un reverſion, &c. & il eſt certain, pur celuy que leſſa fuit ſeiſie de le moity ē ſon demeſn come de fee, & nul avera aſcun Joynture en ſon Franktenement, Ergo ceo diſcēdra a ſon iſſue, &c. Sed quære.

his right, and his companion in this caſe in no manner ſhall be received, the which proveth the reverſion of the moity to be onely in the Leſſor: and ſo by conſequent, if the Leſſour dyeth, living the Leſſee for term of life, the reverſion ſhall deſcend to the heir of the Leſſour, and ſhall not come to the other Joyntenant by the ſurvivor, *Ideo quære.* But in this caſe, if that joyntenant which hath the Freehold hath iſſue, and dies, living the Leſſor and the Leſſee, then it ſeemeth that the ſame Iſſue ſhall have this moity in demeſne, and in fee by deſcent, for that a freehold cannot by nature of Joynture be annexed to a reverſion, &c. And it is certain, That hee which leaſed was ſeiſed of the moity in his Demeſne as of Fee, and none ſhall have any joynture in his Freehold, therefore this ſhall deſcend to his Iſſue, &c. *Sed quære.*

*Sect.*

## *Sect.* 303.

¶ MEs ſi iſſint ſoit q̄ la ley en ceſt cas eſt tiel, que ſi le leſſor deby vivant le leſſee, & vivant lauter joyntenant, que ad le frāktenemēt de lauter moity, que le reverſion diſcendra al iſſue del leſſor, donque eſt le joynture, & title q̄ alcū de eux poit aver per le ſurvivor, & le droit de le joynture aniet, & tout ouſtermēt defeat a touts jours. En meſme le maner eſt, ſi celuy joyntenāt que ad le franktenemēt deby, vivant le leſſor, & le leſſee, ſi la le ſoit tiel que ſon frāktēement & fee q̄ il ad en le moity, diſcendra a ſon iſſue, dōques le joynture ſerra defeat a touts jours.

BUt if it be ſo that the Law in this caſe be ſuch, that if the Leſſor die, living the Leſſee, and living the other Joyntenant which hath the freehold of the other moity, that the Reverſion ſhall deſcend to the Iſſue of the Leſſor, then is the Joynture and title which any of them may have by the Survivor, and the right of the Joynture taken away, and altogether defeated for ever. In the ſame manner it is, if that Joyntenant which hath the freehold die, living the Leſſor and the leſſee, if the Law be ſo as his freehold and fee which he hath in the moity ſhall deſcend to his iſſue, then the Joynture ſhall be defeated for ever.

¶ *Donque eſt le joynture & title, &c. & le droit de le joynture anient, &c.*

And the reaſon of this is, for if the Joynture be ſevered at the time of the death of him that firſt deceaſed, the benefit of the ſurvivor is utterly deſtroyed for ever, as hath been ſaid * afore in the Chapter of Joyntenants. But in the caſe aforeſaid, if tenant for life dieth in the life of both the Joyntenants, they are Joyntenants again as they were before.

* Vid. Sect. 291.

If two Joyntenants be in fee, and the one letteth his part to another for the life of the leſſor, and the leſſor dieth, ſome ſay that his part ſhall ſurvive to his companion: for by his death the leaſe was determined. And others hold the contrary, and their reaſon is, firſt, for that at the time of his death the Joynture was ſevered; for ſo long as he lived the leaſe continued. And ſecondly, that notwithſtanding the act of any one of the Joyntenants there muſt be equal benefit of Survivor as to the Freehold. But here if the other Joyntenant had firſt died, there had been no benefit of Survivor to the Leſſor without queſtion.

## *Sect.* 304.

¶ IE ſi trois joyntenants ſont, & lun releſſa p ſon fait a un d ces cōpanions tout le droit que il avoit en le terre, donques ad celuy a que le releaſe eſt fait le tierc part de les ter-

ANd if three Joyntenants be, and the one releaſe by his deed to one of his companions all the right which he hath in the Land, then hath he to whom the releaſe is made the third part of

¶ UPon this caſe theſe two things are to be obſerved. Firſt, that in this caſe this releaſe doth enure by way of mitter leſtate and not * by way of Extinguiſhment, for then the Releaſe ſhould enure to his companion alſo, and he is in the Per by him that maketh the Releaſe. * But if he had releaſed to the other two, then had he wrought no degree

* Eliz. Dyer 263. 19. H. 6. 17. 2 40 E. 3. 41. 13 E. 3. tit. Garr. 35 E. 3. releaſe 43. 22 H. 6. 42. 14 E. 3. Briefe 28. 19 H. 6. 17. 33 H. 6. 5. 23 H. 6. 2. 37 H. 8. Alienation 38. 8 H. 4. 8. 10 E. 4. 3.

gree but in ſuppoſition of Law, for many purpoſes they to whom the Releaſe is made (as hath been ſaid) ſhall be ſuppoſed in from the firſt feoffor, as they ſhall deraign the firſt warranty for the whole.

b 9 Eliz. Dyer 263. 19 H.6.17.

b The ſecond thing to be obſerved is, that he to whom the releaſe is made hath a fee ſimple without theſe words (heirs) as hath been touched in the firſt Chapter of the firſt Book, for that he to whom the releaſe is, is ſeiſed per my, & per tout, of the fee and inheritance, as hath been ſaid in the Chapter of Joyntenants. And note, the like Law is between Coparceners: and further if there be two Coparceners, and the one hath iſſue twenty daughters, and dieth, the other may releaſe to any one of the daughters her whole part, albeit ſhe to whom the releaſe is hath not an equal part, but for the privity, and the undivided eſtate, the releaſe is good.

*ante 9.a*

But if two Joyntenants be of twenty Acres, and the one maketh a feoffment of his part in eighteen Acres, the other cannot releaſe his entire part, but only in two Acres, for that the Joynture is ſevered for the reſidue.

res per force de le dit releas, & il & ſon companion, teignet les auters deux parts en joynture. Et quant al tierce part, que il ad per force de releas, il tient cel tierce part obe luy m̃ & ſon companion en common.

the Lands by force of the ſaid releaſe, and he and his companion ſhall hold the other two parts in joynture. And as to the third part which he hath by force of the releaſe, he holdeth that third part with himſelf and his companion in common

## *Sect. 305.*

THis is evident upon that which hath been ſaid before. c And it is to be underſtood that a Releaſe may enure four manner of ways. Firſt, by way of mitter leſtate, as here it appeareth. Secondly, by way of mitter la droit. Thirdly, by way of Extinguiſhment. Fourthly, by way of creation or enlargement of an Eſtate, as hereafter in this chapter ſhall appear. And it is to be obſerved, that upon a Releaſe that creates or enlargeth an Eſtate, or enures by way of mitter leſtate, a Rent may be reſerved, but not upon a releaſe that enureth by way of mitter le droit or which enures by way of Extinguiſhment.

c 10 Eliz. Bendloes Caſe. 9 Eliz. Dyer 263.

*See more of this in the Chapter of Releaſes.*

10 E.3.4.b.21 H.6.8.b.

The (&c.) in the end of this Section implieth a diverſity

Et eſt aſcavoir, q̃ aſcun foits un releas prendra effect, & urera pur mitter leſtate de celuy que fiſt le releas, a celuy a que le releas eſt fait, ſi come en le cas avantdit, & auxy ſi come joynt eſtate ſoit fait a le barõ & ſa feme, & a le tierce perſon & la tierce perſon releſſa tout ſon droit que il ad a le baron, adonque ad le baron la moitie que le tierce avoit, & la feme de ceo nad riens. Et ſi en tiel caſe le tierce releſſa a la feme nient noſmant le baron en le releas, donques ad la feme le moitie que le tierce avoit, &c. & l' barõ nad riens de ceo forſq̃

And it is to be obſerved, that ſometimes a deed of releaſe ſhall take effect and enure to put the eſtate of him which makes the releaſe to him to whom the releaſe is made, as in the caſe aforeſaid, and alſo as if a joynt eſtate be made to the husband and wife, and to a third perſon, & the third perſon releaſe all his right which he hath to the husband, then hath the husband the moity which the third had, and the wife hath nothing of this. And if in ſuch caſe the third Releaſe to the wife not naming the husband in the releaſe, then hath the wife the moity which the

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en droit sa feme, pur ceo que en tiel case le releasse urera de fair estate a celuy a que le releasse est fait, de tout ceo que affiert a celuy que fait le releasse, &c.

third had *&c.* And the husband had nothing of this but in right of his Wife; because that in this case the releasse shall enure to make an estate to whom the releasse is made of all that which belongeth to him which maketh the releasse, *&c.*

between a release which enures by way of mitter lestate (whereof Littleton here speaketh) & a Release that enures by way of Extinguishment: for a release enuring by way of extinguishment made to the husband, the wife shall take benefit, or to the wife; the husband shall take benefit, as hereafter shall more at large be said.

## *Sect.* 306.

¶ EN en aſcun cas un releas urera de mitter tout le droit q̄ il q̄ fait le releas ad a celuy a q̄ le releasse est fait: Si come home seisie de certain tenemēts est disseisie per deux disseisors, & le disseisee p̄ son fait releſſa tout son droit, &c. a un des disseisors, donque celuy a que releas est fait avera & tiendra touts les tenements a luy solement, & oustera son companion de cheſcun occupation de ceo. Et le cauſe est, pur ceo q̄ les deux disseisors fuerōt eins encounter la ley, & quāt un de eux happe le releas de celuy que ad droit dentre, &c. cest droit en tiel cas vestera ē celuy a que le releas est fait, & est ē tiel plyte, come il q̄ avoit droit avoit enter, & luy enfeoffa

And in some case a releasse shall enure to put all the right which he who maketh the releasse hath, to him to whom the releasse is made. As if a man seised of certain Tenements is disseised by two disseisors, if the disseisee by his deed releasse all his right *&c.* to one of the disseisors, then hee to whom the releasse is made shall have and hold all the tenements to him alone, and shall oust his companion of every occupation of this. And the reason is, for that the two disseisors were in against the law, and when one of them happeth the releasse of him which hath right of entry, *&c.* this right in such case shall vest in him to whom the releasse is made, and he is in like plite, as he which

¶ Here Littleton pursueth the second part of his division, viz. where a releasse shall enure by way of Mitter le droit.

¶ *Disseisee per deux disseisors, &c.* The like Law is where there be two joynt Abators or Intruders which come in meerly by wrong. But if two men do usurp by a wrongful presentation to a Church, and their Clerk is admitted, instituted, and inducted, and the rightful Patron releaseth to one of them, this shall enure to them both, for that the usurpers come not in meerly by wrong, but their Clark is in by admission, & institution, which are judicial acts. (l)

(l) Fitz. N.B. 35. in it. R. 2. quare Imp. 144.

And therefore an usurpation shall work a Remitter to one that hath a former right.

¶ *Donques celuy a que le releas est fait avera & teignera touts les tenements, &c.* Here by operation of Law presently upon the delivery of the releasse the whole freehold & inheritance is vested in him to whom the releasse is made, & all the state that the other Disseisor had wholly devested: for right and wrong cannot consist together, but the wrongful estate giveth place to the rightful. And the reason hereof is, for that as hath been said, the disseisor to whom the releasse was

was made was ſeiſed Per my & per tout, wherevnto when the right cometh it excludeth the wrong: (e) for right which is lawful, and wrong that is contrary to Law cannot ſtand together.

(e) Brit.fol.116.26.Aſſ. pl.39.39.E.3.29.21.H.6 41.22.H.6.22. 7.E.4. 25.9. E.4.6.11.H.7.12. 20.H.7.5,21.H.7.18. 12.E.4.tit.Diſcontin.1. 9.H.6,37.21.H.6.52.

¶ *En tiel plite ſicome il que avoit droit, avoit enter & luy enfeoffe, &c.*

ꝛc. Et la cauſe eſt, pur ceo que il q̄ avoit a debant eſtate per tort, ſ. p diſſeiſin, ꝛc. ad ore per le releas un eſtate droiturel.

hath the right had entred & enfeoffed him, &c. And the reaſon is, for that he which before had an eſtate by wrong, ſ. by diſſeiſin, &c. hath now by the releaſe a rightfule eſtate.

This (&c.) doth imply that this is true ſecundum quid, but not ſimpliciter; for as to the holding out of the joynt diſſeiſor, it amounts to as much as if he had entred and enfeoffed him to whom the releaſe is made, but it doth not amount to an entry and feoffment ſimpliciter to all purpoſes, as ſhall be ſaid hereafter in his proper place in the chapter of Releaſes.

## *Sect.* 307.

HEre Littleton ſpeaketh of the third kind of releaſes. And the reaſon of this diverſity (implyed in the (ꝛc.) in the end of this Section) betweene the diſſeiſors & their feoffees is, for that the Feoffees coming in by title and purchaſe, are intended in Law to have a warrantie (which is much eſteemed in Law), and therefore leſt the warranty ſhould be avoyded, the releaſe ſhall enure to both the feoffees in favour of Purchaſors, and ſo the right and benefit of every one ſaved. (f) And in ancient time if the Diſſeiſor had made a feoffment in fee, or a gift in taile, or a leaſe for life, and the Feoffee, Donee, or Leſſee had continued in ſeiſin quietly a year and a day, the entry of the Diſſeiſee had not been lawfull upon him; and the reaſon was, for the benefit and ſafegard of the warranty, (which was intended by law) ſhould have been deſtroyed by the entry. But hereof alſo more ſhall be ſaid in his proper place in the Chapter of Releaſes.

(f) 20.H.3.Aſſ.43.2.Aſſ. 13.9. Aſſ.15.21. Aſſ.28. 27.Aſſ.68.32.29.Aſſ.54. 43.Aſſ.17.40.E.3.24.50. E.3.21.3.R.2. entry cong.38.13. E.3.tit. Aſſ.9.12.Aſſ.20.

ET en alcun cas un releas urera per voy dextinguiſhment, & en tiel caſe tiel releas aydera la joyntenant a q̄ le releas ne fuit fait, auribien come luy a q̄ le releas fuit fait. Sicome un home ſoit diſſeiſie, & le diſſeiſor fait feoffment a deux homes en fee, ſi le diſſeiſee releſſa per ſon fait a un de les feoffees, donques cel releaſe urera a ambideux les feoffees, pur ceo q̄ les feoffees ont eſtate pur le ley, ſ. per feoffment, & nemy per tort fait a mulluy, ꝛc.

AND in ſome caſe a releaſe ſhall enure by way of extinguiſhment, & in ſuch caſe ſuch releaſe ſhall ayd the Joyntenant to whom the releaſe was not made, as well as him to whom the releaſe was made. As if a man be diſſeiſed, & the diſſeiſor makes a feoffment to two men in fee, if the diſſeiſee releaſe by his deed to one of the feoffees, this releaſe ſhall enure to both the feoffees, for that the feoffees have an eſtate by the law, ſ. by feoffment, and not by wrong done to any &c.

## *Sect.* 308.

EN meſme le maner eſt, ſi le diſſeiſy fait un leaſe a un hõe pur terme de ſa vie, le remain-

IN the ſame manner it is, if the Diſſeiſor maketh a releaſe to a man for terme of his life, the re-

der

der ouster a un auter en fee, ſi le diſſeiſee releſſa a le tenant a term d̄ vie tout ſon dꝛoit, &c. cel releaſe urera auxibien a celuy en le remainder come a le tenant a term de vie. Et la cauſe eſt, pur ceo que le tenant a terme de vie vient a ſon eſtate per courſe de ley, & pur ceo cel releaſe urera & pꝛent effect pur voy dextinguiſhment de dꝛoit de celuy que releſſa, &c. Et per cel releaſe le tenant a terme d̄ vie nad pluis ample ne greinder eſtate, que il avoit devant le releaſe fait a luy, & le dꝛoit celuy que releſſa eſt tout oustꝛerment extinct. Et entant que ceſt releaſe ne poit enlarge le ſtate de le tenant a terme de vie, il eſt reaſon que cel releaſe urera a celuy en le remainder, &c.

¶ Pluis ſerra dit de Releaſes en le Chapiter de Releaſes.

mainder over to another in fee, if the diſſeiſee releaſe to the Tenant for terme of life all his right, &c. this releaſe ſhall inure as well to him in the remainder, as to the tenant for terme of life. And the reaſon is, for that the Tenant for life cometh to his eſtate by courſe of law, and therefore this releaſe ſhall enure & take effect by way of extinguiſhment of the right of him which releaſeth, &c. And by this releaſe the tenant for life hath no ampler nor greater eſtate than he had before the releaſe made him, & the right of him which releaſeth is altogether extinct. And inaſmuch as this releaſe cannot inlarge the eſtate of the tenant for life, it is reaſon that this releaſe ſhall enure to him in the remainder, &c.

More ſhall be ſaid of Releaſes in the Chapter of Releaſes.

¶ *Ceſt releaſe urera auxibien a celuy en le remainder, come a le tenant a terme de vie, &c.* Of this and the reſt of this Section, foꝛ avoyding repetition, moꝛe ſhall be ſaid in his pꝛoper place in the Chapter of Releaſes.

¶ *Tout ſon droit, &c.* Here by this (&c.) is implyed title, demand, and other woꝛds which may tranſfer the right, &c. Alſo here is implied of, in, oꝛ to the land.

## *Sect.* 309.

¶ ITem ſi ſoient deux Parceners, & lun alien ceo que a luy affiert a un auꝰ, dōques lauter parceñ & lalienée ſont Tenants en Common.

ALſo if two Parceners be, and the one alieneth that to her belongeth to another, then the other Parcener and the Alienee are Tenants in Common.

This is evident and needeth no explication.

## *Sect.* 310.

¶ ITem nota que Tenants en common poiēt eſtre per titl' de Pꝛeſcription, ſicom lun & ſes Auncеſtoꝛs, ou ceux que eſtate il

ALſo note that Tenants in Common may be by title of Preſcription, as if the one and his Anceſtors, or they whoſe e-

ad en un moity ont tenus en common meſme le moity, ove lauter tenant que ad lauter moity & ove ſes auncеſtors ou ove ceux que eſtate il ad Pro indiviſo, de temps dont memory ne curt, &c. Et diuers auters manners poyent faire & cauſer homes deſtre Tenaunts en Common, que ne ſont icy expreſſes, &c.

ſtate he hath in one moitie have holden in cõmon the ſame moity with the other tenant which hath the other moity, & with his Anceſtors, or with thoſe whoſe ſtate he hath undivided, time out of mind of man. And divers other manners may make & cauſe men to be Tenants in common, which are not here expreſt, &c.

11.E.3.Tranſ.212.13.E.3.Briefe 674.8.H.6.16.b.Lib. Intrat.23.

¶ Of this, beſides Littleton, there is good authority in Law, as there is for all his other caſes throughout his three books, but Joyntenants cannot be by preſcription, becauſe there is ſurvivor between them, but not between Tenants in Common.

The two (&c.) in this Section are evident.

## *Sect.* 311.

¶ In this Section wee learn two things: Firſt, That in reall Actions, and in Actions alſo that are mixt with the perſonalty, tenants in common ſhall ſever in Action, becauſe they have ſeverall freeholds, and claim in by ſeveral titles, and therefore as they ſhall be ſeverally impleaded, ſo ſhal they ſeverally implead others in all real and mixt Actions, unleſſe it be in caſe of neceſſity for a thing entire, as hereafter in this Chapter ſhall appear. And Littleton here putteth the caſe of the Aſſiſe which is mixt with the perſonalty, and therefore he needeth not to put any caſe of any Præcipe quod reddat; for if it be ſo in caſe of Aſſiſe a fortiori, in Writs of higher nature, which is neceſſarily implyed in the (&c.) How of ſuits that ſound in the realty, and of perſonal actions, Littleton ſpeaketh hereafter in this Chapter.

ITem en alcun cas Tenants en Common doyent aver de lour poſſeſſion ſeveralx Actions, & ẽ alcun cas ils joyndront en un Action. Car ſi ſont deux Tenants en Common, & ils ſont diſſeiſies, ils doyent aver deux Aſſiſes, & nemy un Aſſiſe, car chescun de eux covient aver un Aſſiſe de ſon moity, &c. Et la cauſe eſt, pur ceo que Tenants en common fueront ſeiſies, &c. per ſeveralx titles. Mes auterment eſt de Joyntenants, car ſi ſoyent dint Joyntenants, & ils ſont diſſeiſies, ils averont ẽ touts lour noſmes forſque un Aſſiſe, pur ceo que ils nont forſque un ioynt title.

ALſo in ſome caſe tenants in Common ought to have of their poſſeſſion ſeveral actions, and in ſome caſes they ſhall joyne in one Action. For if two Tenants in Common be, and they be diſſeiſed, they muſt have two Aſſiſes, and not one Aſſiſe; for each of them ought to have one Aſſiſe of his moity, &c. and the reaſon is, for that the Tenants in Common were ſeiſed, &c. by ſeverall Titles. But otherwiſe it is of Joyntenants, for if twenty Joyntenants be, and they be diſſeiſed, they ſhall have in all their names but one Aſſiſe, becauſe they have not but one joynt title.

5. E.4.18.b.

¶ The ſecond thing here to be learned, is the diverſity between Tenants in Common, and Joyntenants, which both of it ſelfe, and upon that which hath been ſaid, is apparent.

## *Sect.* 312.

¶ Item ſi ſoient trois Joyntenãts, & un releaſe a un de ſes companiõs tout l' droit que il ad, &c. & puis les auters deux ſont diſſeiſies de lentiertie, &c. en ceſt caſe les deux auters averont ſeveralx Aſſiſes, &c. en ceſt forme, s. ils averont en lour ambideux noſmes, un Aſſiſe de les deux parts, &c. pur ceo que les deux parts ils teignõt joyntment al temps de le diſſeiſin. Et quãt a le tierce part, celuy a que le releaſe fuit fait, covient aver de ceo un Aſſiſe en ſon noſme demeſne, pur ceo que il (quaunt a meſme le tierce part) eſt de ceo Tenant en Common, &c. pur ceo que il vient a cel tierce part per force del Releaſe, & nemy tãtſolemẽt per force del joynture.

ALſo if three Joyntenants bee, and one releaſe to one of his fellowes all the right which hee hath, &c. and after the other two be diſſeiſed of the whole, &c. In this caſe the two others ſhall have ſeveral Aſſiſes, &c. in this manner, s. They ſhall have in both their names an Aſſiſe of the two parts, &c. becauſe the two parts they held joyntly at the time of the diſſeiſin. And as to the third part, he to whom the releaſe was made, ought to have of that an Aſſiſe in his own name, for that he (as to the ſame third part) is thereof Tenant in Common, &c. becauſe he cometh to this third part by force of the Releaſe, and not only by force of the Joynture.

¶ This is put for an example (which ever doth illuſtrate the Rule, and is evident of it ſelfe: and the (&c.) in this Section needeth no further explication.

## *Sect.* 313.

¶ Item quant a ſuer des Actions que touchant l' realtie, y ſont diverſities peẽter parceners que ſont eins per divers diſcents, & Tenaunts en common. Car ſi home ſeiſie de certaine terre ẽ ſõ ad iſſue deux files et mozuſt, & les files entront, &c. et chelcun de eux ad iſſue un fits, et devieront ſauns partition fait enter eux, per que lun moity diſcendiſt a le fits dun Parcener, & l'auter moitie diſcẽdiſt al fits dauter parcener, et ils entront

ALſo to the ſuing of Actions which touch the realty, there bee diverſities between Parceners which are in by divers deſcents, and Tenants in Common: For if a man ſeiſed of certain land if Fee, hath iſſue two Daughters and dyeth, and the Daughters enter, &c. and each of them hath iſſue a Son, and dye without partition made between them, by which the one moity deſcends to the Son of the one Parcener, & the other moity deſcends to the

entront & occupiont en common & ſont diſſeiſées, en ceſt caſe ils averont en lour deux noſmes un Aſſiſe & nemy deux Aſſiſes. Et la cauſe eſt, que comẽt que ils veignont eins per divers diſcents, &c. uncore ils ſont Parceners & briefe de Partitione facienda giſt ẽter eux. Et ils ne ſont parceners eyant regard ou reſpect tantſolement a le ſeiſin & poſſeſſion de lour meres, mes ils ſont Parceners pluis eyant reſpect a leſtate que diſcendiſt de lour ayel a lour meres, car ils ne poyent eſtre Parceners ſi lour meres ne fueront Parceners a devant, &c. Et iſſint a tiel reſpect & conſideration, ſ. quant a le primer diſcẽt que fuit a lour meres ils ont un title en parcenarie, le quel fait eux parceners. Et auxy ils ne ſont forſque come un heire a lour common Auncellors, ſ. a lour ayel de que la terre diſcendiſt a lour meres. Et pur ceux cauſes devant partition enter eux, &c. ils averont un Aſſiſe coment que ils veignont eins p ſeveralx diſcents.

Sonne of the other Parcener, and they enter and occupie in common and be diſſeiſed, in this caſe they ſhall have in their two names one Aſſiſe, and not two Aſſiſes. And the cauſe is, for that albeit they come in by divers deſcents, &c. yet they are Parceners, and a Writ of Partition lieth between them. And they are not Parceners, having regard or reſpect onely to the Seiſin & poſſeſſion of their mothers, but they are Parceners rather, having reſpect to the eſtate which deſcended frõ their Grandfather to their mothers; for they cannot be Parceners if their mothers were not Parceners before, &c. And ſo in this reſpect and conſideration, s. as to the firſt deſcent, which was to their mothers, they have a title in Parcenary, the which makes them Parceners. And alſo they are but as one heire to their common Anceſtors, s. to their grandfather, from whom the land deſcended to their mothers. And for theſe cauſes, before partition between them, &c. they ſhall have an Aſſiſe, although they come in by ſeveral deſcents.

Vide Sect. 241.

¶ THis, upon that which hath been ſaid in the * Chapter of Parceners, is evident: where you may read excellent points of learning, and diverſities concerning this matter, all which are here either expreſſed or implied, as the ſtudious and diligent Reader will obſerve.

## *Sect.* 314.

¶ *EN ceſt caſe quant a le rent & liver de Pepper, ils averount deux Aſſiſes & quant a leſperuer ou le Chival forſque un Aſſiſe.*

But for the better underſtanding hereof it is to be known. That if two Te-

¶ ITem ſi ſont deux Tenants en Common de certain Terre en fee, & ils doneront tel terre a un home ẽ le tail, ou leſſerõt a un home per term

ALſo if there bee two Tenants in Common of certain Land in Fee, and they give this Land to a man in Taile, or let it to one for terme of life, ren-

de

de vie, rendant a eux annuelment un certain rent, & un liver de Pepper, & un eſperuer, ou un cheual, & ils ſont ſeiſies de cell ſervice, & puis tout le rent eſt aderere, & ils diſtreigneront pur ceo, & le tenãt a eux fait reſcous. En ceſt cas quant a le rent & liver de Pepper ils averont deux Aſſiſes, & quãt a leſperuer, ou le cheual forſq; un Aſſiſe. Et la cauſe pur que ils averont deux Aſſiſes, quant a le rent & liver de Pepper, eſt ceo, entant que ils fueront tenants en common en ſeverall titles, & quant ils dergnt un done le taile ou leas pur term de vie, ſavant a eux le reverſion, & rendant a eux certaine rent, &c. tiel reſervatiõ eſt incident a lour reverſion, & pur ceo que lour reverſion eſt e commõ, & per ſeveral titles, grome lour poſſeſſion fuit devant le rent, & autres choſes que poient eſtre ſeveres, & fueront a eux reſerves ſur le done ou ſur le leas, queux ſont incidents per le ley a lour reverſion, tiels choſes iſſint reſerves fueröt de la nature del reverſion. Et entant que l'reverſiõ eſt a eux dring to them yeerly a certaine rent, and a pound of Pepper, and a Hawke, or a Horſe, and they be ſeiſed of this ſervice, and afterwards the whole Rent is behind, and they diſtraine for this, and the tenant maketh Reſcous. In this caſe, as to the Rent and pound of Pepper, they ſhall have two Aſſiſes, and as to the Hawke or the Horſe, but one Aſſiſe. And the reaſon why then they ſhall have two Aſſiſes as to the rent and pound of Pepper, is this, inſomuch as they were Tenants in Common in ſeveral titles, and when they made a gift in taile or leaſe for life, ſaving to them the Reverſion, and rendring to them a certain rent, &c. ſuch reſervation is incident to their reverſion, and for that their reverſion is in common and by ſeveral titles as their poſſeſſion was before the rent, and other things which may be ſevered, and were reſerved unto them upon the gift or upon the leaſe which are incidents by the Law to their reverſion, ſuch things ſo reſerved were of the nature of the reverſion. And in as much as the reverſion is to them in common by ſeveral titles, it behoo-

nants in Common bee, and they grant a rent of twenty ſhillings per annum, out of their Land, the Grantee ſhall have two rents of twenty ſhillings, for that every mans grant ſhall be taken moſt ſtrongly againſt himſelf, & therefore they be ſeveral grants in Law. Pl. Com. Hill & Grangee caſe 171. Vide Sect. 219.

But if they two make a gift in taile, a leaſe for life, &c. reſerving twenty ſhillings rent to them and their heires, they ſhall have but one 20 ſhillings, for they ſhall have no more than themſelves reſerved: and the Donee or Leſſee ſhall pay but twenty ſhillings according to their own expreſſe reſervation: And albeit the reſervation of Rent reverſable bee in joynt words, yet in reſpect of the ſeveral reverſions the Law makes thereof a ſeverance. Now for the rent, as namely twenty ſhillings or a pound of Pepper may be levered, the one Tenant in Common may have an Aſſiſe for the moity of two ſhillings, and the moity of a pound of Pepper, de medietate unius libræ piperis, but he cannot have an Aſſiſe of ten ſhillings, or de dimidio libræ piperis. But for the Hawke or Horſe, albeit they be Tenants in Common, they ſhall joyn in an Aſſiſe, for otherwiſe they ſhould be without remedie, for one of them cannot make his plaint in Aſſiſe of the moity of a hawke, or of a horſe, for the Law will never ſuffer any man to demand any thing againſt the order of nature Vide 16 Aſſ. pl. 1. 16. E. 2. Joyndre en action 27.

ture or reason, as before it appeareth by Littleton, Section 129. Lex enim spectat naturæ ordinem. Also the Law will never enforce a man to demand that which he cannot recover, and a man cannot recover (l) the moytie of a Hawke, Horse, or of any other entire thing: Lex neminem cogit ad vana, seu inutilia. But in that case they shall joyne in an assise, and the reason is, Ne Curia Domini Regis deficeret in justitia exhibenda, or lex non debet deficere conquerentibus in justitia exhibenda. And if they should not joyne, they should have damnum & injuriam, & yet should have no remedy(*) by law, which should be inconvenient: but the Law will, that in every case wher a man is wronged & endamaged, that he shall have remedie. Aliquid conceditur ne injuria remaneret impunita, quod alias non concederetur.

Regula. Vide Sect. 179.

(l) Lib. 5. fol. 21.

Regula.

Regula.

(*) 3.E.3.19.2.

38. E. 3. 35. Regula.

en common per severall titles, il covient que le rent, & le liver de Pepper, queux poyent estre severs, soyent a eux en common, & per severall titles, & de ceo ils averont deux Assises, & chescun de eux en pleint de le moity del le rent, & de le moity del liver de Pepper, mes de lesperver, ou de chival que ne poyent estre severs, ils averont forsque un Assise, car home ne poit faire un pleint en Assise de le moity dun esperver, ne de le moity dun chival, &c. En mesme maner est dauter rents & dauters services que Tenants en Common ount ẽ grosse per divers titles, &c.

veth that the rent and the pound of Pepper which may be severed, be to them in common and by several titles. And of this they shall have two Assises, and each of them in his Assise shall make his plaint of the moity of the rent, and of the moity of the pound of Pepper. But of the Hawke or of the Horse which cannot be severed, they shall have but one Assise; for a man cannot make a plaint in an Assise of the moity of a Hawk, nor of the moity of a Horse, &c. In the same manner it is of other Rents and of other Services which Tenants in Common have in grosse by divers titles, &c.

(m) And Tenants in Common shall joyne in a quare impedit, because the presentation to the Advowson is entire.

(n) Also Tenants in Common of a Seigniorie shall joyne in a Writ of right of ward, and Wardship of ward for the bodie, because it is entire.

(m) 5.H.7.8.13.E.2. quar.imp.170.33. H6. 11.6. E. 4 10.15. E.3. darr.presentment 10.

If two Tenants in Common be of the wardship of the body, & one doth ravish the ward, and the one Tenant in Common releases to the ravisher, this shall go in benefit of the other tenant in Common, and he shall recover the whole, and this release shall not be any bar to him. And so it is if two Tenants in Common be of an Advowson, & they bring a Quare impedit, and the one doth release, yet the other shall sue forth, and recover the whole presentment.

(n) 6.H.4.6.45. E.3. 10.30.H.6. Ass.39.18. E.3.56.

Two Tenants in common shall joyne in a detinue of Charters; and if the one be Nonsuit, the other shall recover.

18.E.3.56.

It is said that tenants in common shall joyn in a Warrantie Charte, but sever in Voucher.

¶ *Moitie de chival, &c.* Here is implyed, or any other entire rent or service.

¶ *Per divers titles, &c.* That is, by several titles, and not by one joynt title, as hath been said.

## *Sect.* 315.

39.E.3.51. 43. E.3 24. 46.E.3.27.5.H.4.3.14. H.4.31.3. H.6.57.12. H.6.22.22.H.6.14.18. E.4.30.2.R.3.16.10.H. 7.27.21.H.7.22. 37.H. 6.35.21.E.4.12.

*Averont tiels actions personels joynament en touts lour noymes, &c.* By this

¶ Item quant al actiõs personels tenants ẽ common averõt tiels actions

Also as to Actions personals, Tenants in common may have such Actions per-

per-

plonals ioyntment ẽ touts lour noims, ſicome de treſpas, ou de offence que touche lour tenements en common, ſicome de byuſer lour meaſõs, de ẽfreinder de lour cloſes, de paſture, de gaſter, & defoulet des herbs, ỗ couper lour bois, ỗ piſcher ẽ lour piſcary, & hujuſmodi. Et en ceſt cas tenãts en common averont un action ioyntmẽt, & recoveront joyntment lour damages, pur ceo que laction eſt ẽ le perſonaltie, et nemy ẽ le realtie.

ſonals joyntly in all their names as of treſpaſſe, or of offences which concerne their Tenements in Common; as for breaking their houſes, breaking their Cloſes, feeding, waſting, & defouling their graſſe, cutting their woods, for fiſhing in their Piſchary, and ſuch like. In this caſe Tenants in Common ſhall have one Action joyntly, & ſhall recover joyntly their damages, becauſe the Action is in the perſonalty, and not in the realty, &c.

it appeareth that Tenants in common ſhall have perſonal Actions joyntly. And it is to be obſerved, that where damages are to be recovered for a wrong done to Tenants in Common, or parceners in a perſonal Action, and one of them dye, the ſurvivor of them ſhall have the action; for albeit the property or eſtate be ſeveral between them, yet (as it appeareth here by Littleton) the perſonal action is joynt. Vide Sect. 319, 320, 321.

¶ *Et hujuſmodi.*

Hereby is implyed a diverſity between a Chattel in poſſeſſion, and a perſonal Choſe in action belonging unto them. As if two Tenants in Common be of land, and one doth a treſpaſs therein, of this action they are joyntenants, and the ſurvivor ſhall hold place. So it is if two tenants in Common be of a Mannor, & they make a Bayliff thereof, and one of them dyeth, the ſurvivor ſhall have the Action of Account, for the Action given unto them for the arrerages upon the Accoune was joynt. So it is if two tenants in Common ſow their land, and one doth eat the ſame with his cattel, though they have the Corn in Common, yet the action given to them for treſpaſs in the ſame is joynt, and ſhall ſurvive. For the treſpaſſe and damage done to them was joynt; all which here is implyed by Littleton, who ſaith, that they ſhall have an Action joyntly, and the ſame Law is of Coparceners. 22. H. 6. 12. 38. E. 3. 7. 13. E. 3. Account 126. 45. E. 3. 13, 14. 37. H. 6. 32, 38.

But if two Tenants in Common be of goods, as of an horſe, or of any other goods perſonal, there if one dye, his Executors ſhall be Tenant in Common with the ſurvivor. 38. E. 3. 5. 17 E. 3. 11. 3.

¶ *Et nemy en le realtie, &c.* If two Tenants in Common be of an Advowſon, & a ſtranger uſurp, ſo as the right is turned to an action, and they bring a writ of Quare impedit which concerns the realty, the ſix months paſſe, and the one dyeth, the Writ ſhall not abate, but the ſurvivor ſhall recover, otherwiſe there ſhould be no remedy to redreſſe this wrong. And ſo it is of Caparceners, and this is one exception out of our Authors rule. H. 5. Quare Imp. 71. 14. H. 4. 12. 9. H. 6. 20. 22. H. 4. 14. 37. H. 6. 9. b. 10. El. Dyer. 279. F. N. B. 35. 9. E. 3. 36, 37. Pl. Com. Seig. Barkleys caſe.

(*) But if three Coparceners recover land and damages in an Aſſiſe of Mordancestor, albeit the judgment be joynt that they ſhall recover the land and damages, yet the damages being accellory, though they be perſonal, do in judgment of Law depend upon the Freehold, being the principal which is ſeveral. And though the words of the judgment be joynt, yet ſhall it be taken for diſtributive. And therefore if two of them dye, the intire damages doe not ſurvive, but the third ſhall have execution according to her portion; and this is another exception out of our Authors rule. But if all three had ſued execution by force of an Elegit, and two of them had dyed, the third ſhould have had the whole by ſurvivor, till the whole damages be paid. (*) 14. E. 3. Execution 75. 45. E. 3. 3. b. 45. E. 3. 3. b. 4. E. 3. 14. 11. H. 4. 16. b. 35. H. 6.

If the Aunt and Niece joyn in an action of waſte, for waſte done in the life of the other ſiſter, the Aunt ſhall recover the damages onely, becauſe the ſame belongs not by Law to the Niece. And ſome hold the damages in that caſe to be the principal. 23. b. 11. E. 2. Waſt. 115.

## *Sect.* 316.

¶ Item ſi deux tenants en common font un leaſe de

Alſo if two Tenants in Common make a leaſe of their lour

lour tenemẽts a un auter p̄ term̄ des ans, rendant a eux certaine rent annualmẽt durant l' terme si le rent soit aderere, &c. les tenants ẽ cõmon averont un action de debt enders le lessée, & nemy divers actions, pur ceo que laction est en la personalty.

nements to another for terme of years, rendring to them a certain Rent yearly during the term if the rent be behind, &c. the Tenants in Common shall have an action of debt against the lessee, and not divers actions, for that the action is in the personalty.

This upon that which hath been said is evident.

## *Sect.* 317.

¶ MEs en avowry pur l' dit rent ils covient̄ lever, Car ceo est en le realty come le assise est supra.

BUt in an Avowry for the said rent they ought to lever: for this is in the realty, as the Assise is above.

Vide 9 E. 3. 36, 37. Pl. Com. Seignior Barkleys Case.

This being an addition to Littleton, albeit it be consonant to Law, yet I omit it.

## *Sect.* 318.

¶ ITem tenants en common poyent bien faire partition enter eux sils voilent, coment q̄ ils ne serront compelles de fair partition per la ley, mes sils sont enter eux partition per lour agreemẽt & consẽt, tiel partition est assets bone, come est adjudge en le liber dassises.

ALso tenants in common may well make partition between them if they will, but they shall not be compelled to make partition by the Law; but if they make partition between themselves by their agreement and consent, such partition is good enough, as is adjudged in the book of Assises.

Vid. Sect. 259, 290, 247, 264. 19. Ass. p. 1. 30. Ass. p. 8. 47. E. 3. 22.

Of this sufficient hath been said in the chapter of Parceners and Joyntenants.

¶ *En le liver dassises.* This book is of great Authority in Law, and is so called because it principally containeth the proceeding upon Writs of Assise of Novel disseisin, which in those dayes was Festinum & frequens remedium.

## *Sect.* 319.

¶ ITem sicome y sont tenants en common de terres & tenements, &c. cõe est avantdit: en mesm le maner y sont de chattels reals & personals: Sicome lease soit fait de certain terres a deux homes pur terme de 20. ans, & quant ils sont de

ALso as there be Tenants in Common of Lands and Tenements, &c. as aforesaid; in the same manner there be of chattels reals and personals: As if a Lease be made of certain Lands to two men for terme of 20 years, and when they be of this possessed, the

ceo

ceo poſſeſſes un de les leſſees grant ceo q̄ a luy affiert durant le terme a un auter dōz meſme celuy a que l'grōt eſt fait, et lauter tiendront e occupieront en common.

one of the Leſſees grant that which to him belongeth to another during the terme, then he to whom the grant is made, and the other ſhall hold and occupie in Common.

¶ *Grant ceo que a luy affiert.* The ſame Law it is, if the one Leſſee in this caſe make a Leaſe of part of the terme, the ſecond Leſſee and the other are Tenants in Common, as hath been ſaid in the Chapter of Joyntenants. The (&c.) in the Section implyeth other hereditaments whereof men may be Tenants in Common, whereof ſufficient hath been ſaid before. Vid. Sect. 35.

## *Sect.* 320.

¶ Item ſi deux ont joyntm̄t le gard̄ de corps e de tre dun enfant deins age, et lun de eux granta a un auter ceo q̄ a luy affiert de m̄ le garde, donque le grantee et lauter que ne grāta pas, averont e tiendront ceo en common, &c.

ALſo if two have joyntly the wardſhip of the body & land of an infant within age, and the one of them grant to another that which to himſelfe belongeth of the ſame ward, then the grantee, and the other which did not grant ſhall have and hold this in common, &c.

¶ Hereby it appeareth that there may be Tenants in Common aswell of chattels real entire, as wardſhip of the body, &c. as of chattels perſonal, as a Hawke or a Horſe. If two Tenants in Common be of a Seigniory, and a ward fall, they are Tenants in Common of the wardſhip as well of the body as land. And ſo it is if the land it ſelfe eſcheat to them, they ſhall be Tenants in common thereof, and ſo it is of Parceners. 16.E.3.tit.Ayd.

¶ *En common*, &c. Here (&c.) implyeth any other entire chattel. Vid. devant. Sect. 315.

## *Sect.* 320.

¶ Eſm̄elme le maner eſt de chateux perſonals: Si come deux ont joyntment per done ou per achate un chival ou boefe, &c. et lun grant ceo que a luy affiert de meſm̄ le chival ou boefe a un auter: Donq̄s le grātee, e lauter que ne granta pas, averont et poſſiderōt tiels chateux perſonals en common. Et en tiels cales, ou diverſ perſons ont chateux reals ou perſonals en common eux divers titles, ſi lun de eux morust les auters q̄ ſurveſquōt, avera ceo p̄ le ſur-

IN the ſame manner it is of chattels perſonals. As if two have joyntly by gift, or by buying, a horſe or an oxe, &c. and the one grant that to him belongs of the ſame horſe or oxe to another, the Grantee, and the other which did not grant, ſhall have and poſſeſſe ſuch chattels perſonals in Common: And in ſuch cales where divers perſons have chattels reall or perſonall in Common, and by divers titles, if the one of them dieth, the others which ſurvive ſhall not have this as Survivor, but the exe-

vivoz, mes les executoꝛs celuy q̄ mozust tiendꝛont & occupiek ceo obesq̄ eux que survesquont, ſi come lour testatoꝛ fist ou deboit en ſa vie, &c. pur ceo q̄ lour titles & droits en ceo fueront ſeverals, &c.

cutors of him which dieth ſhall hold and occupie this with them which ſurvive, as their teſtator did or ought to have done in his life time, &c. becauſe that their titles and rights in this were ſeveral, &c.

Vid. devant, Sect. 315. This is evident enough, and thereof ſufficient hath been ſaid.

## *Sect.* 322.

¶ *Pur terme de ans*, &c. For one year, halfe a year, &c.

¶ *Lun occupie tout & mist lauter hors de poſſeſſion.* Theſe are words materially added, for albeit one Tenant in Common take the whole profits, the other have no remedy by Law againſt him, for the taking of the whole profits is no ejectment: But if he drive out of the land any of the Cattel of the other Tenant in Common, or not ſuffer him to enter or occupie the Land, this is an ejectment or expulſion, whereupon he may have an Ejectione firmæ for the one mottie, & recover damages for the entry, but not for the mean profits.

¶ Ejectione firmæ, *de la moity*, &c. Here by this and the other (&c.) in theſe two Sections, are to be underſtood divers diverſities between Actions which concern righe and intereſt, (as of Ejectione firmæ, Ejectment de guard, quare ejecit infra terminum of a Chattel real upon an expulſion or ejectment) and Actions concerning the bare taking of the profits riſing of the Land, or doing of Treſpaſſe upon the Land, as here by the examples do appear; for the righe is ſeveral, and the taking of the profits in Common. The ſecond diverſity is between

21.E.4.11.22.43.E.3. 24.45.E.3.13.29.H.6. 50.58.8.H.6.17.19.H.6 57.32.H.6.16.2.E.4. 23.14.E.4.8.19.E.4.30. 37.H.6.33.21.E.3.29. 12.Aſſ.28.47.E.3.22.b. 10.H.7.16.F.N.B.117. 2.17.E.2.Account.122.

¶ Item è le caſe avantd̄, ſicõe deux ont eſtate cõmon pur term̄ dãs, &c. lun occupier tout, & mist lauter hors de poſſeſſiõ & occupation, &c. dõq̄s celuy, q̄ est miſe hors de occupatiõ avera enders lauter briefe de eject. firmæ, de la moity, &c.

## *Sect.* 323.

¶ Emm̄ le maner est lou deux teignont le gard des terres ou tenements durãt le nonage dũ enfant, ſi lun ouſta lauter de lõ poſſeſſion, il que est ouſte avera briefe de Ejectment de gard de le moitie, &c. pur ceo q̄ ceux choles ſon chateux reals, et poyent estre apportions et ſevers, &c. Mes nul Action de Treſpas, ceſtaſcavoir, Quare clauſum ſuum fregit, & herbam ſuam, &c.

Alſo in the caſe aforeſaid, as if two have an eſtate in Common for term of years, &c. the one occupie all & put the other out of poſſeſſion and occupation, he which is put out of occupation ſhall have againſt the other a writ of *Ejectione firmæ*, of the moity, &c.

In the ſame manner it is where two hold the wardſhip of lands or tenements during the nonage of an Infant, if the one ouſt the other of his poſſeſſion, he which is ouſted ſhall have a Writ of *Ejectment de gard* of the moitie, &c. becauſe that theſe things are chattels reals, and may be apportioned and ſevered, *&c.* but no Action of Treſpaſs *(videlicet) Quare clauſum ſuum fregit, & herbam ſuam* &c. *conculcavit, & con-*

con-

conculcavit & consumpſit, &c. & hujuſmodi actiones, &c. iū ne poit aver envers lauter pur č q̄ chelcun de eux poit entrer & occupier č cōmon, &c. per my & p tout, les Terres & tenemēts queux ils teignont č common. Mes ſi deux ſont poſſeſſes de chattels perſonalx č commō per diders titles, ſicome dun chival, ou Beof, ou Vache, &c. ſi lun prent ceo tout a luy hors d̄ poſſeſſion dauter, lauter nad nul auſ remedy mes de prender ceo de luy q̄ ad fait luy le tort, pur occupier č common, &c. quāt il poit beir ſon temps, &c. En meſm̄ le mān̄er eſt de chattels realx, que ne poyent eſtre ſevers, ſicome en le caſe avantdit, que deux ſōt poſſeſſe dun gard d̄ corps dun enfant deins age, ſi lun prent lenfant hors de poſſeſſion dauter, lauter nad aſcun remedie p aſcun action per la ley, mes de prend̄ lenfant hors de le poſſeſſion dauſ quaunt il beir ſon temps.

*ſumpſit, &c. & hujuſmodi actiones, &c.* the one cannot have againſt the other; for that each of them may enter and occupy in common, &c. *per my & per tout*, the Lands and Tenements which they hold in common. But if two be poſſeſſed of Chattels perſonals in common by divers titles, as of an Horſe, an Ox, or a Cow, &c. if the one take the whole to himſelf out of the poſſeſſion of the other, the other hath no other remedy but to take this from him who hath done to him the wrong, to occupy in common, &c. when he can ſee his time, &c. In the ſame manner it is of Chattels reals., which cannot be ſevered, as in the caſe aforeſaid, where two be poſſeſſed of the wardſhip of the body of an Infant within age, if the one taketh the Infant out of the poſſeſſion of the other, the other hath no remedy by an action by the Law, but to take the Infant out of the poſſeſſion of the other when he ſees his time.

Chattels reals that are apportionable or ſeverable, as Leaſes for years, wardſhip of lands, intereſt of tenements by Elegit, ſtatute merchant, Staple, &c. of lands and tenements, and Chattels reals entire, as wardſhip of the body, a Villein for years, &c. for if one tenant in common take away the Ward or the Villein, &c. the other hath no remedy by action, but he may take them again. Another diverſity is between Chattels reals and Chattels perſonals; for if one Tenant in Common take all the Chattels perſonals, the other hath no remedy by action, but he may take them again: and herein the like Law is concerning Chattels reals entire, and Chattels perſonal for this purpoſe. But of Chattels entire, as of a ſheep, horſe, or any other entire Chattel, real or perſonal, no ſurbiver ſhall be between them that hold them in Common: And Tenants in Common ſhall not joyn in an Ejectione firmæ, nor in a Writ of Ejectment de guard, or a Quare ejecit infra terminum, &c. for that theſe Actions concern the right of lands which are ſeveral.

10 *H.*4. Treſpaſs 178.
11 *H.*4.5.
21 *E.*4.11,12.

If two Tenants in Common be of a Manor, to the which waife and ſtray doth belong, a ſtray doth happen, they are Tenants in Common of the ſame, & if the one doth take the ſtray, the other hath no remedy by action, but to take him again. But if by preſcription the one is to have the firſt beaſt happening as a ſtray, & the other the ſecond, there an action lieth if the one take that which pertains to the other.

13 *E.*3. Briefe 674.

If two Tenants in Common be of a Dove-houſe, and the one deſtroy the old doves, whereby the flight is wholly loſt, the other tenant in common ſhall have an action of Treſpaſs, Quare vi & armis columbare ſe pl' fregit, & ducentas columbas pretii 40 s. interfecit; per quod volatum columbaris ſui toraliter amiſit: For the whole flight is deſtroyed, and therefore he cannot in bar plead

47 *E.*3.22.b.

Tenancy in Common. And ſo it is if two Tenants in Common be of a Park, and one deſtroyeth all the Deer, an Action of Treſpaſs lieth.

4 E.2.Treſpaſs 233.
(c) 2 *H.*5.1. 2 *H.*5.3.

(c) If two Tenants in Common be of Land and of Mere ſtones, pro metis & bundis, and the one take them up and carry them away, the other ſhall have an action of Treſpaſs, Quare vi & armis againſt him, in like manner as he ſhall have for deſtruction of Doves.

(d)13.E.3. Treſp.212. 19.R.2. *Br.*927. 11 *E.*3. Treſpaſs 212. Vi. 18 *H.* 6.5.

(d) If two Tenants in Common be of a Folding, and the one of them diſturb the other to erect hurdles, he ſhall have an action of Treſpaſs Quare vi & armis, for this diſturbance.

(e) 13 *H.*7.26.

(e) If two ſeveral owners of houſes have a River in Common between them, if one of them corrupt the River, the other ſhall have an action upon his Caſe.

(f)F.N.*B.*127.Reg.163.

(f) If two Tenants in Common, or Joyntenants be of an houſe or mill, and it fall in decay, and the one is willing to repair the ſame, and the other will not, he that is willing ſhall have a Writ de reparatione facienda, and the Writ ſaith, Ad reparationem & ſuſtentationem ejuldem domus teneantur, whereby it appeareth that owners are in that caſe bound probono publico to maintain houſes and mills which are for habitation and uſe of men.

17 E.2.tit.Account 22. 8 E.2.Account 115. 30 E.1.Account 127. 45 *E.*3.10.47 *E* 3.22.b. 38 E.3.9. 22 E.3.60. 3 E.3.27.39 E.27 82.F. N.B.118.1.10 *H.*7.16. 2 E.4.25.

If one Joyntenant or Tenant in Common of Land maketh his companion his Bayliff of his part, he ſhall have an Action of Account againſt him, as hath been ſaid. But although one Tenant in Common, or Joyntenant, without being made Bayliff take the whole profits, no action of Account lieth againſt him; for an Action of Account he muſt charge him either as a Guardian, Bayliff, or Receiver, as hath been ſaid before, which he cannot do in this caſe, unleſs his companion conſtitute him his Bayliff. And therefore all thoſe Books which affirm that an Action of Account lieth by one Tenant in Common or Joyntenant againſt another, muſt be intended when the one makes the other his Bayliff: for otherwiſe never his Bayliff to render an account is a good plea.

W.2.cap.23.

If there be two Tenants in Common of a Wood, Turbary, Piſchary, or the like, and one of them doth waſte againſt the will of his companion, his companion ſhal have an Action of Waſte, and he that did the Waſte before judgment, hath elexion either to take his part in certainty by the Sheriff and the oath of men, &c. or that he grant, That from thenceforth he ſhall not do waſte but according to his portion, &c. and if he make choyce of a certain place, then the place waſted ſhall be aſſigned to him. (g) But this extends not to Coparceners, becauſe they were compellable to make partition by the Common Law: and this, as it is ſaid, doth extend as well to Tenants in Common, and Joyntenants for life, as to an eſtate of Inheritance. But if one Tenant in Common, or Joyntenant of a Dove-houſe, deſtroy the whole flight of Doves, no action of Waſte doth lie in that caſe upon the ſaid Statute, (*b*) as ſome do hold.

(g) 27 *H.*8.13. 21 E.3. 29. 29 E.3.39. 3 *E.*2. Waſt.35.F.N.*B.*59.d.F. N.B.49.I.

If lands be given to two, and to the heirs of one of them, and the Tenant for life doth waſte, he that hath the inheritance ſhall have no action of waſte by the ſtatute of Glouceſter, but upon the ſtatute of W.2. he ſhall have an Action of Waſte. And it is to be known, that one Tenant in Common may infeoff his companion, but not releaſe, becauſe the Free-hold is ſeveral. Joyntenants may releaſe, but not infeoff, becauſe the Free-hold is joynt; but Coparceners may both infeoff and releaſe, becauſe their ſeiſin to ſome intents is joynt, and to ſome ſeveral.

(h)47 E.3.22.50 E.3.3. 10 E.4.3. 12 *H.*6.42. 2 E.3.47. 17 *E.*3.47. 18 E.4.27. 28 E.3.4.

## *Sect.* 324.

¶ ITem quant un home voile mẽer un feoffment fait a luy ou un done en le taile, ou ũ leaſe p̃ terme de vie dalcun fres ou tenemẽts, la il dirra p̃ force d̃ quel feoffm̃t, done, ou leas il fuit ſeiſie &c. mes lou un voil plead ũ leas ou grãt fait a luy d̃ chattiel real ou perſonal, la il dirra, per force de quel il fuit poſſeſſe, &c.

ALſo when a man will ſhew a Feoffment made to him, or a gift in taile, or a leaſe for life, of any lands or tenements, there he ſhall ſay, by force of which feoffment, gift or leaſe, he was ſeiſed, &c but where one will plead a leaſe or grant made to him of a chattel real or perſonal, then he ſhall ſay, by force of wch he was poſſeſſed, &c.

¶ Pluis ſerra dit de tenants en common en le chapter de Releales, & tenant per Elegit.

More ſhall be ſaid of tenants in Common in the Chapters of Releaſes and Tenant by *Elegit*.

¶ *Il fuit ſeiſie, &c.* Seiſe is a word of Art, and in pleading is only applied to a Freehold at leaſt, as Poſſeſſe for diſtinction ſake is to a Chattel real or perſonal.

As

As if B. plead a feoffment in fee, he concludeth, Virtute cujus predict' B. fuit ſeiſitus, &c. But if he plead a leaſe for years, he pleadeth, Virtute cujus predictus B. intravit & fuit inde poſſeſſionatus, and ſo of Chattels perſonal, Virtute cujus fuit inde poſſeſſionatus.

And this holdeth not only in caſe of Lands or Tenements which lie in livery, but alſo of Rents, Advowſons, Commons, &c. and other things that lie in grant, whereof a man hath an eſtate for life or inheritance.

Alſo when a man pleads a leaſe for life, or any higher eſtate which paſſeth by Livery, he is not to plead any entry, for he is in actual ſeiſin by the livery it ſelfe. Otherwiſe it is of a leaſe for years, becauſe there he is not actually poſſeſſed until an entry.

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# *Cap.* 5. Of Eſtates upon Condition. *Sect.* 325.

¶ Eſtates q̄ homes ount en terres ou tenements ſur condition ſont d̄ deux maners, ſcilicet, ou ils ont eſtate ſur condition en fait ou ſur condition ē ley, &c. Sur condition ē fait eſt, ſi come un home p̄ fait endent enfeoffa un auter ē fée ſimple, reſervant a luy et a ſes heires annualment certaine rent payable a un feaſt, ou a divers feaſts p̄ an, ſur condition que ſi l' rent ſoit aderere, &c. q̄ bien liſt al feoffor et a ſes heires en meſmes les terres ou tenements d̄ entr̄, &c. ou ſi rent ſoit alié a un home en fée rendant a luy certaine rent, &c. et ſi happa q̄ le rent ſoit aderere per un ſemaign̄ apres aſt iour d̄ payment de

EStates wch men have in Lands or Tenements upon Condition, are of two ſorts, *viz.* either they have eſtate upon Condition, in Deed, or upon Condition in Law, &c. upon Condition in Deed is, as if a man by Deed indented, enfeoffs another in fee ſimple, reſerving to him and his heires yearly a certaine rent payable at one feaſt or divers Feaſts *per annum*, on condition that if the Rent be behind, &c. that it ſhall be lawful for the Feoffor and his heires into the ſame Lands or Tenements to enter, &c. And if it happen the Rent to be behind by a week after any day of payment of it, or by a moneth after any day of payment of it, or by halfe a yeere, &c. that then it ſhall be lawful to the Feof-



¶ *Sur Condition.* Littleton having before ſpoken of Eſtates abſolute, now begin̄eth to entreat of Eſtates upon Condition. And a condition annexed to the realty whereof Littleton here ſpeaketh in the legal underſtanding eſt modus, a quality annexed by him that hath Eſtate, intereſt, or right to the ſame, whereby an Eſtate, &c. may either be defeated, or inlarged, or created upon an incertain event. Conditio dicitur cum quid in caſum incertum qui poteſt tendere ad eſſe aut non eſſe confertur.

Glanvil Lib. 10. cap. 8. Bract. lib. 2. ca. 5, 6, 7. &c. lib. 4. fo. 213. Brit. cap. 36. & fol. 89. 99. 114, 130. 205, 206, 207, 249. Flet. lib. 3. cap. 9. & lib. 5. cap. 5. Mirr. c. 2. ſect. 15. & 17.

¶ *Sur condition en fait quæ eſt facti*, that is, upon a condition expreſſed by the party in legal termes of Law.

¶ *Ou ſur Condition en ley, &c.* quæ eſt juris, that is, tacite created by Law without any words uſed by the partie. Again, Littleton ſubdivideth Conditions in deed (though not in expreſſe words) into conditions precedent (of which it is ſaid, Conditio adimpleri debet priuſquam ſequatur effectus) and conditions ſubſequent. Again of conditions in deed, ſome be affirmative, & ſome in the negative: & ſome in the affirmative, which imply a negative: ſome make the eſtate whereunto they are annexed, voydable by entry or claim: & ſome make the eſtate void ipſo facto.

ceo, ou per un mois apres alcun jour de payment de ceo, ou p un demy, &c. q̃ adonques bien lirroit a le feoffor et a les heires dentrer, &c. En ceux cales ſi le rent ne ſoit paie a tiel tẽps ou devant tiel tẽps limit et ſpecifie deins le cõdition compriſes en lẽdenture, dõqs poit l' feoffor ou ſes heirs entrer en tielx terres ou tenements, et eux en ſon primer eſtate aver et tener, & de ceo ouſte le feoffee tout net. Et eſt apelle eſtate ſur condition pur ceo que leſtate le feoffee eſt defeaſible ſi le condition ne ſoit perfozm, &c.

for and his heires to enter, &c. In theſe caſes if the Rent be not paid at ſuch time or before ſuch time limited and ſpecified within the Condition compriſed in the Indenture, then may the Feoffor or his heires enter into ſuch Lands or Tenements, and them in his former eſtate to have and hold, and the Feoffee quite to ouſte thereof. And it is called an Eſtate upon Condition, becauſe that the ſtate of the Feoffee is defeaſible if the Condition be not performed, &c.

ſuch, without entry or claim.

Alſo of conditions in deed, ſome be annexed to the rent reſerved out of the land, and

Mir.cap.2.Sect.15.&17. ſome to collateral acts, &c. ſome be ſingle, ſome in the conjunctive, ſome in the diſjunctive, as ſhall evidently appear in this Chapter, where the examples of theſe diviſions ſhall be explained in their proper place.

¶ *En ley, &c.* Of conditions in Law more ſhall be ſaid hereafter in this Chapter.

¶ *Sur condition en fait, eſt ſicome un home per fait indent, &c.* Here Littleton putteth one example of ſix ſeveral kinds of conditions. That is, firſt, of a ſingle condition in deed. Secondly, of a condition ſubſequent to the Eſtate. Thirdly, a condition annexed to the rent, &c. Fourthly, a condition that defeateth the eſtate. Fifthly, a condition that defeateth not the eſtate before an entry. And laſtly, a condition in the affirmative, which implieth a negative (as behind or unpaid implieth a negative) viz. not paid. All which do appear by the expreſſe words of Littleton.

¶ *Rend a luy certaine rent, &c.* Here by this (&c.) is implyed for life, in taile, or in fee.

*Et en ceſt caſe ſi le rent ne ſoit pay a tiel temps, &c. donques poit le feoffor ou ſes heires entrer, &c.* By this Section, and by the (&c.) therein contained ſix things are to be underſtood.

(b)40.Aſſ.11.20.H.6. 30.31.6.H.7.7.19.H.6. 76.20.H.6.32.22.H.6. 46. Pl. Com. Kidweyls caſe fo.70. & Hill & Granges caſe fol.73.

Firſt, where our Author ſaith, Si le rent ſoit arere, that though the rent be behind and not paid, (b) yet if the Feoffor doth not demand the ſame, &c. he ſhall never re-enter, becauſe the land is the principal debtor, for the rent iſſueth out of the land, and in an Aſſiſe for the rent the land ſhall be put in view; and if the land be evicted by a title paramount, the rent is avoyded; and after ſuch eviction the perſon of the Feoffee ſhall not be charged therewith, for the perſon of the Feoffee was only charged with the rent in reſpect of the grant out of the land.

Lib.4. fol.72. 73. Boroughs caſe.

Secondly, the demand muſt be made upon the land, becauſe the land is the debtor, and that is the place of demand appointed by Law.

If the King maketh a leaſe for years, rendring a rent payable at his Receipt at Weſtminſter, and after the King granteth the reverſion to another, and his heirs, the Grantee ſhall demand the rent upon the land, and not at the Kings Receipt at Weſtminſter, for as the Law without expreſſe words doth appoint the Leſſee in the Kings caſe to pay it at the Kings Receipt, ſo in caſe of a ſubject, the Law appoints the demand to be on the Land.

49. Aſſ.5.15. Eliz.Dyer 329.

If there be a houſe upon the ſame, he muſt demand the rent at the houſe. And he cannot demand it at the back door of the houſe, but at the fore door, becauſe the demand muſt ever be made at the moſt notorious place. And it is not material whether any perſon be there or no.

(c) Bendloes en Treſp. 4.& 5.Ph.& Mar.

Albeit the Feoffor be in the Hall, or other part of the houſe, yet the Feoffor need not (c) but come to the fore-door, for that is the place appointed by Law, albeit the door be open.

(d) If

(d) If the feoffment were made of a wood only, the demand muſt be made at the gate of the wood, or at ſome high way leading through the wood, or other moſt notorious place. And if one place be as notorious as another, the feoffor hath election to demand it at which he will; and albeit the Feoffee be in ſome other part of the wood ready to pay the Rent, yet that ſhall not avail him. Et ſic de ſimilibus. (d) 15. Eliz. Dyer 329.

Thirdly, And if the Feoffor demand it on the ground at a place which is not moſt notorious, as at the back-door of a houſe, &c. and in pleading the Feoffor alledge a demand of the Rent generally at the houſe, the Feoffee may traverſe the demand, and upon the evidence it ſhall be found for him, for that it was a void demand.

Fourthly, If the Rent be reſerved to be paid at any place from the Land, yet it is in Law a Rent, and the Feoffor muſt demand it at the place appointed by the parties, obſerving that which hath been ſaid before concerning the moſt notorious place. Lib. 4. Boroughs caſe fol. 73. Pl. Com. 70.

Fifthly, And all this is to be underſtood when the Feoffee is abſent; for if the Feoffee cometh to the Feoffor at any place upon any part of the ground at the day of payment, and offer his Rent, albeit they be not at the moſt notorious place, nor at the laſt inſtant, the Feoffor is bound to receive it, or elſe he ſhall not take any advantage of any demand of the Rent for that day.

Sixtly, therefore the place of demand being now known, it is further to be known what time the Law hath appointed for the ſame. This partly appeareth by that which hath been laſt ſaid. For albeit the laſt time of demand of the rent is ſuch a convenient time before the Sun ſetting of the laſt day of payment, as the mony may be numbred and received, notwithſtanding, if the tender be made to him that is to receive it upon any part of the land at any time of the laſt day of payment, and he refuſeth, the condition is ſaved for that time; for by the expreſſe reſervation, the mony is to be paid on the day indefinitely; and convenient time before the laſt inſtant, is the uttermoſt time appointed by Law, to the intent that then both parties ſhould meet together, the one to demand and receive, and the other to pay it, ſo as the one ſhould not prevent the other. But if the parties meet upon any part of the land whatſoever, on the ſame day, the tender ſhall ſave the Condition for ever for that time. Lib. 5. fol. 114. Wades caſe.

And if the reſervation of the rent be (as here Littleton putteth the caſe) at certain feaſts, with condition that if it happen the rent to be behind, by the ſpace of a week after any day of payment, &c. In this caſe the Feoffor needeth not demand it on the feaſt day, but the uttermoſt time for the demand is a convenient time (as hath been ſaid) before the laſt day of the week, unleſſe before that the Feoffee meet the Feoffor upon the Land, and tender the rent: as is aforeſaid. Pl. Com. Hill & Granges caſe 167. 172. 20. H. 6. 30, 31, 6. H. 7. 3.

If a rent be granted payable at a certain day, and if it be behind, and demanded, that the Grantee ſhall diſtrain for it: In this caſe the Grantee need not demand it at the day, but if he demand it at any time after, he ſhall diſtrain for it, for the Grantee hath election in this caſe to demand it when he will to enable him to diſtrain. Mich. 40 & 41. Eliz. inter Stanly and Read Lib. 7. fol. 28. Maundes Caſe.

¶ *Et eux en ſon primer eſtate aver, &c.* Regularly it is true, that he that entreth for a condition broken ſhall be ſeiſed in his firſt eſtate, or of that eſtate which he had at the time of the eſtate made upon condition, but yet this faileth in many caſes. 8. H. 7. 7. b.

Firſt in reſpect of impoſſibility. As if a man ſeiſed of lands in the right of his wife, maketh a feoffment in fee by deed indented, upon condition that the Feoffee ſhould demiſe the land to the Feoffor for his life, &c. the husband dyeth, the condition is broken; in this caſe the heire of the husband ſhall enter for the condition broken; but it is impoſſible for him to have the eſtate that the Feoffor had at the time of the Condition made: For therein he had but an eſtate in the right of his wife, which by the coverture was diſſolved. And therefore when the heire hath entred for the condition broken, and defeated the Feoffment, his eſtate doth vaniſh, and preſently the ſtate is veſted in the wife. 4. H. 6. 2. Li. 8. fol. 43, 44. Whittinghams caſe. 5. H. 7. 6. 2.

2. In reſpect of Neceſſity. If Ceſty que uſe after the Statute of R. 3. and before the Statute of 27. H. 8. had made a feoffment in fee upon condition, and after had entred for the condition broken. In this caſe he had but an uſe when the feoffment was made; but now he ſhall be ſeiſed of the whole ſtate of the land. So that as in the former caſe, the Anceſtor had ſomewhat at the making of the Condition, and the heire ſhall have nothing when he hath entred for the condition broken, ſo in this caſe the Feoffor had no eſtate or intereſt in the land at the time of the condition made, but a bare uſe; yet after his entry for the condition broken, he ſhall be ſeiſed of the whole eſtate in the land, and that alſo for neceſſity; for by the feoffment in fee of Ceſty que uſe, the whole eſtate and right was deveſted out of the Feoffor. And therefore of neceſſity the Feoffor muſt gaine the whole eſtate by his entry for the Condition broken.

Tenant in ſpecial taile hath iſſue, and his wife dieth, Tenant in taile maketh a feoffment in fee upon condition, the iſſue dieth, the condition is broken, the Feoffor re-enters, ſhe ſhall have

have but an eſtate for life as tenant in taile apres poſſibility of iſſue extinct by the re-entry, and yet he had an eſtate taile at the time of the Feoffment, and that alſo for neceſſity.

3. In ſome caſes the Feoffor by his re-entry ſhall be in his former eſtate, but not in reſpect of ſome collateral qualities. As if Tenant by homage anceſtrel maketh a Feoffment in fee upon Condition, and entreth upon the Condition broken, it ſhall never be holden by Homage anceſtrel again. And ſo it is if a Copyhold eſcheat, and the Lord maketh a Feoffment in fee upon condition, and entreth for the condition broken. And the reaſon in both theſe caſes is, for that the cuſtome or preſcription for the time is interrupted.

Lord and Tenant by fealty & rent, the Lord is in ſeiſin of his rent, the Lord granteth his Seigniory to another and to his heirs upon condition, the Tenant attorneth and payeth his rent to the Grantee, the condition is broken, the Lord diſtreineth for his rent, and Reſcous is made, he ſhall be in his former eſtate, and yet the former ſeiſin ſhall not enable him to have an Aſſiſe without a new ſeiſin. 15.Aſſ.12.

If Tenant in taile make a Feoffment in fee upon condition, and dieth, the iſſue in taile within age doth enter for the condition broken, he ſhall be firſt in as Tenant in fee ſimple, as heire to his father, and conſequently and inſtantly he ſhall be remitted. But if the heir be of full age, he ſhall not be remitted, becauſe he might have had his Formedon againſt the feoffee, and the entry of the Condition is his own act. But more ſhall be ſaid hereafter in his proper place in the Chapter of Remitter. 8.H.7.7.

If a man make a Feoffment in fee of black acre and white acre, upon condition, &c. and for breach thereof that he ſhall enter into black acre, this is good. 2.H.6.4.

If Tenant for life make a feoffment in fee upon condition, and entreth for the Condition broken, he ſhall be Tenant for life again, but ſubject to a forfeiture, for the ſtate is reduced, but the forfeiture is not purged. 43.Aſſ.47.13.E.4.4. 2.H.5.7.b.39.Aſſ.15. 11.H.5,25.16.Aſſ.47.

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¶ EN meſme le manner eſt ſi terres ſont dones en le tail, ou leſſées a term de vie ou des ans, ſur condition, &c. Vid. ſect.232. 19 E.3. tit.barre.280. 39.R.2.donerent 10.Pl. Com.524.

IN the ſame manner it is, if Lands be given in taile, or let for term of life or of years, upon condition, &c.

¶ *Sur condition, &c.* This implyeth the ſeveral kinds of conditions in Deed before ſpecified.

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¶ ET *la terre tener tanque ils ſoyent ſatisfies ou paies, de le rent aderere &c.* By this it is implyed that if ſuch a feoffment be made reſerving (b) (for example) 8. marks rent at the feaſt of Eaſter, with ſuch a Condition as is aforeſaid, the Feoffor at the feaſt day demands the Rent, the Feoffee payeth unto him 6. marks parcel of the Rent, the Feoffor entreth into the lands, and taketh the profits towards ſatisfaction. Afterwards the Feoffee doth tender the two marks reſidue of the rent to the feoffor upon the land, who refuſeth it. (b) 20.E.3.tit.Coven.3.

¶ MES lou feoffemēt eſt fait de certaine terres reſervant certain rent, &c. ſur tiel conditiō que ſi le rent ſoit aderere, q̄ bien lirroit al feoffor, et ſes heires, dentrer, et la terre tener tanq̄ ils ſoient ſatiſfies ou payes de le rent aderere, &c. En ceſt caſe ſi le rent ſoit aderer, & le feoffor ou ſes heires enter, le

BUt where a feoffment is made of certaine Lands reſerving a certaine rent, &c. upon ſuch condition that if the rent be behind, that it ſhall be lawful for the feoffor and his heirs to enter, and to hold the land until he be ſatisfied or payed the rent behind, &c. In this caſe if the rent be behind, and the Feoffor or his

feoffe

feoffee nell pas exclude de ceo tout net, mes le feoffor avera et tiendra la terre et prendra ent les profits tanq; il soit satisfie de le rent aderere, e quant il est satisfie, donq; poyet le feoffee re-enter en mesn̄ la terr̄, et ceo tener come il tenoit adevāt. Car en tiel cas le feoffor avera la fre forsq; en maner cōe pur un distres, tanq; il soit satisfie d̄ le rent, &c. cōment q̄ il prendre les profits en le meane temps a son use demesne, &c.

heires enter, the feoffee is not altogether excluded from this, but the Feoffor shall have and hold the Land, and thereof take the profits untill he be satisfied of the Rent behind; and when he is satisfied, then may the feoffee re-enter into the same land, and hold it as he held it before. For in this case the Feoffor shall have the land but in manner as for a distresse, until he be satisfyed of the rent, &c. though he take the profits in the mean time to his own use, &c.

hath been adjudged that the Feoffee upon the refusal may enter into the Land, for when the Feoffor is satisfied either by prescription of the profits, or by payment, or tender and refusal, or partly by the one and partly by the other, the Feoffee may re-enter into the land. And this is within the words of Littleton, viz. (Until he be satisfied.) And albeit the Feoffor had accepted part of his rent, yet he may enter for the Condition broken, and retain the land until he be satisfied of the whole. All which is worthy of observation.

¶ *Et en tiel case le Feoffor avera le terra forsque en manner come un distresse tanque il soit satisfie de la rent, &c.*

By this it appeareth that the Feoffor by his re-entry gaineth no estate of freehold, but an interest by the agreement of the parties to take the profits in nature of a Distresse. And therefore if a man maketh a Lease for life, with a reservation of a rent and such a condition, if he enter for the condition broken, and take the profits of the land Quousque &c. he shall not have an action of debt for the rent Arere, for that the freehold of the Lessee doth continue; and therefore the book (c) that seemeth to the contrary, is false printed; and the true case was of a lease for years, as it appeareth afterwards in the same page of the leafe.

(c) 20. E. 3. fol. 7.

But herein also a diversity worthy the observation is implied, viz. If a man make a Lease for years, reserving a rent, with a condition that if the rent be behind, that the Lessor shall re-enter, and take the profits until thereof he be satisfied, there the profits shall be counted as parcel of the satisfaction; and during the time that he so taketh the profits, he shall not have an action of debt for the rent, for the satisfaction whereof he taketh the profits. But if the condition be, that he shall take the profits until the Feoffor be satisfied or paid of the rent, without saying (thereof) or to the like effect, there the profits shall be accounted no part of the satisfaction, but to hasten the Lessee to pay it; and as Littleton here saith, that until he be satisfied, he shall take the profits in the mean time to his own use.

30. E. 3. 7. semblable 27. H. 8. 4 43. E. 3. 21. 31. Ass. Pl. 26. Vid. le statute de Merton. cap. 6. and observe these words, quod inde percipere possint duplicem valorem, &c. Et ca. 7. without this word (Inde.)

## Sect. 328.

¶ ITem, divers parolx (ent̄ auters) y sont, queux p vertue de eux mesmes font estates sur condition, un est le parol Sub conditione: Si come A. enfeoffa B. *A.* infeoffe *B.* of cer-

ALso divers words (amongst others) there be which by vertue of themselves make estates upon condition, one is the word (*sub condit.*) as if

¶ HEre in this and the next two Sections Littleton doth put four examples of words that make Conditions in Deed, and first, Sub conditione. This is the most expresse and proper Condition in Deed, and therefore our Author beginneth with it.

Sub conditione. (e) Marie, Dyer 138. 27. H. 8. 15. 13. H. 4. entr. Cong. 57. 29. Ass. 7. 33. Ass. 12. 40. Ass. 12. Bracton ubi supra. Flet. lib. 4. cap. 9. Brit. cap. 36. & ubi supra.

¶ *Talem reddidum, &c.*

This

Vid.Sect.325.

(This(&c.)imp̃teth any other rent or ſum in grosſe, or any collaterall condition whatſoever, either to be performed by the Feoffee, (whereof our Author here putteth his caſe) or by the Feoffor, and extendeth to all kinds of Conditions in Deed, before ſpecified.

de certaine terre, habendum & tenendum eidem B. & hæredibus ſuis, ſub conditione, quod idem B. & hæredes ſui ſolvant ſeu ſolvi faciant præfat' A. & hæredibus ſuis annuatim talem redditum, &c. En teel caſe ſans aſcun pluis dire le Feoffee ad eſtate ſur condition.

taine land, To have and to hold to the ſaid B. and his heires, upon condition that the ſaid B. and his heires do pay or cauſe to be paid to the aforeſaid A. and his heires, yearly, ſuch a rent, &c. In this caſe, without any more ſaying, the feoffee hath an eſtate upon condition.

## Sect. 329.

Proviſo. Vid.Sect.220. Dyer 28.H.8.fol.13. 27.H.8.fol.14,15,13. H.4. Entr. Cong.57. Seignior Cromwels caſe. Lib.2.fo.71,72.at large. 35.H.8. tit condition Br. Lib.8.89. Frances caſe.

¶ *Proviſo ſemper qd' B. ſolvat, &c.*

Our Author putteth his caſe where a Proviſo cometh alone. And ſo it is if a man by Indenture letteth Lands for yeares, prohibiting alwaies, and it is covenanted and agreed between the ſaid Parties, That the Leſſee ſhould not alien; and it was adjudged that this was a condition by force of the Proviſo, and a covenant by force of the other words.

This word Proviſo ſhall be alſo taken as a limitation or qualification, as hereafter in his proper place ſhall be ſaid. And ſometime it ſhall amount to a Covenant. All which do appear by the authorities in the margent. *

(*)27.H.8.15.&c. Ita quod. Flet. lib.4. cap.9. Bracton ubi ſupra. Britton ubi ſupra.

For the(&c.) in this Section, explanation is made in the Section next before.

¶ *Ou fueront tiels.*

¶ *Ary ũ les parols fueront tiels, Proviſo ſemper quod prædict' B. ſolvat, ſeu ſolvi faciat præfato A. talem redditum, &c. ou fueront tiels, Ita quod prædict B. ſolvat ſeu ſolvi faciat præfato A. talem redditũ, &c. En ceux caſes ſaũs pluis dire, le Feoffee nad eſtate forſque ſur condition, iſſint que ſil ne performa le condition, l'feoffor & ſes heires poyent entrer, &c.*

ALſo if the words were ſuch, Provided alwaies that the aforeſaid B. do pay or cauſe to be paid to the aforeſaid A. ſuch a rent, &c. Or theſe, So that the ſaid B. do pay or cauſe to be paid to the ſaid A. ſuch a rent, &c. In theſe caſes without more ſaying, the Feoffee hath but an eſtate upon condition: So as if he doth not performe the condition, the Feoffor and his heires may enter, &c.

Ita quod. This is the third condition in Deed, whereof our Author makes mention.

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6,E.2. Entrie cong.65. 8. E. 2. Aſſ. 320. adjudged. Quod ſi contingat. Paſch. 37. Eliz. Rot. 254. inter Sayer & Hares in com. banco.

¶ *Quod ſi contingat; &c.*

This is the fourth condition in Deed, ſet down by our Author:

¶ *Dentrer, &c.* Hereby it is evident, That

¶ *Item auks parols ſont ẽ un fait queux cauſont les Tenements eſtre Conditionals. Sicõe ſur tiel feof-*

ALSO there be other words in a Deed which cauſe the Tenements to be conditional: As if upon ſuch feoffement

ment

ment un Rent eſt reſerve al Feoffor, &c. et puis ſoit mitte en le Fait ceſt parol, Quod ſi contingat reddi-tum prædict' à retro fore in parte vel in toto, quod tunc benè licebit a le Feoffor et a les heirs dentr', &c. ceo eſt un fait ſur condition.

a rent be reſerved to the feoffor, &c. and afterward this word is put into the Deed, that if it happen the aforeſaid rent to be behind in part or in all, that then it ſhall be lawful for the feoffor and his heirs to enter, &c. This is a Deed upon condition.

ſome words of themſelves do make a Condition, and ſome other (whereof our Author here and in the next Section * putteth an example) do not of themſelves make a condition without a concluſion and clauſe of re-entry: And many times (Si) makes a Condition, and ſometimes a limitation, as hereafter ſhall be ſaid in this Chapter. * Vide Sect. 331. 3.H.6.7. Flet.lib.4.ca.9. Br.li.4. fol.213.b.

Ineſſe poteſt donationi modus, conditio, ſive cauſa. * Scito quòd (ut) modus eſt, (ſi) conditio (quia) cauſa. * 4. Mar.Dyer.138.b. Bract. ubi ſupra.

Conditio is explained before.

Modus is at this day properly taken for a modification, limitation or qualification. for the which alſo the Law hath appointed apt words: and becauſe Littleton ſpeaketh of this alſo in the end of this Chapter, I will reſerve this matter to its proper place, where the Reader ſhall perceive excellent matter of learning touching this point.

Cauſa, The cauſe or conſideration of the Grant, and herein there is a diverſity between a gift of lands, and a gift of an annuity or ſuch like. For example, If a man grant an annuity pro una acra terræ, in this caſe this word pro ſheweth the cauſe of the Grant, and therefore amounteth to a condition; for if the acre of land be evicted by an elder title, the Annuity ſhall ceaſe, for ceſſante cauſa, ceſſat effectus. Pro. 24. E.3.3

And ſo if an Annuity be granted pro decimis, &c. if the Grantee be unjuſtly diſturbed of the tithes, the Annuity ceaſeth. And ſo it is if an Annuity be granted pro conſilio, and the Grantee refuſe to give counſel, the annuity ceaſeth. So if an annuity be granted quod præſtaret conſilium, this makes the grant conditional. 9.E.4.20.32. E. 3. Annu. 30.14. E.4 4.15. E.4.2.b.8.H.6.23.5. E. 2.tit.An-44.41.E.3.19. 32.E.1.Avowry 242.

But if A pro conſilio impenſo, &c. make a feoffment or a leaſe for life, of an acre, or pro una acra terræ, &c. albeit he denieth Counſel, or that the acre be evicted, yet A. ſhall not reenter; for in this caſe there ought to be legal words of condition or qualification; for the cauſe or conſideration ſhall not avoid the ſtate of the Feoffee; and the reaſon of this diverſity is, for that the ſtate of the Land is executed, and the annuity executory. 21.E.4.49.22.E.4.28. 35.H.6.2.10.E.3.44.5. E.2.9.E.4.20.15. E. 4.3.

And yet ſometime in caſe of lands or tenements (Cauſa) ſhall make a Condition. As if a woman give lands to a man and his heirs, cauſâ matrimonii prælocuti, in this caſe if ſhe either marry the man, or the man refuſe to marry her, ſhe ſhall have the land again to her and to her heirs. (e) But of the other ſide, if a man give land to a woman and to her heirs, cauſâ matrimonii prælocuti, though he marry her, or the woman refuſe, he ſhall not have the lands again; for it ſtands not with the modeſty of women in this kind, to aſk advice of learned Counſel, as the man may and ought: * And the rather, for that in the caſe of the woman, ſhe may averre the cauſe (for the reaſon aforeſaid) although it be not contained in the deed, yea though the feoffment be made without Deed. Flet.li.5.c.34.34.Aſſ.1. 40. Aſſ.13. (e) 5. E.2. Cui in vita 34.tit. Condit, Br. 5. H.4.1. *12.E.1.1.Feoffments & Faits 114.F.N.B. 205. L. Vid.Sect.365. Ad faciend. ea intentione &c.Dyer 138.7.H.4.22.

If a man maketh a feoffment in fee, ad faciendum, or faciendo, or eâ intentione, or ad effectum, or ad propoſitum, that the Feoffee ſhall do or not do ſuch an act, none of theſe words make the ſtate in the land conditional; for in the judgment of Law they are no words of condition, and ſo was it reſolved, Hill. 18.Eliz. in Com. Banco, in the caſe of a common perſon; but in the caſe of the King, the ſaid or the like words do create a Condition; and ſo it is in the caſe of a Will of a common perſon, which caſe I my ſelf heard and obſerved. 31.H.8.tit. Condition 19.Br.Pl. Com.142.38. H.6.33.36,37. Doct. & Stud.lib.2.cap. 34. 27. H.8.18.2.32.E.3.Brev. 291.

But for the avoiding of a leaſe for years, ſuch preciſe words or condition are not ſo ſtrictly required as in caſe of Freehold and Inheritance. (f) For if a man by Deed make a Leaſe of a Manor for years, in which there is a clauſe (And the ſaid Leſſee ſhall continually dwell upon the capital Meſſuage of the ſaid Manor, upon pain of forfeiture of the ſaid term) theſe words amount to a Condition. (f) 7.E.6.Dyer, 79.28. H.8.Dyer 27.2. Subpœna foriſfacturæ.

And ſo it is if ſuch a clauſe be in ſuch a leaſe, Quòd non licebit, to the Leſſee, dare, vendere, vel concedere ſtatum, &c. ſub pœna foris facturæ, this amounts to make the leaſe for years defeaſible, and ſo was it adjudged in the Court of Common Pleas, (g) in Queen Elizabeths time; and the reaſon of the Court was, That a leaſe for years was but a Contract, which may begin by word, and by word may be diſſolved. Quod non licebit. 3.E.6 Dyer, 65,66. 4.Mar.138. (g) Hil.40.El.Rot.1610 inter Brown & Ayer Vid.Pl.Com.142. Br. & Beſtones caſe.

Sect.

## Sect. 331.

MEs ſi eſt diuerſity prenter ceſt parol (ſi contingat, &c.) & les parols precheins avantdits. Car ceux parols, (Si contingat, *&c.*) ne valent riens a tiel condition, ſi non que il ad ceux parols ſubſequēts, que oūſt lieu al feoffor & a ſes heires dentrer, &c. Mes en les cases avātdits, il ne beſoign per la Ley, de mitter tiel clauſe (ſcilicet) que le Feoffor & les heires poyent entrer, &c. pur ceo que ils poyent faire ceo per force des parols avantdits, pur ceo q̄ ils imprejgnont a eux meſmes in Ley un condition, ſcilicet, que le Feoffor & les heires poyent entrer, &c. Uncore il eſt communemēt uſe en touts tiels cases avantdits d̄ mitter les clauſes ſi les faits ſcilicet, ſi le rent ſoit aderere, &c. que bien lirroit a le Feoffor & a ſes heires dentre, &c. Et ceo eſt bien fait, a cel intent pur declarer et expreſſer a les lays gents que ne ſont apprīſes en la Ley, de le maner & le condition de le feoffment, &c. Sicome home ſeiſe de terre, ſella meſme la terre a un auter per fait indēt, pur terme des ans rendāt a luy certain rēt, il eſt uſe de mitter en le fait, que ſi le rent ſoit arere al jour de payment, ou per un ſemaigne, ou per un mois, &c. que adonque bien lirroit al Leſſor a diſtreyn̄, &c. uncor̄ le leſſor poit diſtreyn̄ de cōmon droit p̄ le rent arere, &c. coment que tiels parols ne unque fueront miſes en le Fait, &c.

BUt there is a diverſity between this word, *Si contingat*, *&c.* and the words next aforeſaid, *&c.* for theſe words, *Si contingat*, *&c.* are nought worth to ſuch a condition, unleſſe it hath theſe words following, That it ſhall be lawful for the Feoffor and his heires to enter, *&c.* but in the caſes aforeſaid, it is not neceſſary by the Law to put ſuch clauſe, *ſcilicet*, that the Feoffor and his heires may enter, *&c.* becauſe they may do this by force of the words aforeſaid, for that they containe in themſelves a condition, *ſcilicet*, that the Feoffor and his heires may enter, *&c.* yet it is commonly uſed in all ſuch caſes aforeſaid, to put the clauſes in the Deeds, *ſcilicet*, if the Rent be behind, *&c.* that it ſhall be lawful to the Feoffor and his heires to enter, *&c.* And this is well done, for this intent, to declare and expreſſe to the Common people who are not learned in the Law, of the manner and condition of the Feoffement, *&c.* And if a man ſeiſed of Land letteth the ſame Land to another by Deed indented for Terme of years, rendring to him a certain Rent, it is uſed to be put into the Deed, That if the Rent be behind at the day of payment, or by the ſpace of a week or a moneth, *&c.* that then it ſhall be lawful to the Leſſor to diſtrain, *&c.* yet the Leſſor may diſtrain of common right for the Rent behind, &c. though ſuch words were not put into the Deed, &c.

¶ *Ils ne beſoigne per la ley de mitter tiel clauſe,&c.* Quæ dubitationis cauſa tollendæ inferuntur, communem legem non lædunt. Et expreſſio eorum quæ tacite inſunt, nihil operatur.

¶ *Per un mois,&c.* Here albeit the clauſe of diſtreſs be added, That if the Rent be behind by the ſpace of a week or a moneth, that the Leſſor may diſtrain, yet he may diſtrain within the week or moneth, becauſe a diſtreſs is incident of common right to every rent ſervice. And the words be in the affirmative, and therefore cannot reſtrain that which is incident of common right.

The other(&c.) in this Section, upon that which hath been ſaid, are evident.

## *Sect.* 332.

¶ Item ſi feoffment ſoit fait ſur tiel condition, que ſi le feoffor paya al feoffee a certaine jour, &c. 40 l' dargent, que adonqz le feoffor poit re-entrer, &c. en ceo cas le feoffee eſt appell tenant en morgage, que eſt autãt a dire en Francois come mortgage, & en Latin, mortuum vadium. Et il ſemble que la cauſe, pur que il eſt appelle mortgage, eſt, pur ceo que il eſtoit en a werouſt ſi le feoffor voyt payer al jour limitte tiel ſumme, ou non: & ſil ne paya pas, dõque le terre que il mitter ẽ gage ſur condition de payment de le money, eſt ale de luy a touts jours, & iſſint mort a luy ſur condition, &c. & ſil paya le money, donqs eſt le gage mort quant a le Tenant, &c.

*Item*, if a feoffment be made upon ſuch condition, that if the feoffor pay to the feoffee at a certain day, &c. forty pounds of money, that then the feoffor may re-enter, &c. In this caſe the feoffee is called Tenant in morgage, which is as much to ſay in French as mortgage, and in Latine *mortuum vadium*. And it ſeemeth that the cauſe why it is called mortgage, is, for that it is doubtfull whether the feoffor will pay at the day limited ſuch ſum, or not; and if he doth not pay, then the Land which is put in pledge upon condition for the payment of the mony, is taken from him for ever, and ſo dead to him upon condition, &c. And if he doth pay the money, then the pledge is dead as to the Tenant, &c.

*Mortgage* is derived (c) of two French words, viz. Mort, that is mortuum, and Gage, that is, vadium, or pignus. And it is called in Latine mortuum vadium, or morgagium. Now it is called here Mortgage, or mortuum vadium, both for the reaſon here expreſſed by Littleton, as alſo to diſtinguiſh it from that which is called vivum vadium. Vivum autem dicitur vadium, quia nunquam moritur ex aliqua parte quod ex ſuis proventibus acquiratur. As if a man borrow a hundred pounds of another, and maketh an eſtate of Lands unto him, until he hath received the ſaid ſum of the iſſues and the profits of the Land, ſo as in this caſe neither money nor land dieth, or is loſt, (whereof Littleton hath ſpoken (d) before in this Chapter) and therefore it is called Vivum vadium.

(c) Glanvil li.10.c.68. & lib.13.cap.26,27.

(d) Vid.ſect.327.

## Sect. 333.

¶ Item ſi come home poit faire feoffement en fee en Mortgage, iſſint home poit faire done en taile en Mortgage, et un leas pur terme de vie, ou pur terme des ans en Mortgage, et touts tiels tenancs ſont appels tenants en Mortgage, ſolonque les eſtates, que ils ont en la terre, &c.

ALſo as a man may make a feoffment in fee in Morgage, ſo a man may make a gift in Taile in Morgage, and a Leaſe for term of life, or for term of years in Morgage. And all ſuch tenants are called tenants in morgage according to the eſtates which they have in the Land, *&c.*

This Section upon that which hath been ſaid needeth no further explication.

## Sect. 334.

¶ *Que le feoffor paiera a tiel jour*, &c.

27. H.8. 19. b. Li.8.fo.21. Frances caſe.

Albeit Conditions be not favoured, yet they are not alwayes taken literally, but in this caſe the Law enableth the heir that was not named to perform the condition, for four cauſes.

Firſt, becauſe there is a day limited, ſo as the heire cometh within the time limited by the Condition, for otherwiſe he could not do it, as ſhall be ſaid hereafter in this Chapter.

Secondly, for that the condition deſcends unto the heire, and therefore the Law that giveth him an intereſt in the condition, giveth him an ability to perform it.

Thirdly, for that the feoffee doth receive no damage or prejudice thereby (all theſe reaſons are expreſſly to be collected out of the words of Littleton) And theſe things being obſerved,

Fourthly, the intent and true meaning of the Condition ſhall be performed. And where it is here ſaid; that the heir may tender al jour aſſeſſe, &c. herein is implyed, that

¶ Item ſi feoffement ſoit fait en mortgage ſur condition que le Feoffor payera tiel ſumme a tiel jour, &c. come eſt enter eux per lour fait endent accorde et limit, comẽt que le feoffor mozult devãt le jour de payment, &c. uncore ſi le heir le feoffor paya meſme le ſumme de mony a meſme le jour a le feoffee, ou tender a luy les deniers, et le feoffee ceo refuſa de receiver, dõque poit l'heire entrer l'terre, et uncore le condition eſt, que ſi le feoffour payera tiel ſumm a tiel jour, &c. nient ſealant mention en le condition

ALſo if a feoffement be made in morgage upon condition that the Feoffor ſhal pay ſuch a ſum at ſuch a day, *&c.* as is between them by their Deed indented, agreed, and limited, although the Feoffor dyeth before the day of payment, *&c.* yet if the heire of the Feoffor pay the ſame ſumme of money at the ſame day to the Feoffee, or tender to him the money, and the Feoffee refuſe to receive it: Then may the heire enter into the Land, and yet the condition is, that if the Feoffor ſhall pay ſuch a ſum at ſuch a day, *&c.* not making mendaſcun

dalcun payment de cel fait per ſon heire, mes pur ceo que le heire ad intereſſe de droit en le condition &c. et lentent fuit forſque que les deniers ſerront pais al jour aſſeſſe, &c. et le feoffee nad pluis dāmage, ſi il ſoit pay per l' heir, que ſi il fuit pay per le pier, &c. Et pur ceſt cauſe, ſi le heire paya les deniers, ou tendera les deniers a le jour aſſeſſe, &c. et lauter ceo refuſa, il poit entrer, &c. Mes ſi un eſtrāge de ſa teſte demeine, que nad alcun intereſſe, &c. voile tender les avantdits deniers al feoffee a le jour aſſeſſe, le feoffee neſt pas tenus de ceo receiver.

tion in the condition of any payment to be made by his heire, but for that the heire hath intereſt of right in the condition, &c. and the intent was but that the money ſhould be paid at the day aſſeſſed, &c. and the Feoffee hath no more loſſe if it be paid by the heir, than if it were paid by the Father, &c. therefore if the heire pay the money or tender the money at the day limited, &c. and the other refuſe it, he may enter, &c. But if a ſtranger of his own head, who hath not any intereſt, &c. will tender the aforeſaid money to the Feoffee at the day appointed, the Feoffee is not bound to receive it.

the Executors or Adminiſtrators of the Mortgagor, or in default of them the Ordinary may alſo tender, as ſhall be ſaid (f) hereafter in this Chapter. But what if the Condition had been, if the Mortgagor or his heires did pay, &c. and he dyed before the day without heir, ſo as the condition became impoſſible, here it is to be obſerved, that where the condition becometh impoſſible to be performed by the act of God, as by death, &c. the ſtate of the Feoffee ſhall not be avoyded, as ſhall be ſaid hereafter in this Chapter. And therefore the Law here inableth the heir (of whom no mention was made in the Condition) to perform the Condition, leſt the inheritance ſhould be loſt, wherein divers diverſities are worthy of obſervation.

(f) Vide Sect. 327.

Firſt, between a Condition annexed to a ſtate in lands or Tenements upon a feoffment, gift in tail, &c. and a Condition of an Obligation, recognizance, or ſuch like. (g) For if a Condition annexed to lands be poſſible at the making of the Condition, and become impoſſible by the act of God, yet the ſtate of the feoffee, &c.

(g) Pl. Com. 496. Wrothes caſe. 14 H. 7. 3. 15. H. 1. 14. B. 4. 3. 39. H. 6. 2. 3.

ſhall not be avoyded. As if a man maketh a feoffment in fee upon Condition, that the Feoffor ſhall within one year go to the City of Paris about the affaires of the Feoffee, and preſently after the Feoffor dieth, ſo as it is impoſſible by the Act of God, that the Condition ſhould be performed, yet the eſtate of the feoffee is become abſolute; for though the Condition be ſubſequent to the ſtate, yet there is a precedency before the re-entry, viz. the performance of the Condition. And if the Land ſhould by conſtruction of Law be taken from the Feoffee, this ſhould work a dammage to the Feoffee, for that the Condition is not performed which was made for his benefit. And it appeareth by Littleton, that it muſt not be to the dammage of the Feoffee, and ſo it is if the Feoffor ſhall appear in ſuch a Court the next Tearm, and before the day the Feoffor dieth, the eſtate of the Feoffee is abſolute. (h) But if a man be bound by Recognizance or Bond with Condition that he ſhall appear the next Tearm in ſuch a Court, and before the day the Conuſee or Obligor dyeth, the Recognizance or Obligation is ſaved, and the reaſon of the diverſity is, becauſe the ſtate of the Land is executed and veſted in the Feoffee, and cannot be redemed back again but by matter ſubſequent, viz. the performance of the condition. But the Bond or Recognizance is a thing in Action, and executory, whereof no advantage can be taken until there be a default in the Obligor; and therefore in all caſes where a Condition of a Bond, Recognizance, &c. is impoſſible at the time of the making of the condition, and before the ſame can be performed the condition becomes impoſſible by the Act of God, or of the Law, or of the Obligee, &c. there the Obligation, &c. is ſaved. But if the Condition of a Bond, &c. be impoſſible at the time of the making of the condition, the Obligation, &c. is ſingle. And ſo it is in caſe of a feoffment in fee with a condition ſubſequent, that is impoſſible the ſtate of the Feoffee is abſolute, but if the Condition precedent be impoſſible, no

(h) 13. H. 7. 18. 21. H. 6. barre 60. 18. E. 4. 17. 9. El. 262 Dyer li. 3. 22. Laughters caſe 38. H. 6. 2. Fleta li. 4. cap. 9. & Bracton. & Britton ubi ſupra

eſtate or intereſt ſhall grow thereupon. And to illuſtrate theſe, by examples, you ſhall underſtand: If a man be bound in an Obligation, &c. with condition that if the Obligator do go from the Church of St Peter in Weſtminſter to the Church of St Peter in Rome, within three houres, that then the obligation ſhall be void. The condition is void and impoſſible, and the Obligation ſtandeth good.

14.H.8.28.10.H.7.22. 4.H.7.8.8.E.4.1.28.H. 8, 25. Lib. 5. fol.22. Laughters caſe & 75,39. E.3.5.17 H.6.Obligat. 18.5.El.Dyer 22.

And ſo it is, if a feoffment be made upon condition that the Feoffee ſhall go as is aforeſaid, the ſtate of the Feoffee is abſolute, and the condition impoſſible and void.

*Pl. Co. Fullers caſe 272.

* If a man make a leaſe for life, upon condition, that if the Leſſee go to Rome as is aforeſaid, that then he ſhall have a fee, the condition precedent is impoſſible and void, and therefore no fee ſimple can grow to the Leſſee.

35.H.6. tit, Barre 262. 37.H.6.Barre 60.2.E. 3.9.9. Eliz. Dyer 262. 28. H.8.30.

If a man make a feoffment in fee upon condition that the Feoffee ſhall re-infeoffe him before ſuch a day, and before the day the Feoffor diſſeiſe the Feoffee, and hold him out by force until the day be paſt, the ſtate of the feoffee is abſolute, for the Feoffor is the cauſe wherefore the condition cannot be performed, and therefore ſhall never take advantage for non-performance thereof. (i) And ſo it is if A. be bound to B. that I. S. ſhall marry Jane G. before ſuch a day, and before the day B. marry with Jane, he ſhall never take advantage of the bond, for that he himſelfe is the mean that the condition could never be performed. And this is regularly true in all caſes.

(i)4 H.74.30.H.8 Dyer 42.11.H.4.57.in protection.10.8.7.18.

But it is commonly holden (k) that if the condition of a Bond, &c. be againſt Law, that the Bond it ſelfe is voyd.

(k)Vi. Bracton, Britton, Flera ubi ſupra Bracton lib.3. fol.100.2. H.4.9. 8.E.4 12,b.2 E.4.2.X 3. 4 H.7.4. b.10. H.7.22. 14.H.8.20.42.E.3.6.23.

But herein the Law diſtinguiſhing between a condition againſt law for the doing of any act that is Malum in ſe, and a Condition againſt Law (that concerneth not any thing that is malum in ſe) but therefore is againſt Law, becauſe it is either repugnant to the ſtate, or againſt ſome maxime or rule in Law. And therefore the common opinion is to be underſtood of conditions againſt Law for the doing of ſome act that is malum in ſe, and yet therein alſo the Law diſtinguiſheth. As if a man be bound upon condition that he ſhall kill I. S. the bond is voyd.

2. H. 4. 5.

Pl. Com. Brownings caſe 133.

But if a man make a feoffment upon condition that the feoffee ſhall kill I. S. the eſtate is abſolute, and the condition void.

If a man make a feoffment in fee, upon condition that he ſhall not alien, this condition is repugnant and againſt Law, and the ſtate of the Feoffee is abſolute (whereof more ſhall be ſaid in his proper place.) But if the Feoffee be bound in a bond, that the Feoffee or his heirs ſhall not alien, this is good, for he may notwithſtanding alien, if he will forfeit his bond that he himſelfe hath made.

7.H.6.43.b.21.H.6.33. 21.H.7.11,21.H.7.30. 20.E.4.8. Pl.Com.in Brownings caſe 133.a.27.H.8.

So it is, if a man make a feoffment in fee, upon condition that the Feoffee ſhall not take the profits of the land, this condition is repugnant and againſt law, & the ſtate is abſolute. But a bond with a condition that a Feoffee ſhall not take the profits, is good. If a man be bound, with a condition to enfeoffe his wife, the condition is good and againſt Law, becauſe it is againſt a maxime in Law, and yet the bond is good; but if he be bound to pay his wife money, that is good. Et ſic de ſimilibus, whereof there be plentiful Authorities in our books.

Vide Sect.325.

¶ *Tender les deniers al jour aſſeſſe*, &c. Note, hereby is implied, that albeit a convenient time before ſun ſet be the laſt time given to the Feoffor to tender, yet if he tender it to the perſon of the Mortgagee at any time of the day of payment, and he refuſeth it, the condition is ſaved for that time.

¶ *Il poit enter*, &c. And ſo may his heire after his death.

¶ *Mes ſi eſtranger de ſa teſte demeſne que nad aſcun intereſſe, &c. voile tender les avant dits deniers al feoffee al jour aſſeſſe, le feoffee neſt pas tenus ceo receiver.* Note, by this period and the (&c.) it is implied that if the Mortgager dye, his heir within age of 14 years (the land being holden in Socage) the next of kin to whom the land cannot deſcend being his Gardian in Socage, may tender in the name of the heir, becauſe he hath an intereſt as Gardian in ſocage. Alſo if the heir be within age of 21. years, and the land is holden by Knights ſervice, the Lord of whom the land is holden may make the tender for his intereſt which he ſhall have when the condition is performed, for theſe in reſpect of their intereſt are not accounted eſtrangers.

Vide Sect, 401. Hill.28.Eliz.in Banco Regis inter Watkins & Aſtwicke, pro terrisin Com.Devon.45. E.3. tit.Release.28, 32.E.1. tit. Annuity 51. 33.H. 6.18.

But if the heir be an Ideot, of what age ſoever, any man may make the tender for him, in reſpect of his abſolute diſability; and the Law in this caſe is grounded upon charity, and ſo in like caſes.

36.H. 6. tit. barre 166. 38.E.1.tit.Annuity 51. 35.E.3. Judgment 254.

¶ *Le Feoffee neſt pas tenus de ceo receiver.* And note, that Littleton ſaith, that he is not bound to receive it at a ſtrangers hand. But if any ſtranger in the name of

of the Mortgagor or his heire (without his consent or privity) tender the money, and the Mortgagee accepteth it, this is a good satisfaction, and the Mortgagor or his heire agreeing thereunto may re-enter into the lands. Omnis ratihabitio retro trahitur & mandato æquiparatur. But the Mortgagor or his heire may disagree thereunto if he will.

## *Sect.* 335.

¶ ET memorandum que en tiel cas, lou tiel tender de le money est fait, &c. & le feoffee ou receiver ceo refusa, per que le feoffor ou ses heires entront, &c. donque l'feoffee nad ascun remedy daver l'money per le cõmon ley, pur ceo que il serra rette sa folly que il refusa le money quant un loyal tender de ceo fuit fait a luy.

And be it remembred that in such case, where such tender of the mony is made, &c. and the Feoffee refuse to receive it, by which the feoffor or his heires enter, &c. then the feoffee hath no remedy by the common Law to have this money, because it shall be accounted his own folly that he refused the mony, when a lawful tender of it was made unto him.

¶ *Tender de le money est fait, &c.* Here is implied, at the due time and place according to the condition.

¶ *Entrons*, &c. viz. into the lands or tenements.

¶ *Donque le feoffee nad ascun remedy daver le money per le common ley, &c.* And the reason is, because the money is collateral to the Land, and the feoffee hath no remedy therefore. 8.E.2.tit. Ass. 389. 31. Ass. 32.

If an obligation of an hundred pound be made with condition for the payment of fifty pounds at a day, & at the day the Obligor tender the money, and the Obligee refuseth the same; yet in action of debt upon the Obligation if the Defendant plead the tender and refusal, he must also plead that he is yet ready to pay the money, & tender the same in Court. But if the Plaintiff will not then receive it, but take issue upon the tender, and the same be found against him, he hath lost the money for ever. 22.*H.*8.39, 21.E.4.25. 22.E.3.5. Lib.9.fol.79.*H.* Peytoes case.

If a man be bound in 200 quarters of wheat for delivery of a 100 quarters, if the Obligor tender at the day 100 quarters, &c. he shall not plead uncore prist, because albeit it be the parcel of the condition, yet they be Bona peritura, and it is a charge for the Obligor to keep them. And the reason wherefore in the case of the Obligation the summe mentioned in the condition is not lost by the tender and refusal, is, not only for that it is a duty and parcel of the Obligation, and therefore is not lost by the tender and refusal, but also for that the Obligee hath remedy by Law for the same. And in this case, Liberata pecunia non liberat offerentem. 8.E.2.tit.Ass.389.

But if a man make a single bond, or knowledg a Statute or Recognisance, & afterwards make a defeasance for the payment of a lesser sum at a day, if the Obligor or Conusor tender the lesser sum at the day, and the Obligee or Conusee refuseth it, he shall never have any remedy by Law to recover it, because it is no parcel of the sum contained in the Obligation, Statute or Recognisance, being contained in the defeasance made at the time or after the Obligation, Statute, or Recognisance. And in this case in pleading of the tender and refusal the party shall not be driven to plead, that he is yet ready to pay the same, or to tender it in Court: neither hath the Obligee or Conusee any remedy by Law to recover the sum contained in the Defeasance. (o) And so it is if a man make an Obligation of 100 pound, with condition for the delivery of Corn or Timber, &c. or for the performance of an arbitrement of the doing of any act, &c. This is collateral to the Obligation, that is to say, is not parcel of it, and therefore a tender and refusal is a perpetual barre. 7.*H.*4.18.5. Mar. Dyer 150.21.*E.*4.25.22.*E.*3.5.33.*H.*6.2.b.17.Ass.pl.2.20.E.4.4.b.9.*H.*6.16.30.*H.*6.26.15.E.4.1.16.*H.*7.13.18.*E* 3.53.7.E.4.4.b.19.*H.*8.12.27.*H.*8.1.2,22.*H.*6.39. tit.Abatement 11.49. E.3.3.19.*H.*6.12. (o) Henry Peytoes case. ubi supra. 31.Ass.25.11.*H.*4.33.1. *H.*6.8.1.E.4.17.E.4.3. Pl.Com. Pogasses case. fol.6.

But if a man be bound to make a feoffment in fee to the Obligee, and he make a lease and a release to him and his heirs, albeit this be a collateral condition, yet is it well performed, because this amounts in Law to a feoffment.

¶ *Money, moneta, Legalis moneta Angliæ.* Lawful money of England, either of Gold or Silver, is of two sorts, viz. the English money coyned by the Kings authority, Lib. 5. fol. 114, 115. Wades case, Lib.9.fo. 78.

authority of forreine coyne by proclamation made currant within the Realm. Coyne, cuns, dicitur a cudendo, of coyning of money. In french, Coin ſignifieth a corner, becauſe in ancient time money was ſquare with corners, as it is in ſome countries at this day. Some ſay that Coine dicitur a κοινὸς, id eſt, communis, quod ſit omnibus rebus communis. Moneta dicitur a monendo, not only becauſe he that hath it is to be warned prouidently to uſe it, but alſo becauſe Nota illa de authore & valore admoner. Pecunia dicitur a Pecus, beaſts, Omnes enim veterum divitiæ in animalibus conſiſtebant; and it appeareth that in Homers time there was no money, but exchange of cattle, &c.

Ariſtotle lib.5. cap.8.

(*)9.N.5.Stat.2. cap.7. Nummus ἀπὸ τοῦ νόμου, quia lege ſit, non natura. Vide * the Statute of 9 H.5. of the noble, half noble, and farthing of gold, which is the fourth part of a noble, and that is 20 pence.

## Sect. 336.

11.E.3.Condit.8, 13. Ed.3. fol.10.12.Aſſ.5.

¶ *ET ſil faile de payer les deniers, &c.*

If a man make a feoffement of Lands, To have and to hold to him and to his heires, upon Condition, That if the Feoffee pay to the Feoffor at ſuch a day twenty pounds, that then the Feoffee ſhall have the Lands to him and his heires: If the condition had not proceeded further, it had been void, for that the Feoffee had a fee ſimple by the firſt words, and therefore the words ſubſequent are materially added, (And if he faile to pay the money, &c.)

Li.5.fo.96,97. Goodales caſe.

¶ *Le ſecond Feoffee voile tender le ſumme des deniers, &c.*

Albeit the ſecond Feoffee be not named in the Condition, yet ſhall he tender the ſumme, becauſe he is privie in eſtate, and in judgment of Law hath an eſtate and intereſt in the condition, (as Littleton here ſaith) for the ſalvation of his Tenancy, Vid. Sect. 334. And note, he that hath intereſt in the condition on the one ſide, or in the Land on the other, may tender.

Li.5.fo.114,115. Wades caſe.

And it is to be ob-

¶ ITem ſi feoffment ſoit fait ſur tiel condition, Que ſi le Feoffee paya al Feoffor tiel jour inter eux limit, &c. l' adonques le Feoffee avera la Terre a luy & a ſes heires, & ſil faile de payer les deniers a le jour aſſeſſe, que adonque bien liſt a le Feoffor ou a ſes heires dentrer, &c. et puis devant le jour aſſeſſe, le Feoffee benda la terre a un auter, & de ceo fait feoffment a luy, en ceſt caſe ſi l' ſecond Feoffee voile tender le ſumme de les deniers a le jour aſſeſſe, a le Feoffor, & le Feoffor ceo refuſa, &c. donque le ſecond Feoffee ad eſtate en la terre clerement ſans condition. Et la cauſe eſt pur ceo que le ſecond Feoffee avoit intereſt en l'condition pur ſalvation de ſõ Tenancy. Et en ceſt caſe il ſemble que ſi le primer Feoffee apres tiel vender de la terre voile render l' mony a

ALſo if a Feoffment be made on this condition, That if the Feoffee pay to the Feoffor at ſuch a day between them limited, twenty pounds, then the feoffee ſhall have the land to him and to his heirs; and if he faile to pay the money at the day appointed, that then it ſhall be lawful for the Feoffor or his Heires to enter, &c. and afterwards before the day appointed the feoffee ſel the Land to another, & of this maketh a feoffment to him, in this caſe if the ſecond feoffee will tender the ſum of mony at the day appointed, to the Feoffor, and the Feoffor refuſeth the ſame, *&c.* then the ſecond Feoffee hath an eſtate in the land cleerly without condition. And the reaſon is, for that the ſecond feoffee hath an intereſt in the condition for the ſafegard of his tenancy: and in this caſe it ſeems that if the firſt feoffee after ſuch ſale of

le

le jour asselle, &c. a le feoffor, ceo serra assets bone pur salvation de tiate de le second Feoffee, pur ceo que le prim Feoffee fuit privy a le condition, et uſſint le tender de action de eux deux est assets bon, &c.

the land, will tender the money at the day appointed, &c. to the feoffor, this ſhall be good enough for the ſafegard of the eſtate of the ſecond feoffee, becauſe the firſt feoffee was privie to the condition, and ſo the tender of either of them two is good enough, &c.

terbedaile. That the feoffee may tender any money that is currant within the Realme, albeit it be forreign coyne, ſo as it be currant by Act of Parliament, or by the Kings proclamation, as hath been ſaid.

¶ *Tender le ſumme.* The feoffee may tender the money in purſes or bags, without ſhewing, or telling the ſame, for he doth that which he ought, viz. to bring the money in purſes or bags, which is the uſuall manner to carry money in, and then it is the part of the party that is to receive it, to put it out and tell it.

¶ *A primer feoffee.* Here it appeareth, that the firſt Feoffee may notwithſtanding his feoffment pay his money to the Feoffor, becauſe he is party and privy to the Condition, and by his tender may ſave the eſtate of his Feoffee, which in all good dealing he ought to doe.

## *Sect.* 337.

¶ Item ſi Feoffement ſoit fait ſur condition, Que ſi le Feoffor paya certain ſumme dargent all Feoffee, adonqs bien lirroit a Feoffor, et a ſes heirs dentrer: en teſt caſe ſi le feoffor devie devant le payment fait, et l'heire voile tender al feoffee les deniers, tiel tender eſt voyd, pur ceo que le temps deins quel ceo doit eſtre fait eſt paſs, car quaunt le condition eſt, que ſi le feoffor paya les deniers al Feoffee, &c. ceo eſt tant adire, que ſi le feoffor durant ſa vie paya les deniers al feoffee, &c. et quant l'feoffor mozuſt, don-

ALſo if a feoffment be made upon condition, That if the Feoffor pay a certain ſumme of money to the feoffee, then it ſhall be lawful to the feoffor and his heires to enter. In this caſe if the feoffor dye before the payment made, and the heire will tender to the Feoffee the money, ſuch tender is void, becauſe the time within which this ought to be done, is paſt. For when the condition is, That if the Feoffor pay the money to the Feoffee &c. this is as much to ſay, as if the Feoffor during his life pay the money to the Feoffee, &c. and when the feof-

¶ THis diverſity is plain and evident, and agreeth with our (a) Bookes, and yet ſomewhat ſhall be obſerved hereupon: for here it appeareth, That ſeeing no time is limited, the Law doth appoint the time, & that is, during the life of the Feoffor. Wherein divers diverſities are worthy the obſervation: (a) 14.*H.*7.31.15.*H.*7.1.

Firſt, Between this caſe that Littleton here putteth of the condition of a feoffment in fee, for the payment of money where no time is limited, and the condition of a Bond for the payment of a ſumme of money where no time is limited: for in ſuch a condition of a Bond the money is to be paid preſently, that is, in convenient time. (b) And yet in caſe of a condition of a bond there is a diverſity between a condition of an Obligation, which concernes the doing of a tranſitory act without limitation of any time, as payment of money, delivery of Charters, or the like; for there the condition is to be performed preſently, that is, in convenient time, and when by the condition of the Obligation the act that is to be done 44.*E.*3.9.33. *H.*6.45.& 48.b.4.*E.*4.29.9.*E.*4.22. 15.*E.*4.30.21.*E.*4.38.b: 9.*H.*7.17.b.10.*H.*7.15. 14.*H.*8.21.a.& 29.b.

(b) Lib.6.fo.30,31. Beoſthies caſe. 33.*H.*6.47, 48.

done to the Obligee is of his own nature local, for there the Obligor (no time being limited) hath time during his life, to perform it, as to make a Feoffment, &c. if the Obligee doth not haſten the ſame by requeſt. In caſe where the condition of the Obligation is local, there is alſo a diverſity, when the concurrence of the Obligor and the Obligee is requiſite, (as in the ſaid caſe of the Feoffment) and when the Obligor may perform it in the abſence of the Obligee, as to knowledg ſatisfaction in the Court of Kings Bench; * although the knowledg of ſatisfaction is local, yet becauſe he may do it in the abſence of the Obligee, he muſt doe it in convenient time, and hath not time during his life.

3.

(*)Boothies caſe; ubi ſupra.

4. Another diverſity is, where the condition concerneth a tranſitory or local act, and is to be performed to the feoffee or Obligee, and where it is to be performed to a ſtranger: as if A. be bound to B. to pay ten pounds to C. A. tender to C. and he refuſeth, the Bond is forfeited, as in this Section ſhall be ſaid more at large.

5. Another diverſity is between a condition or an Obligation, and a condition upon a Feoffment, where the Act that is local is to be done to a ſtranger, and where to the Obligee or Feoffor himſelfe. As if one make a feoffment in fee, upon condition that the Feoffee ſhall infeoffe a ſtranger, and no time limited, the Feoffee ſhall not have time during his life to make the feoffment, for then he ſhould take the profits in the mean time to his own uſe, which the Eſtranger ought to have, and therefore he ought to make the feoffment as ſoon as conveniently he may, and ſo it is of the condition of an Obligation. But if the condition be, That the Feoffee ſhall re-infeoffe the Feoffor, there the Feoffee hath time during his life, for the privity of the condition between them, unleſſe he be haſtned by requeſt, as ſhall be ſaid hereafter.

Boothies caſe li.6, fol: 31. Lib.2. fol.79. b. Seignior Cromwels caſe, 44. E.3.9.21. E.4.41.2. E.4. 3.4.19. H.6.67.73.76.3. E.4.4.b.26. H.8.9.b.

6. Another diverſity is, when the Obligor or Feoffee is to enfeoffe a ſtranger, as hath been ſaid, and when a ſtranger is to infeoffe the Feoffee or Obligee: As if A. infeoffe B. of Black Acre, upon condition that if C. infeoffe B. of white Acre, A. ſhall re-enter, C. hath time during his life, if B. doth not haſten it by requeſt; and ſo of an Obligation.

7 But in ſome caſes, albeit the condition be collateral, and is to be performed to the Obligee, and no time limited, yet in reſpect of the nature of the thing, the Obligor ſhall not have time during his life to perform it. As if the condition of an Obligation be, to grant an annuity or yeerly rent to the Obligee during his life, payable yeerly at the feaſt of Eaſter, this annuity or yeerly rent muſt be granted before Eaſter, or elſe the Obligee ſhall not have it at that feaſt during his life; & ſic de ſimilibus; and ſo was it reſolved by the Judges (*) of the Common Pleas in the argument of Andrews caſe, which I my ſelfe heard.

14.E.3. Det. 138. lib.2. fol.80. Seignior Cromwels caſe.

(*)Vid. Dyer 14. El. 311.

8 Laſtly, when the Obligor, Feoffor, or Feoffee is to doe a ſole act or labour, as to go to Rome,

ques le temps de le tender eſt paſſe. Mes auterment eſt lou un jour de payment eſt limit, & le feoffor devie devaunt le jour, donque poit le heire tender les deniers, come eſt avaundit, pur ceo que le temps de le tender ne fuit paſſe pur le mort del feoffor. Auxy il ſemble que en tiel caſe lou le feoffor devy devant le jour de payment, ſi les Executors de le feoffor tendront les deniers al feoffee al jour de payment, cel tender eſt aſſets bon. Et ſi le feoffee ceo refuſe, les heires de feoffor poient entrer, &c. Et le cauſe eſt, pur ceo que les Executors repreſentont l'perſon lour Teſtator, &c.

for dyeth, then the time of the tender is paſt. But otherwiſe it is where a day of payment is limited, and the Feoffor dye before the day, then may the heir tender the mony as is aforeſaid, for that the time of the tender was not paſt by the death of the Feoffor. Alſo it ſeemeth, that in ſuch caſe where the Feoffor dyeth before the day of payment, if the Executors of the Feoffor tender the mony to the Feoffee at the day of payment; this tender is good enough; and if the Feoffee refuſe it, the heires of the Feoffor may enter, &c. And the reaſon is, for that the Executors repreſent the perſon of their Teſtator, &c.

Rome, Jeruſalem, &c. In ſuch and the like caſes, the Obligor, Feoffor, or Feoffee, hath time during his life, and cannot be haſtened by requeſt. And ſo it is if a ſtranger to the Obligation or Feoffment were to do ſuch an act, he hath time to do it any time during his life.

¶ *Si les executors del feoffor tendront.* &c. So as now it appeareth that either the heire of the Feoffor, or his Executors may (when a day is limited) pay the money, and ſo alſo may the Adminiſtrator of the Feoffor do, if the Feoffor dye inteſtate, (f) and this may the Ordinary do if there be neither Executor nor Adminiſtrator, as hath been ſaid. Li. 5. fo. 96, 97. Goodales caſe. (f) Vide Sect. 334.

¶ *Et le feoffee refuſe, les heires del feoffor prient entrer*, &c. Note, a tender by the Executors or Adminiſtrators, and a refuſal, doth give the heire of the feoffor a title of the entry. And here by this (&c.) is a diverſity implyed, when a tender and refuſal ſhall give a third perſon title of entry.

If a man be bound to A. in an Obligation with Condition infeoffe B. (who is a meer ſtranger) before a day, the Obligor doth offer to enfeoffe B. and he refuſeth, the Obligation is forfeit, for the Obligor hath taken upon him to enfeoffe him, and his refuſal cannot ſatisfie the Condition, becauſe no feoffment is made, but if the feoffment had been by the condition to be made to the Obligee, or to any other for his benefit or behoof, a tender and refuſal ſhall ſave the Bond, becauſe he himſelfe upon the matter is the cauſe wherefore the condition could not be performed, and therefore ſhall not give himſelfe cauſe of action. But if A. be bound to B. with condition that C. ſhall enfeoffe D. In this caſe if C. tender, and D. refuſe, the Obligation is ſaved, for the Obligor himſelfe undertaketh to do no act, but that a ſtranger ſhall enfeoffe a ſtranger. And it is holden in books, (h) that in this caſe it ſhall be intended, that the feoffment ſhould be made for the benefit of the Obligee. Some to reconcile the Books ſeem to make a difference between an expreſſe refuſal of the ſtranger, and a readineſſe of the Obligor at the day and place to make performance, and the abſence of the ſtranger: but that can make no difference. I take it rather to be the error of the Reporter, and the records themſelves are neceſſary to be ſeen, for the Law herein is as hath been before declared. 33 H. 6. 26, 17. 36. H. 6. 8. 2. E. 4. 2. 3. 15. E. 4. 5, 6. 22. E. 4. 13. 32. E. 3 barre 264. 7. E. 3. 29. 9. H. 7. 17. 13. H. 7. 14. b. 35. H. Dye 56. lib. 5. fol. 23, Lambes caſe. (h) 8. E. 4. 14. 2. E. 4. ubi ſupra.

If I enfeoffe one in fee upon condition to enfeoffe I. S. and his heirs, the Feoffee tenders the feoffment to I. S. and he refuſeth, the feoffor may re-enter, for by the expreſſe intent of the Condition the feoffee ſhould not have and retain any benefit or eſtate in the land, but as it were an inſtrument to convey over the land. 19. H. 6. 34.

But in that caſe, if the condition were to make a gift in taile to I. S. and he refuſeth it, and a tender and refuſal is made, there the feoffor ſhall not re-enter, for that it was intended that the feoffee ſhould have an eſtate in the Land. And ſo it is, if a feffment be made upon Condition that the Feoffee ſhal grant a Rent charge to a ſtranger, if the Feoffee tender the grant, and he refuſeth, the Feoffor ſhall not re-enter, becauſe the Feoffee was to retain the land, which points are worthy of due obſervation. 2. E. 4. Entry conge 25.

Here in the caſe of Littleton, when the executors make the tender, and the Feoffee refuſeth, albeit the heire be a third perſon, yet is he no ſtranger, but he and the Executors alſo are privies in Law,

¶ *Le perſon del teſtator.* &c. This is to be underſtood concerning goods and chattels either in poſſeſſion or in action, and the executor doth more actually repreſent the perſon of the Teſtator, than the heire doth the perſon of the Anceſtor. For if a man bindeth himſelfe, his Executors are bound though they be not named, but ſo it is not of the heire: Furthermore, here the Adminiſtrators and the Ordinary alſo are implied, as before hath been ſaid.

## *Sect.* 338.

¶ ET nota, que en touts caſes de condition de payñt d certain ſumme en groſſe, touchant terres ou tenements, ſi loyal tender ſoit un

AND note, that in all caſes of condition for payment of a certain ſumme in groſſe, touching Lands or Tenements, if lawful tender be once re-

¶ This is to be underſtood, that he that ought to tender the money is of this diſcharged for ever to make any other tender, but if it were a duty before, though the Feoffor enter by force of the condition, yet the debt or duty remaineth. As if A. borroweth a hundred Vide Sect. ſequen.

hundred pounds of B. and after mortgageth land to B. upon condition for payment thereof. If A. tender the money to B. and he refuseth it, A. may enter into the Land, and the land is freed for ever of the Condition; but yet the Debt remaineth, & may be recovered by action of Debt. But if A. without any loane, debt or duty preceding, infeoffe B. of land, upon Condition for the payment of a hundred pounds to B. in nature of a gratuity or gift: In that case, if he tender the hundred pound to him according to the Condition, and he refuseth it, B. hath no remedy therefore; and so is our Author in this and his other cases of like nature to be understood.

soits refuse, celuy q̄ duiſſoit tender l'money eſt d̄ ceo aſſouth, et pleinm̄ diſcharge per touts temps apres.

fused, he which ought to tender the money is of this quit and fully discharged for ever afterwards.

## Sect. 339.

¶ *Altera tiel ſumme a tiel jour*, &c. Here is implied that this payment ought to be real and not in shew or appearance. For if it be agreed between the Feoffor and the Executors of the feoffee that the Feoffor shall pay to the Executors but part of the money, and that yet in appearance the whole summe shall be paid, and that the residue shall be repaid, and accordingly at the day and place, the whole sum is paid, and after the residue is repaid, this is no performance of the condition; for the state shall not be devested out of the heir which is a third person, without a true and effectual payment, and not by a shadow or colour of payment; and the agreement precedent doth guide the payment subsequent.

18.E.4.fol.18.Lib.5.fol. 94.Geodales case.49.H. 6.54.20.E. 3.Account. Pl.70.

And by this Section also it appeareth, that the Executors do more represent the person of the Testator, than the heir doth to the Ancestor; for though the Executor be not named, yet the

¶ Item ſi le feoffee en mortgage, devant l'jour de payment que ſerroit fait a luy face ſes executors et devie, et ſon heire enter en le terre come il devoit, &c. il ſemble ē ceſt cas que le feoffor doit payer le money al jour aſſeſſe al executors, et nemy al heire le feoffee, pur ceo que le money al commencemēt trenchast al feoffee ē manner come un duty, et ſerra entendue que leſtate fuit fait per cauſe de le prompter de le mony per le feoffee, ou pur cauſe dauter duty. Et pur ē le payñt ne ſerra fait al heire, come il ſemble. Mes les parols del condition poyent eſtre tiels, que le payment ſerra fait al heire, come ſi le condition fuit, que ſi le feoffor paya al feoffee, ou a ſes heires, tiel ſumme a tiel jour, &c. la apres

ALſo if the Feoffee in mortgage before the day of payment which should be made to him, makes his Executors and dye, and his heir entreth into the land as he ought, &c. It seemeth in this case, that the Feoffor ought to pay the money at the day appointed to the Executors, and not to the heire of the Feoffee, because the money at the beginning trenched to the Feoffee in manner as a duty, and shall be intended that the estate was made by reason of the lending of the money by the Feoffee, or for some other duty; and therefore the payment shall not be made to the heire, as it seemeth; but the words of the Condition may be such, as the payment shall be made to the heire. As if the Condition were, that if the Feoffor pay to the Feoffee or to his heires such a summe at la

la mort le feoffée ſil mourſt devant l'jour limit, l'payment doit eſtre fait al heir al jour aſſeſſe, &c.

ſuch a day, *&c.* there after the death of the feoffee, if he dyeth before the day limited the payment ought to be made to the heir at the day appointed, &c.

Law appoints him to receive the money, but ſo doth not the Law appoint the heir to receive the money unleſs he be named.

¶ *Doit eſtre fait al heire al jour aſſeſſe*, &c. And here it alſo appeareth that if the condition upon the mortgage be to pay to the Mortgagee or his heires the money, &c. and before the day of payment the Mortgagee dyeth, the feoffor cannot pay the money to the Executors of the Mortgagee: For Littleton ſaith, that in this caſe the payment ought to be made to the heir. *Et* in hoc caſu deſignatio unius perſonæ eſt excluſio alterius, & expreſſum facit ceſſare tacitum. And the Law ſhall never ſeek out a perſon when the parties themſelves have appointed one: But if the condition be to pay the mony to the Feoffee, his heirs or Executors, then the Feoffor hath election to pay it either (m) to the heir or Executors.

Vid. li. 5. fo. 96. Goodales caſe. Dyer 2. Eliz. 181. 44. E. 3. 1. b.

(m) 12. E. 3. Condition 8. & 10.

If a man make a feoffment in fee upon condition that the feoffee ſhould pay to the feoffor, his heirs or aſſigns, 20. pound at ſuch a day; and before the day the feoffor make his Executors and dyeth, the feoffee may pay the ſame either to the heir or to the Executors, for they are his Aſſigns in Law to this intent: But if a man make a feoffment in fee upon condition, that if the feoffor pay to the feoffee his heirs or aſſigns 20. pound before ſuch a feaſt, and before the feaſt the feoffee maketh his Executors and dyeth, the feoffor ought to pay the mony to the heir, and not to the Executors, for the Executors in this caſe are no aſſignees in Law; and the reaſon of this diverſity is this, for that in the firſt caſe the law muſt of neceſſity find out Aſſigns, becauſe there cannot be any Aſſigns in deed, for the feoffor hath but a bare condition, and no eſtate in the land which he can aſſigne over: But in the other caſe the Feoffee hath an eſtate in the land which he may aſſign over; and where there may be Aſſignees in Deed, the Law ſhall never ſeek out or appoint any aſſigns in Law; And albeit the Feoffee made no aſſignment of the eſtate, yet the Executors cannot be Aſſignees, becauſe Aſſignees were only intended by the condition to be aſſignees of the eſtate, and ſo was it reſolved, (*) Mich. 23. & 24. Eliz. by the two chief Juſtices in the Court of Wards, between Randall and Brown, which I obſerved.

2. *H.* 8. 2. 3. & 4. Ph. & Mar. 140. a. (*) Mich. 23. & 24. Eliz. in curia Wardorum, Inter Randal & Brown. Vide 2. *Eliz.* Dyer 181. Pl. Com. Chapmans caſe 186. 288.

But if the condition be to pay the mony to the Feoffee, his heirs or aſſigns, and the Feoffee make a feoffment over, it is in the election of the feoffor to pay the mony to the firſt Feoffee, or to the ſecond feoffee; and ſo if the firſt feoffee dyeth, the Feoffor may either pay the mony to the heir of the firſt feoffee, or to the ſecond feoffee; for the Law will not enforce the Feoffor to take knowledge of the ſecond feoffment, nor of the validity thereof, whether the ſame be effectual or not, but at his pleaſure, and the firſt feoffee and his heirs are expreſſly named in the Condition.

Vid. Goodales caſe. li. 5. fol. 96, 97. 17. Aſſ. pl. 2. Goodales caſe, ubi ſupra.

## *Sect.* 340.

¶ Item ſur tiel caſe de feoffment in Mortgage, queſtiõ ad eſte demaunde en quel lieu le feoffour eſt tenus de tender les deniers a l'feoffée al jour aſſeſſe, &c. Et aſcuns ont dit, q̃ ſur la terre iſſint tenus en Mortgage pur ceo que l'cõdition eſt dependant ſur le fre. Et ont dit q̃

ALſo upon ſuch caſe of feoffement in Morgage, a queſtion hath been demanded, in what place the Feoffor is bound to tender the money to the Feoffee at the day appointed, *&c.* And ſome have ſaid, upon the land ſo holden in morgage, becauſe the condition is depending upon the land. And they

¶ *Item ſur tiel caſe de feoffement in mortgage, queſtion ad eſte demande*, &c. Here and in other places, that I may ſay once for all, where Littleton maketh a doubt, and ſetteth downe ſeverall opinions and the reaſons, he ever ſetteth down (*) the better opinion and his own laſt, and ſo he doth here. (n) For at this day this doubt is ſetled, having been oftentimes reſolved, that ſeeing the money

(*) Vi. ſect. 170. 302. 375.

(n) 8. E. 4. 4. & 14. 11. *H.* 4. 62 17. Aſſ. p. 2. 17. *E.* 3. 2. 21. *H.* 7. Kelway 74. 16. *Eliz.* Dyer 127. Lib. 4. f. 73. in Boroughs caſe. 21. *E.* 4. 6.

money is a ſumme in groſs and collateral to the title of the land, that the Feoffor muſt render the money to the perſon of the Feoffee according to the latter opinion, and it is not ſufficient for him to tender it upon the land, otherwiſe it is of a rent that iſſueth out of the land. But if the condition of a Bond, or Feoffement be to deliver twenty Quarters of Wheat, or twenty load of Timber, or ſuch like, the Obligor or Feoffor, is not bound to carry the ſame about, and ſeek the Feoffee, but the Obligor or Feoffor before the day muſt go to the Feoffee, and know where he will appoint to receive it, and there it muſt be delivered. And ſo note a diverſity between money and things ponderous, or of great weight. If the condition of a Bond or Feoffement be to make a Feoffment, there it is ſufficient (b) for him to render it upon the land, becauſe the ſtate muſt paſs by livery.

8.E.4.2.19.R.2.Det. 178.

(b) 2.E.4.3.

¶ *Deins le roialm Dengleterre.* For if he be out of the Realm of England, he is not bound to ſeek him or to go out of the Realm unto him. And for that the Feoffee is the cauſe that the Feoffor cannot tender the money, the Feoffor ſhall enter into the land, as if he had duly tendered it according to the condition.

¶ *Un especiall corporall service al feoffee.* This is a diverſity between a Rent iſſuing out of Land, and a Corporal ſervice iſſuing out of land; for it ſufficeth (as hath been

ſi le feoffor ſoit ſur le terre la prest a paier la money al feoffee a le jour aſſesse, et le feoffee adonqz ne ſoit pas la, adonqz le feoffor est assouth, et excuse de paymēt de l' mony, pur ceo que nul default est en luy. Mes il semble a aſcuns que la ley est contrary, & que default est en luy. Car il est tenus d querer le feoffee ſi ſoit adonqz en aſcun auter lieu deins le Roialm de Engleterr. Come ſi home ſoit oblige en un obligation de 20. li. ſur condition endorce ſur meſm lobligat, que ſi il paya a celuy a que lobligation est fait a tiel jour 10. li. adonque lobligation de 20. li. perdra ſa force, et ſerra tenus per nul, en ceſt cas il covient a celuy que ſist obligation de querer celuy a que lobligation est fait; ſi ſoit deins Engleterre, et al jour aſſesse de tender a luy les dits 10. li. auterment il forfeitera la ſumme de 20. li. compriſe deins l' obligation, &c. Et iſſint il ſemble en lauter cas, &c. Et coment que aſcuns ont dit, que le condition est dependant ſur la terre, uncore ceo ne prove que

have ſaid that if the feoffor be upon the land there ready to pay the money to the feoffee at the day ſet, and the feoffee be not then there, then the feoffor is quit and excuſed of the payment of the money, for that no default is in him. But it ſeemeth to ſome that the Law is contrary, and that default is in him; for he is bound to ſeek the feoffee if he be then in any other place within the Realm of *England*. As if a man be bound in an obligation of 20. pound upon condition endorſed upon the ſame obligation, that if he pay to him to whom the obligation is made at ſuch a day ten pound, then the obligation of twenty pound ſhal loſe his force and be holden for nothing; In this Caſe it behooveth him that made the obligation to ſeek him to whom the obligation is made if he be in *England*, and at the day ſet to tender unto him the ſaid 10. li. otherwiſe he ſhall forfeit the ſum of twenty pound compriſed within the obligation, *&c.* And ſo it ſeemeth in the other caſe, *&c.* And albeit that ſome have

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le feasans de le condition deſire perfoyme, covient eſtre fait ſur la terr, &c. nient plus que ſi le condition fuit que le Feoffor ſerra a tiel jour, &c. un eſpeciall corporall ſerbice al Feoffee, nient noſmant le lieu ou tiel corporal ſerbice ſerra fait, & tiel cas le feoffor doit faire tiel corporal ſerbice al jour limitte al Feoffee, en quelconque lieu Dengleterre que le Feoffee eſt, ſi voile aver advãtage de le condition, &c. Jſſint il ſembl' en lauter cas. Et il ſemble a eux que il ſerroit pluis properment dit, que leſtate de la terre eſt dependant ſur la condition, que dire, que le condition eſt dependãt ſur la terre, &c. Sed quære, *&c.*

ſaid that the condition is depending upon the land, yet this proves not that the making of the condition to be performed, ought to be made upon the Land, *&c.* no more than if the condition were that the Feoffor at ſuch a day ſhall do ſome ſpecial corporall ſervice to the Feoffee, not naming the place where ſuch corporal ſervice ſhall be done. In this caſe the feoffor ought to do ſuch corporal ſervice at the day limited to the feoffee in what place ſoever of *England* that the Feoffee be, if he will have advantage of the condition, *&c.* ſo it ſeemeth in the other caſe. And it ſeemes to them, that it ſhall be more properly ſaid, that the eſtate of the land is depending upon the condition, then to ſay that the condition is depending upon the land, *&c. Sed quære*, &c.

ſaid) that the rent be tenored upon the Land, out of which it iſſueth. But Homage or any other ſpecial corporall ſervice muſt be done to the perſon of the Lord, and the Tenant ought by the Law of conveniency to ſeek him to whom the ſeervice is to be done in any place within England.

22. E. 3. 10. 20. H. 6. 31: 27. E. 3. 34. 21. Aſſ. 13. 7. E. 4. 4. 21. E. 4. 17. 20. E. Avowry 113. 45. E. 3. 9. 46. E. 3. Barre 216.

If a man be bound to pay twenty pound at any time during his life, at a place certain, the Obligor cannot tender the money at the place when he will, for then the Obligee ſhould be bound to perpetual attendance; and therefore the Obligor in reſpect of the incertainty of the time, muſt give the Obligee notice that on ſuch a day at the place limited, he will pay the mony, and then the Obligee muſt attend there to receive it: for if the Obligor then and there tender the mony, he ſhall ſave the penalty of the Bond for ever.

Mich. 22. & 23. Eliz. in Banke le Roy, which I my ſelf heard and obſerved. 13. Eliz. Dyer 354. Lib. 8. fol. 92. in Frances caſe.

The ſame Law it is if a man make a feoffment in fee upon condition, if the feoffor at any time during his life pay to the feoffee twenty pound at ſuch a place certain, that then, &c. In this caſe the Feoffor muſt give notice to the Feoffee when he will pay it; for without ſuch notice, as is aforeſaid, the tender will not be ſufficient. But in both theſe caſes, if at any time the Obligor or feoffor meet the Obligee or feoffee at the place, he may tender the money.

18. Eliz. Dier 354.

If A. be bound to B. with condition that C. ſhall infeoffe D. at ſuch a day, C. muſt give notice to D. thereof, and requeſt him to be on the land at the day to receive the feoffment, and in that caſe he is bound to ſeek D. and to give him notice.

4. E. 4. 3. & 4.

¶ *De tender*, or Tendre, is a word common both to the Engliſh and French, in Latine Offerre, and in that ſence, and with that Latine word it is always uſed in the common Law. Vide Sect. 514. the tender of the half mark. And before Sect. 333, 334. 337.

## *Sect.* 341.

¶ HEre the diverſity appeareth between a ſumme in groſſe, and a rent iſſuing out of the land, as hath been touched before.

¶ *Uncore il poit eſtier, ſ. de relinquiſher ſon entry ou de aver un Aſſiſe.*

Here it appeareth, That if the condition be broken for non payment of the rent, yet if the Feoffor bringeth an Aſſiſe for the rent due at that time, he ſhall never enter for the condition broken, becauſe he affirmeth the rent to have a continuance, and thereby waiveth the condition. And ſo it is if the rent had had a clauſe of diſtreſſe annexed unto it, if the Feoffor had diſtrained for the rent for the non-payment whereof the condition was broken, he ſhould never enter for the condition broken: but hee may receive the rent, and acquit the ſame, and yet enter for the condition broken. But if he accept a rent due at a day after, he ſhall not enter for the condition broken, becauſe he thereby affirmeth the leaſe to have a continuance.

14.E.3.Entre congeable 45.14 Aſſ. 11.45.Aſſ.5. 6.*H.*7.3.17.E.3.73.Pl. Com.133.22.*H.*6.37.

¶ MEs ſi feoffment ẽ fee ſoit fait reſerbant al feoffor un annual rent, et pur default de payment un re-entry, &c. en teel caſe il ne beſoigne le tenant a tender le rent, quaunt il eſt arere lorſque ſur le fee pur ceo que ceo eſt Rent iſſuant hors de la Terre, que eſt Rent ſecke. Car ſi le Feoffor ſoit ſeiſie un foits ď ceſt rent, et puis il vient ſur la terre, &c. et le rent luy ſoit denie, il poit aver Aſſiſe de Novel diſſeiſin: Carcoment que il poit entre p cauſe de le condition enfreint, &c. uncore il poit eſlier, ſ, de relinquiſher ſon entry ou de aver un Aſſiſe, &c. Et iſſint eſt diverſity quant al tẽder de le Rent que eſt iſſuant hors de la Terre, et del tender dauter ſum en groſſe que ne paſſe iſſuant hors dalcun Terre.

But if a feoffement in fee be made, reſerving to the feoffor a yearly rent, and for default of payment a re-entry, *&c.* in this caſe the Tenant needeth not to tender the rent when it is behind, but upon the Land, becauſe this is a Rent iſſuing out of the Land, which is a Rent Secke. For if the Feoffor be ſeiſed once of this Rent, and after he cometh upon the Land, *&c.* and the Rent is denied him, he may have an Aſſiſe of *Novel diſſeiſin*: for albeit he may enter by reaſon of the condition broken, *&c.* yet he may chooſe either to relinquiſh his entry, or to have an Aſſiſe, *&c.* And ſo there is a diverſity as to the tender of a rent which is iſſuing out of the Land, and of the tender of another ſumme in Groſs, which is not iſſuing out of any Land.

## *Sect.* 342.

¶ ET pur ceo il eſtera bone e ſure chole pur celuy que voet faire tiel feoffement en mortgage, de mitter un eſpecial lieu lou les deniers ſront pays, et le pluis eſpecial que eſt mis,

AND therefore it will be a good and ſure thing for him that will make ſuch feoffment in morgage, to appoint an eſpecial place where the money ſhall be paid, and the more eſpecial that it be put, the

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le melior eſt pur le feoffor. Sicome A. infeoffe B. aver a luy et a ſes heirs, ſur tiel conditiõ, Que ſi A. paya a B. en le Feaſt de Saint Michael Larchangel procheine a vener, ẽ Eſglíſe cathedral de Pauls en Londres, deins quater heures procheine devant le heure d̃ noone d̃ meſm̃ le feaſt a le Rood loft de le Rood de le North doze, deins meſme le Eſglíſe, ou al tombe d̃ S. Erkenwald, ou al huis de tiel Chappel, ou a tiel piller, deins meſm̃ Leſglíſe que adonque bien liſt al avantdit A. et a ſes heires dentrer, &c. en tiel caſe il ne beſoigne de querer le feoffee ẽ auter lieu; ne deſtre en auter lieu, forſque en le lieu compriſe en lendenture, ne deſtre la pluis longe temps, que le temps ſpecifie en meſm̃ lendẽture, pur tẽder ou payer le money a le Feoffee, &c.

better it is for the feoffor. As if A. infeoffe B. to have to him and to his heires, upon ſuch condition, That if A. pay to B. on the Feaſt of Saint *Michael* the Arch-Angel next coming, in the Cathedral Church of Saint *Pauls* in *London*, within four houres next before the houre of Noone of the ſame feaſt, at the Rood loſt of the Rood of the North door, within the ſame Church, or at the Tombe of *Saint Erkenwald*, or at the door of ſuch a Chappel, or at ſuch a pillar within the ſame Church, that then it ſhall be lawful to the aforeſaid A. and his heires to enter, *&c.* In this caſe he needeth not to ſeek the Feoffee in another place, nor to be in any other place, but in the place compriſed in the Indenture; nor to be there longer than the time ſpecified in the ſame Indenture, to tender or pay the money to the Feoffee, *&c.*

¶ Here is good counſel and advice given, to ſet down in Conveyances every thing in certainty and particularity; for Certainty is the mother of Quietnels and Repoſe, and Incertainty the cauſe of variance and contentions: and for obtaining of the one, and the avoiding of the other, the beſt mean is, in all aſſurances to take counſel of learned and well experienced men, and not to truſt only, without advice, to a Preſident: For as the rule is concerning the ſtate of a mans body, Nullum medicamentum eſt idem omnibus, ſo in the ſtate of a mans Lands, Nullum exemplum eſt idem omnibus.

¶ *Al Tombe de Saint Erkenwald*, &c. This Erkenwald was a younger ſon of Anna King of the Eaſt Saxons, and was firſt Abbot of Cherſey in Surrey, which he had founded, and after Biſhop of London, a holy and devout man, and lieth buryed in the South Iſle, above the Quire in Saint Pauls Church, where the Tombe yet remaineth that Littleton ſpeaketh of in this place: he flouriſhed about the year of our Lord, 680.

The reſidue of this Section, and the (&c.) are evident.

## *Sect.* 343.

¶ Item en tiel caſe lou le lieu de payment eſt limitte, le Feoffee neſt oblige de receiver le payment en nul auter lieu forſque en meſme le lieu iſſint

ALſo in ſuch caſe where the place of payment is limited, the Feoffee is not bound to receive the payment in any other place but in the ſame place ſo limited.

¶ Hereby it appeareth, that the place is but a Circumſtance: And therefore if the Obligee receiveth it at any other place, it is ſufficient, though he be not bound to receive it at any other place.

And so it is if the mony be to be paid on such a feast, yet if the mony be tendred and received at any time before the day, it is sufficient.

limit. Mes uncore si il receiust le payment en auter lieu, ceo est assets bone, & auxy fort pur le feoffor, sicome le receite ust este en mesme le lieu illint limit, &c.

but yet if he do receive the payment in another place, this is good enough, and as strong for the *Feoffor*, as if the receipt had been in the same place so limited, *&c.*

## Sect. 344.

THereupon are many diversities worthy of observation.

First, there is a diversity, when the Condition is for payment of money: and when for the delivery of a Horse, a Robe, a Ring, or the like: for where it is for payment of money, there if the Feoffee or Obligee accept an Horse, &c. in satisfaction, this is good; but if the condition were for the delivery of a horse, or robe, there albeit the obligee or Feoffee accept money or any other thing for the Horse, &c. it is no performance of the condition. The like Law is, if the condition bee to acknowledge a Recognisance of twenty pound, &c. if the Obligee or Feoffee accept 20. pounds in satisfaction of the condition, it is not sufficient in law, (*) but notwithstanding such acceptance, the condition is broken. And so it is of all other collateral conditions, though the obligee or Feoffee himself accept it.

3. H. 7. 4. b. 9. H. 7. 16. 11. H. 7. 20, 21. 19. E. 4. 1. b. 47. E. 3. 24. 22. E. 4. 24. 37. H. 6. 26. Li. 9. fol. 78. peytoes case.

12. H. 4. 23.

(*) Peytoes case ubi supra.

ITem en tiel case de feoffmēt en morgage, si l' feoffor paya al feoffee un chival, ou hanap dargent, ou un annual dor, ou auter tiel chose en plein satisfactiō del money, et lauter ceo receiust ē en assets bon & auxy fort sicome il ust receive la summe del money, coment que le chival, ou lauf chose ne fuit de vintisme part del value de sum de le money, pur ceo que lauter avoit ceo accept en pleine satisfaction.

ALso in the case of feoffment in Morgage, if the Feoffor payeth to the Feoffee a Horse, or a Cup of Silver, or a Ring of Gold, or any such other thing in full satisfaction of the mony, and the other receiveth it, this is good enough, and as strong as if he had received the sum of money, though the horse or the other thing were not of the 20th. part of the value of the sum of mony, because that the other hath accepted it in full satisfaction.

Secondly, In case when the condition is for payment of mony, there is a diversity when the mony is to be paid to the party, and when to an estranger: For when it is to be paid to an estranger, there if the stranger accept a horse or any collateral thing in satisfaction of the mony, it is no performance of the Condition, because the Condition in that case is strictly to be performed. But if the Condition be, that a stranger shall pay to the Obligee or Feoffee a sum of mony, there the Obligee or Feoffee may receive a horse, &c. in satisfaction.

4. H. 7. 4. Dy. 35. H. 8. 5. 6. 27. H. 8. 1.

Thirdly, where the Condition is for payment of twenty pounds, the Obligor or Feoffor cannot at the time appointed pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum of mony cannot be a satisfaction of a greater. But if the Obligee or Feoffee do at the day receive part, and thereof make an acquittance under his Seal in full satisfaction of the whole, it is sufficient, by reason the Deed amounteth to an acquittance of the whole. If the Obligor or Lessor pay a lesser sum either before the day, or at another place than is limited by the condition, and the Obligee or Feoffee receiveth it; this is a good satisfaction.

Lib. 5. f. 117. Pinnels case.

26. H. 6. tit. barre 37.

Fourthly, Not only things in possession may be given in satisfaction, (whereof Littleton putteth his case) but also if the Obligee or Feoffee accept a Statute or a Bond in satisfaction of the mony, it is a good satisfaction.

30. E. 3. 23.

If the Obligor or Feoffor be bound by condition to pay an hundred Marks at a certain day

11. R. 2. tit. barre 343.

day, and at the day the parties do account together; and for that the Feoffee or Obligee did owe 10. pound to the Obligor or Feoffor, that ſum is allowed, and the reſt due of the hundred Marks paid. This is a good ſatisfaction, and yet the 20. pound was a Choſe in action, and no payment was made thereof, but by way of retainer or diſcharge. 37.H.6.26.46.E.3.33. 34.H.6,27.12.H.8. 1.b.

¶ *En pleine ſatisfaction.* Note, In ſatisfaction, and in full ſatisfaction, is all one.

## *Sect.* 345.

¶ ITem ſi hõe enfeoffa un auter ſur condition, que il et ſes heires rendront a un eſtrange home et a ſes heires un annual rent de 20. s. &c. et ſi il ou ſes heires failont de payment de ceo que adonques bien lirroit al feoffor et a ſes heires de entrer, ceo eſt bon cõdition, et uncore en teſt cas coment que tiel annual payment eſt appelle en lendencure un annual rent, ceo neſt pas proprement rent. Car il ſerroit rent, il covient eſtre Rent ſervice, ou rent charge, ou rent ſecke, et il neſt aſcun de eux. Car ſi eſtrange ſuit ſeiſie d ceo, et puis il ſuit a luy denie, il navera unque aſſiſe de ceo, pur ceo que il neſt pas iſſuant hors dalcun tenements et iſſint leſtrange nad aſcun remedie ſi tiel annual rent ſoit aderere e teſt cas, mes que le Feoffor ou ſes heires poient entrer, &c. uncore ſi le Feoffor ou ſes

ALſo if a man infeoffe an other upon Condition, that he and his heires ſhall render to a ſtranger and to his heires a yearly rent of 20. ſhillings, *&c.* and if he or his heires faile of payment thereof, that then it ſhall be lawfull to the Feoffor and his heires to enter, this is a good Condition; and yet in this caſe, albeit ſuch annual payment be called in the Indenture a yearly rent, this is not properly a rent. For if it ſhould be a rent, it muſt be Rent Service, Rent Charge, or a Rent Secke; & it is not any of theſe: For if the ſtranger were ſeiſed of this, and after it were denied him, he ſhall never have an Aſſiſe of this, becauſe that it is not iſſuing out of any Tenements, and ſo the ſtranger hath not any remedy if ſuch yearly rent be behind in this caſe, but that the Feoffor or his heirs may enter, *&c.* And yet if the Feoffor or his heirs enter for default of pay-

¶ *Endront a un eſtrange home un annual rent*, &c.

This reſervation is meerly void (a) for the reaſons hereafter in this Section alledged by Littleton, and alſo for that no Eſtate moveth from the ſtranger, and that he is not party to the Deed. (a) Lib.8.fol.70,71.

And albeit it be a void reſervation, and can be no rent, and the words of the Condition be, that if the Feoffee or his heirs fail of payment of it, (that is, of the annual rent) that then, &c. yet it appeareth that the Condition is good, and annuall Rent ſhall be taken for an annuall ſumme of money in groſs, and not in the proper ſignification thereof, viz. to be a Rent iſſuing out of Land, which is to be obſerved, that words in a Condition ſhall be taken out of their proper ſenſe, Ut res magis valeat quàm pereat, and ſo in like caſes it is holden (b) in our Books. (b) 6.E.2 entr.cong. 55. recipere. 8. Aſſ.34.revertere.

But if A. be ſeiſed of certain Lands, and A. and B. joyne in a Feoffement in fee reſerving a rent to them both and their heires, and the Feoffee grant that it ſhall be lawful for them and their heires to diſtreine for the

the rent, this is a good grant of a rent to them both, becauſe hee is party to the Deed, and the clauſe of diſtreſs is a grant of the rent to A. and B. as it appeareth before in the Chapter of rents. But if B. had been a ſtranger to the Deed, then B. had taken nothing. And upon this diverſity are all the (c) Books which prima facie ſeem to vary, reconciled.

(c) 18.E.2.Aſſ.381. 26.*H.*8.2.13.E.2. feoffments & faits 108. 31.Aſſ.p.31.

¶ *Car ſil ſerra rent, il covient eſtre rent ſervice, rent charge, ou rent ſecke, & il neſt nul de eux.* This is a good Logical argument à diviſione, & argumentum à diviſione eſt fortiſſimum in lege. (d) Littleton uſeth this argument elſewhere, where ſee more of this matter.

(d) Vide Sect. 381.

heires entront pur default d̄ payment, adonque tiel rent eſt ale a touts jours. Et iſſint tiel rent neſt forſqz un peine aſſeſſe a le tenant et ſes heires, que ſils ne voilent payer ceo ſolōque la forṁ del Indenture, ils perdront lour terre per lentry del Feoffor ou ſes heires pur default d̄ payment. Et en teſt cas il ſembl' que le Feoffée et ſes heires doyent querer le eſtrāger et heires ſils ſont deins Engleterre, pur ceo que nul lieu eſt limit lou le payment ſerra fait, et pur ceo que tiel rent neſt pas iſſuāt hors dalcun terre, &c.

ment; then ſuch rent is taken away for ever. And ſo ſuch a rent is but as a paine ſet upon the tenant and his heires, that if they will not pay this according to the form of the Indenture, they ſhall loſe their land by the entry of the Feoffor or his heires for default of payment. And in this caſe it ſeemeth that the Feoffee and his heires ought to ſeek the ſtranger and his heires if they be within *England*, becauſe there is no place limited where the payment ſhall be made, and for that ſuch rent is not iſſuing out of any land, *&c.*

¶ *Pur default de payment.* Note here, ſeeing it is but a ſumme in groſs, there needs no demand of rent, for Littleton here ſaith, that the Feoffee ought to ſeek the perſon of the ſtranger to pay him the ſum of mony, becauſe it is a ſum in groſs, and not iſſuing out of the Land.

## *Sect.* 346.

¶ *Le feoffor, donor, &c. ou a lour heires.* Hereby it may ſeem that if a man make a Feoffement, Gift, or Leaſe, that (omitting himſelf) he may reſerve a Rent to his heires: But Littleton is not ſo to be underſtood, his meaning is, that either the Feoffor, &c. may reſerve the Rent to himſelf only, or to himſelf and his heires: And yet it is holden (e) in our books, that a man may make a feoffment in fee, reſerving a Rent of forty ſhillings to the feoffor for term of his life, and

(e) 5.E.3.27,28.

ET hic nota deux choſes, Un eſt, que nul rent (q̄ properment eſt dit rent) poit eſt reſerve ſur alcun feoffement, done, ou leas, forſque tantſolemēt al feoffor, ou al donor, ou al leſſor, ou a lour heirs, et en nul maner il poit eſtre reſerve a alcū eſtrāge

AND here note two things, one is, That no rent (which is properly ſaid a Rent) may be reſerved upon any feoffment, gift, or leaſe, but only to the Feoffor, or to the Donor, or to the Leſſor, or to their heirs; and in no manner it may bee reſerved to any ſtrange perſon. But if

perſon.

perſon. Mes ſi deux joyntenants ſont ſi leas per fait endent, reſervant a ſi de eux un certaine annual rent, ceo eſt aſſets bon a luy a q̄ le rent eſt reſerve, pur ceo q̄ il eſt payy a le leaſe e nemy eſtrange a le leas, &c.

two Joyntenants make a Leaſe by Deed indented, reſerving to one of them a certain yeerly Rent, this is good enough to him to whom the rent is reſerved, for that he is privie to the Leaſe, and not a ſtranger to the Leaſe, &c.

after his decaſe a pound of Cumine to his heirs, that this is good.

If a man make a Feoffement in fee reſerving a Rent to him or his heirs, it is good (f) to him for term of his life, and both to his heire.

(f) Lib. 5. fol. 111. Malories caſe.

¶ *Mes ſi deux joyntenants font un leaſe per fait indent*, &c.

This caſe being by Deed indented, is evident. and is hath been touched before; but

5. D. 44 a. 27. H. 8. 16. Vide Sect. 58.

if that two Joyntenants without a Deed indented make a Leaſe for life, reſerving a rent to one of them, it ſhall enure to them both in reſpect of the joynt reverſion. And ſo it is of a ſurrender to one of them, it ſhall enure to them both.

If two Joyntenants, the one for life, and the other in fee, joyn in a Leaſe for life, or a gift in taile reſerving a rent, the rent ſhall enure to them both; for if the particular eſtate determine, they ſhall be joyntenants again in poſſeſſion. But if tenant for life, and he in the reverſion joyn in a leaſe for life, or a gift in taile by Deed reſerving a rent, this ſhall enure to the Tenant for life onely, during his life, and after to him in the reverſion, for every one grants that which he may lawfully grant; and if at the common law they had made a feoffment in fee generally, the Feoffee ſhould have holden of the Tenant for life during his life, and after of him in reverſion, and ſo it was holden (g) in the Kings Bench.

Vide Sect. 58.

(g) Mich. 36. & 37. El.

## *Sect.* 347.

¶ Le ſecond choſe eſt, que nul entrie, ou re-entry (q̄ eſt tout un) poit eſtre reſerve, ne done a alcun perſon forſq̄ tantſolement al feoffor, ou al donor, ou al leſſor, ou a lour heires: e tiel re-entrie ne poyt eſtre grant a un auter perſō. Car ſi home leſſa terre a un auter pur terme de vie per Indenture, rendant al Leſſor, et a ſes heires certain rent, et pur default de payment un re-entry, &c. ſi apres le leſſor per un fait grāta le reverſiō de la terre a un auter en fee, et le tenant a terme de vie attorna, &c. ſi le rent a

THE ſecond thing is, that no entry nor re-entry (which is all one) may be reſerved or given to any perſon, but only to the Feoffor, or to the Donor, or to the Leſſor, or to their heirs. And ſuch re-entry cannot be given to any other perſon. For if a man letteth land to another for terme of life by indenture, rendring to the Leſſor and to his heires a certain rent, and for default of payment, a re-entry, &c. If afterward the Leſſor by a Deed granteth the reverſion of the land to another in fee, and the Tenant for terme of life attorne, &c. if the rent be

¶ *Que nul Entrie*, &c. Here Littleton reciteth one of the Maximes of the Common Law, and the reaſon hereof is, for avoyding of maintenance, ſuppreſſing of right, and ſtirring up of ſuites: and therefore nothing in action, entry, or re-entry, can be granted over; for ſo under colour thereof, pretended titles might be granted to great men, whereby right might be troden down, and the weak oppreſſed, which the Common Law forbiddeth, as men to grant before they be in poſſeſſion.

¶ *Pur default*

*faults de payment un re-entrie*, &c. Hereupon is to be collected divers diverſities, firſt, between a condition that requireth a re-entry, & a limitation that Ipſo facto determineth the eſtate without any entry. Of this firſt ſort no ſtranger, as Littleton ſaith, ſhall take any advantage, as hath been ſaid. But of limitations it is otherwiſe. As if a man make a Leaſe Quouſque, that is, until I.S. come from Rome, the Leſſor grant the reverſion over to a ſtranger, I.S. comes from Rome, the Grantee ſhall take advantage of it, and enter, becauſe the eſtate by the expreſſe limitation was determined.

pres ſoit averere, le grantee de le reverſiõ poit diſtreiner pur le rent, pur ceo q̃ le rent eſt incident a le reverſion, mes il ne poit entrer en la fre, et ouſte le tenant, ſi come l'leſſor puiſſoit, ou ſes heires, ſi le reverſion uſt eſte continue en eux, &c. Et en ceſt caſe lentry eſt tolle a touts temps, car le grantee de le reverſion ne poit entrer, cauſa qua ſupra. Et le Leſſor, ne ſes heires ne poyent entrer; car ſi le Leſſor puiſſoit ent, donques il covient que il ſerroit en ſon primer eſtate, &c. & ceo ne poit eſtre, pur ceo que il ad alien de luy le reverſion.

after behind, the Grantee of a reverſion may diſtrain for the rent, becauſe that the Rent is incident to the reverſion; but he may not enter into the land, and ouſte the tenant, as the Leſſor might have done, or his heirs, if the reverſion had been continued in them, &c. And in this caſe the entrie is taken away for ever, for the grantee of the reverſion cannot enter, *Cauſa qua ſupra*. And the leſſor nor his heirs cannot enter; for if the Leſſor might enter, then he ought to be in his former eſtate, &c. And this may not be, becauſe he hath aliened from him the reverſion.

Regiſt.246. Pl. Com.27. 3.E.3. Formedon 68. F.N.B.201. Li.10.fo.36. Mary Portingtons caſe.

So it is if a man make a Leaſe to a woman Quamdiu caſta vixerit, or if a man make a Leaſe for life to a widow, Si tam diu in pura viduitate viveret. So it is if a man make a Leaſe for a 100 yeers, if the Leſſee live ſo long, the Leſſor grants over the reverſion, the Leſſee dies, the grantee may enter, cauſa qua ſupra.

2 Another diverſity is between a condition annexed to a Freehold, & a condition annexed to a Leaſe for years.

Brooke tit. Condition in Abh.11.H.7. Loppinion de Bromley 10. E.52.10.Aſſ.Pl.24. Pl. Com.36.11. H.7.17.19. R.2 Done 12.

For if a man make a gift in taile or a Leaſe for life, upon condition, that if the Donee or Leſſee goeth not to Rome before ſuch a day, the gift or leaſe ſhall ceaſe or be void, the grantee of the reverſion ſhall never take advantage of this condition, becauſe the eſtate cannot ceaſe before an entry; but if the leaſe had been but for years, there the Grantee ſhould have taken advantage of the like condition, becauſe the leaſe for years, Ipſo facto, by the breach of the condition without any entry, was void: for a Leaſe for years may begin without ceremony, and ſo may end without ceremony: but an eſtate of Freehold cannot begin nor end without ceremony. And of a void thing an eſtranger may take benefit, but not of a voidable eſtate by entry.

Pl.Com. 313,314. in Scolaſticaes caſe.

¶ *Al feoffor, ou al donor*, &c. *ou a lour heires*, &c. Here is to be obſerved a diverſity between a reſervation of a rent and a re-entry, for (as it hath been ſaid) a rent cannot be reſerved to the heire of the Feoffor, but the heire may take advantage of a condition which the Feoffor could never do. As if I infeoffe another of an acre of ground, upon condition that if mine heire pay to the Feoffee, &c. 20 ſhillings, that he and his heire ſhall re-enter, this condition is gone if after my deceaſe my heir pay the 20 ſhillings, he ſhall re-enter, for he is privy in blood, and enjoy the land as heire to me.

15.E.4.14.a.

21.H.7.18.a.

¶ *For ſique tant ſolement al Feoffor, &c. ou a lour heires.* Our Author ſpeaketh here of naturall perſons, for an example, For if a Biſhop, Archdeacon, Parſon, Prebend, or any other body politike or corporate, Eccleſiaſtical or Temporal, make a leaſe, &c. upon condition, his ſucceſſor may enter for the condition broken, for they are privy in right.

And ſo if a man have a leaſe for years, and demiſe or grant the ſame upon condition, & and dye, his executors or adminiſtrators ſhall enter for the condition broken, for they are privy in right, and repreſent the perſon of the dead.

(y) Cesty que use had made a lease for years, &c. upon condition, the Feoffees should not enter for the condition broken, for they are privy in estate, but not privy in blood. (y) 27. H. 8. 1.

Another diversity is in case of a lease for years, where the condition is that the lease shall cease or be void, as is aforesaid, and where the condition is, that the Lessor shall re-enter, for there the Grantee, as Littleton saith, shall never take benefit of the condition.

And it is to be observed, that where the estate or lease is Ipso facto void by the condition or limitation, no acceptance of the rent after can make it to have a continuance: Otherwise it is of an estate or lease voydable by entry. Pl. Com. Brownings case.

Another diversity is between conditions in Deed, whereof sufficient hath been said before, and conditions in Law. As if a man make a lease for life, there is a condition in Law annexed unto it; That if the Lessee doth make a greater estate, &c. that then the Lessor may enter. Of this and the like conditions in Law which doe give an entry to the Lessor, the Lessor himselfe and his heires shall not only take benefit of it, but also his Assignee, and the Lord by Escheat, every one for the condition in Law broken in their own time. ✗ Sect. 348. Secus

Another diversity there is between the judgment of the Common law, whereof Littleton wrote and the Law at this day by force of the Statute (*) of 32. H. 8. cap. 34. (a) For by the Common law no Grantee or Assignee of the reversion could (as hath been said) take advantage of a re-entry by force of any condition. For at the Common Law if a man had made a lease for life reserving a rent, &c. and if the rent be behind a re-entry, and the lessor grant the reversion over, the grantee should take no benefit of the condition, for the cause before rehearsed. But now by the said Statute of 32. H. 8. the Grantee may take advantage thereof, and upon demand of the rent, and not payment, he may re-enter. By which act it is provided, that as well every person which shall have any grant of the King of any reversion, &c. of any lands, &c. which pertained to Monasteries, &c. as also all other persons being Grantees or Assignees, &c. to or by any other person or persons, & their heirs, Executors, Successors, and assignees shall have like advantage against the Lessees, &c. by entry for non-payment of the rent, or for doing of Waste or other forfeiture, &c. as the said Lessors or Grantors themselves ought or might have had. Upon this act divers resolutions and judgments have been given, which are necessary to be known.

(*) 32. H. 8. cap. 34. in le preamble.

(a) 26, H, 6, tit. ent. con. 49.

1. That the Statute is general, viz. (b) that the Grantee of the reversion of every common person as well as of the King shall take advantage of conditions. (b) Pl. Com. Hill & Granges case 175, 176. M. 10. & 11. Eliz. 180. Dyer Ibid. 14. Eliz. Dyer 309. Winters case.

2. That the Statute doth extend to Grants made by the Successors of the King, albeit the King be only named to the act.

3. That where the Statute speaketh of Lessees, that the same doth not extend to gifts in taile.

4. That where the Statute speaks of Grantees and Assignees of the reversion, (d) that an assignee of part of the state of the reversion may take advantage of the condition. As if Lessee for life be, &c. and the reversion is granted for life, &c. So if Lessee for years, &c. be, and the reversion is granted for years, the Grantee for years shall take benefit of the Condition in respect of this word (Executors) in the act. (d) Pl. Com. Kidwellyes case, 69. Vid. Dyer Mich. 14. & 15. Eliz. 309. Vid. 7. E. 3. 54. Simile adjudged in Com. Banco in the Lord Dyers time. P. 17. El. Mich. 14 & 15. El. Dyer 309. adjudged in Winters case.

5. That a Grantee of part of the reversion, shall not (e) take advantage of the Condition, as if the lease be of three acres reserving a rent upon condition, and the reversion is granted of two acres, the rent shall be apportioned by the act of the parties, but the condition is destroyed, for that it is entire and against common right. (e) Lib. 5. fo. 54. Knights case. Winters case ubi supra: Knights case ubi supra.

6. That in the Kings case the condition in that case is not destroyed, but remains still in the King.

7. By act in law a condition may be apportioned in the case of a common person, as if a lease for years be made of two acres, one of the nature of Burrough English, the other at the common law, and the Lessor having issue two sons, dyeth, each of them shall enter for the condition broken, and likewise a Condition shall be apportioned by the act and wrong of the Lessee, as hath been said in the Chapter of Rents. Lib. 4. fol. 120. Dumpers case.

8. If a lease for life be made, reserving a rent upon condition, &c. the Lessor levies a fine of the reversion, he is grantee or assignee of the reversion, but without attornment he shall not take advantage of the condition, for the makers of the Statute intended to have all necessary incidents observed, otherwise it might be mischievous to the Lessee. Resolved in Dukescase. Pasch. 20. Eliz. in Com. Banco. Mallories case lib. 5. 112. b.

9. There is a diversity between a condition that is compulsory, and a power of Revocation that is voluntary: for a man that hath a power of revocation, may by his own act extinguish his power of revocation in part, as by levying of a fine of part, and yet the power shall remain for the residue, because it is in nature of a limitation and not of a condition; and so it was resolved (b) in the Earl of Shrewsburies case, in the Court of Wards, Pasch. 19. El z. Mich. 40. & 41. Eliz. (b) 14. Eliz. Dyer 39.

10. If the Lessor bargain and sell the reversion by deed indented and inrolled, the Bargainee is not in the Per by the Bargainor, and yet he is an Assignee within the Statute.

So

So if the Lessor grant the reversion in fee to the use of A. and his heires, A. is a sufficient Assignee within the Statute, because he comes in by the act and limitation of the party, albeit he is in the Post, and the words of the Statute be, To or By, and they be Assignees to him, although they be not by him: but such as come in meerly by act in Law, as the Lord of the Villeine, the Lord by Escheat, the Lord that entreth or claimeth for Mortmain, or the like, shall not take benefit of this Statute.

Lib.5.fol.113. Mallories case.

11. If the Lessor in the case before bargain and sell the reversion by Deed indented & inrolled, or if the Lessor make a feoffment in fee, & the Lessee re-enter, the Grantee or Feoffee shall not take any advantage of any Condition, without making notice to the Lessee.

Lib.8.fol.92. Frances case.

12. Albeit the whole words of the Statute be, for non-payment of the rent, or for doing of waste or other forfeiture, yet the Grantees or Assignees shall not take benefit of every forfeiture by force of a condition, but only of such conditions as either are incident to the reversion, as Rent, or for the benefit of the state, as for not doing of waste, for keeping the houses in reparations, for making of Fences, scouring of Ditches, for preserving of woods, or such like, and not for the payment of any sum in grosse, delivery of Corn, Wood, or the like, so as other forfeiture shall be taken for other forfeitures, like to those examples which were there put, (videlicet) of payment of Rent, and not doing of Waste; which are for the benefit of the Reversion.

And so was it resolved in Winters case. Mich. 14 & 15. El. in Com. Banco, and oftentimes since. Vide Dyer 309.

## *Sect.* 348.

¶ *AL Seignior per voy de escheat*, &c.

Note, here it appeareth, That the Lord by Escheat shal distrein for the Rent, and yet the Rent was reserved to the Lessor and his heires, but both Assignees in Deed, and Assignees in Law shall have the rent, because the Rent being reserved of inheritance to him and his heirs, is incident to the reversion, and goeth with the same. But if the rent were reserved to him and his Assigns, & the Lessor assigned over the reversion, and dieth, the Assignee shall not have the Rent after his decease, because the Rent determined by his death, for that it was not reserved to him, his heirs and Assigns.

19.E.3. Resceit 14.

¶ *Mes il ne poit entrer en la terre per force del Condition*, &c.

Hereby it appeareth that at the Common law neither assigns in deed, nor assigns in law could have taken the benefit of either entry or re-entry, by force of a condition.

¶ *Pur ceo que il nest pas heire al Lessor*, &c.

(f) 21.H.7.18.17.Ass. 20.19.E.3.Gard.113, 114.18.Ass.pl.18.Lib.7. fol.7. The Earl of Bedfords case.

The Guardian in Chivalry or in Socage shall in the right of the heire take benefit of a Condition by entry or re-entry, by the Common Law; and so it is here implyed.

¶ ITem ſi ſoit Seignior & tenant, & le tenãt fait un tiel leaſe pur terme de vie, rendant a Leſſor et a ſes heirs tiel annuel rẽt, et pur default de payment un re-entry, &c. ſi apres le leſſor mozult ſans heire durant la vie le Tenant a terme de vie, per que le reverſion devient al Seignior per voy deſcheat, & puis le rent de le Tenant a terme de vie ſoit aderere, le ſeignior poit deſtreiner i' Tenant pur le Rent arere: mes il ne poit entrer en la terre per force del condition, &c. pur ceo que il neſt pas heire al Leſſor, &c.

ALſo if Lord and Tenant be, and the Tenant make a Leaſe for terme of life, rendring to the Leſſor and his heires ſuch an annual Rent, and for default of payment, a re-entry, &c. if after the Leſſor dyeth without heire during the life of the Tenant for life, whereby the Reverſion commeth to the Lord by way of Eſcheate, and after the rent of the tenant for life is behind, the Lord may diſtrein the tenant for the rent behind, but he may not enter into the land by force of the condition &c. becauſe that he is not heire to the Leſſor, &c.

## *Sect.* 349.

¶ Item ſi terre ſoit graunt a un home pur term de deux ans ſur tiel condition, que ſil payeroyt al grantor deins les dits deux ans 40 Markes, adonques il averoit la terre a luy et a ſes heires, &c. en cest caſe ſi le Grantee enter per force de le Grant ſans aſcun liverie de ſeiſin fait a luy per le Grantor, et puis il paya al Grantor les 40 Markes deins les deux ans, uncore il nad riens en la terre forſque pur terme des deux ans, per ceo que nul liverie de Seiſin a luy fuit fait al commencemēt. Car ſil averoit Franktenement et fee en cest caſe, pur ceo que il ad perform le condition donque il averoit Franktenement per force del prime graunt, lou nul livery de Seiſin de ces fuit fait, que ſerroit inconvenient, &c. Mes ſi le Grantor uſt fait livery de Seiſin al Grantee per force de la Grant donq averoyt le Grantee le Franktenement et le fee ſur meſme le condition.

ALſo if Land be granted to a man for terme of two years, upon ſuch condition, That if he ſhall pay to the Grantor within the ſaid two years forty Markes, then he ſhall have the land to him and to his heirs, &c. In this caſe if the Grantee enter by force of the Grant, without any livery of Seiſin made unto him by the Grantor, and after he payeth the Grantor the forty Markes within the two yeares, yet he hath nothing in the Land but for terme of two years, becauſe no livery of Seiſin was made to him at the beginning; for if he ſhould have a freehold and fee in this caſe, becauſe he hath performed the condition, then he ſhould have a freehold by force of the firſt Grant, where no livery of Seiſin was made of this, which would be inconvenient, &c. but if the Grantor had made Livery of Seiſin to the Grantee, by force of the grant, then ſhould the Grantee have the freehold and the fee upon the ſame condition.

¶ HEre ſix things are to be obſerved: Firſt, Littleton here putteth an example of a condition precedent. Secondly, That ſuch a Condition which createth an eſtate may be made by Parol without Deed. Thirdly, That Livery of Seiſin in this caſe muſt be made before the Leſſee enter (as Littleton here ſaith at the beginning) for after his entry, Livery made to him that is in poſſeſſion is void, as hath been ſaid. Fourthly, That if no Livery of Seiſin be made, that no Fee-ſimple doth paſſe, although the money be payd. Fifthly, That it is inconvenient that the Fee-ſimple ſhould paſſe in this caſe without livery of Seiſin. Sixtly, That Argumentum ab inconvenienti, is forcible in Law, as often hath been and ſhall be obſerved. See more of this kind of Condition in the ſection next following. Vide Sect. 60.

¶ *Et a ſes heires*, &c. Here (&c.) implieth an eſtate in taile, or a Leaſe for life.

*Sect.*

## Sect. 350.

¶ *Ore il ad fee ſimple conditionel, &c.*

The like is of an Eſtate in taile or for life. Many are of opinion againſt Littleton in this caſe: and their reaſon is, becauſe the Fee-ſimple is to commence upon a condition precedent, & therefore cannot paſſe until the condition be performed: And that here Littleton of a Condition precedent doth (before the performance thereof) make it ſubſequent: and for proof of their opinion they avouch many ſucceſſions of authorities, that no fee-ſimple ſhould paſſe before the Condition performed. 31. E. 1. tit. feoffments & Fait. 119. Letteth a Mannor to B. for terme of twenty yeers, and the Deed would, That after the term of 20 years, that B. and his heirs ſhould hold the ſaid Mannor for ever by twelve pounds Rent. A. taketh a wife and dieth before the terme be paſt, the wife of A. demands Dower. And there Wayland chiefe Juſtice ſaith, That the fee and the franktenement doth repoſe in the perſon of the Leſſor until the term be paſt, for before that the Condition is not performed: for if the Leſſor had aliened the land before the end of the term, B. ſhould not recover by a Writ of Waſte, and by the death of the Leſſor the chiefe Lord ſhould have had the wardſhip

31. E. 1. tit. Feoffments & Fait. 119.

¶ Item ſi terre ſoyt grant a un home pur ẽme de 5. ans ſz conditiõ, que ſi il pay al Grantor deins les deux primer ans, 40. Markes, que adonq̃ il averoit fee ou autrement forſque pur term de les 5. ans, & liverie de Seiſin eſt fait a luy per force de le graunt, ore il ad fee ſimple conditionell, &c. Et ſi en ceo caſe le Grauntee ne para my al Grantor les 40 Markes deins les primers deux ans, donques immediate apres meſmes les deux ans paſſes, le fee et le franktenement eſt, et ſerra adjudge en le Grantor pur ceo que le Grantor ne poet apres les dits deux ans maintenant enter ſur le Grauntee, pur ceo q̃ le Grauntee ad uncore titl' per trois ans d'aber et occupier la terre per force de ĩ l' grant. Et iſſint pur ceo que le conditiõ ſi part le Grantee eſt enfreint, et le Grauntor ne poet ẽtrer, la Ley mittera l' fee et le franktenement en le Grantor. Car ſi le Grantee ẽ ceſt caſe fait waſt, donques apres le enfrender de le condition, &c. & apres les

ALſo if Land be granted to a man for term of five years, upon condition, that if he pay to the Grantor within the two firſt years forty Markes, that then he ſhall have fee, or otherwiſe but for terme of the five years, and livery of Seiſin is made to him by force of the Grant, now he hath a fee ſimple conditional, &c. And if in this caſe the Grauntee doe not pay to the Grantor the forty Markes within the firſt two years, then immediately after the ſaid two years paſt, the fee and the freehold is and ſhall be adjudged in the Grantor, becauſe that the Grantor cannot after the ſaid two years preſently enter upon the Grauntee, for that the Grauntee hath yet title by three years to have and occupie the land by force of the ſame Grant. And ſo becauſe that the condition of the part of the Grauntee is broken, and the Grantor cannot enter, the Law will put the Fee and the Freehold in the Grantor: for if the Grauntee in this caſe makes Waſte, then after the breach of the condition, &c. and after the two

deux

deux ans, le grantor a vera son briefe de walt. Et ceo est bone proof adonque que le reversion est en luy, &c.

years, the grantor shall have his Writ of Waste. And this is a good proof then that the reversion is in him, *&c.*

of the heir of the Lessor, and by judgment the wife recovered Dower, for the termor could not have fee, all which be the words of that Book, 12.E.2.tit.voucher, 265. I. letteth lands to B. for 8. years, and if the Lessor pay not a hundred Marks to the Lessee at the end of the term, that then he shall have fee: by the non-payment of the mony, the fee and frank-tenement accrueth to him, and before the Lessee cannot be impleaded in a Præcipe, neither shall he vouch. 12.E.2.tit.voucher 265

(x) 7.E 3.10. I. letteth certain lands to N. for the term of ten years, rendring a hundred shillings by the year to him and his heirs, and granted by deed, that if he held the lands over to him and his heirs, that he shall tender by the year twenty pounds; the Lessor during the term brought an Action of debt for the rent. And there Herle Chief Justice of the Common Pleas giveth the rule, that during the term the Lessee had but for years, and therefore the Action of debt maintainable. (x) 7.E.3. 10. Pl.Com. Sayes case, 272.

(y) 44.E.3.tit.attaint. 22. and 43. Ass.p.41. D. and A. infeoffe the two Plaintiffs in the Assise, they let those lands to S. for term of nine years upon Condition, that if the Plaintiff in the Assise pay a hundred shillings to S. during the term, that S. shall have it but for nine years; and if they pay it not, that S. shall have fee. S. continueth his estate by one year, and after granteth his estate to one H. which H. continueth his estate by two years, and granted the residue of the term to R. and within the term of nine years the Plaintiffs in the Assise pay the hundred shillings to S. R. continueth his possession after the term, and infeoffeth D. which infeoffeth the Lord Furnival, against whom and others without any claim or entry made by the Plaintiffs, after the nine years ended, he brought his Assise, and after adjournment recovered. (y) 44.E.3,tit.attaint. 22 43, Ass.p.41.

(z) 10.E.3.39.& 40. R. doth let certain lands to I. for term of twelve years, and in surety of his term he maketh a Charter of the fee upon condition, that if he be disturbed within the term, that he cannot hold the lands until the end of the term, that then he shall hold the lands to him and his heirs for ever, and seisin was delivered upon the one Charter and the other. R. within the term plowed and sowed the land, and took the profits against the will of I. and I. upon this disturbance had fee, and recovered in Assise. (z) 10.E.3.39,40. 10. Ass.15. tit.Ass.161. Pl.Co. Brownings case, 135.

6.R.2.tit. Quid Juris clamat 20. If a Lease be made for a term upon condition if the Lessee pay a certain sum within the term, that then he shall have fee, if he pay the mony he shall have the fee; but if before the day of payment the Lessor levieth a fine to another, the Lessee ought to attorn by protestation, and if he pay the mony, the Conusee shall have it, and the Conusee shall have the rent reserved until the day of payment: and if land be letten for term of years, upon condition, that if the Lessee be ousted within the term by the Lessor, that he shall have fee, if he be ousted, he shall have fee by the Condition; and notwithstanding he shall not have any Assise, but he must have possession after the ouster; and of this he shall have an Assise. 6.R.2. tit. quid juris clamat 20.

And generally the books (*) are cited that make a diversity between a Condition precedent, and a Condition subsequent. (*) 15.H.7.1,2. 14.H.8.18.20.3.H.5.6.9

And lastly, they cite Dyer (a) 10.Eliz.281. and in Say and Fullers case, Pl. Com. 272. the opinions of Dyer and Brown. (a) Dyer 10. Eliz. 281. Pl.Com. 272.

Notwithstanding all this, there are those that defend the opinion of Littleton, both by reason and authority. By reason, for that by the rule of Law a livery of seisin must pass a present Freehold to some person, and cannot give a freehold in futuro, as it must do in this case, if after livery of seisin made, the Freehold and inheritance should not pass presently, but expect until the condition be performed; and therefore if a lease for years be made to begin at Michaelmas, the remainder over to another in fee, if the Lessor make livery of seisin before Michaelmas, the livery is void, because if it should work at all, it must take effect presently, and cannot expect. Vide Lit. in the Chapter of Tenants for years,

Secondly, they say that when the Lessor makes livery to the Lessee, it cannot stand with any reason that against his own livery of seisin a Freehold should remain in the Lessor, seeing there is a person able to take it. But if a man by Deed make a lease for years, the remainder to the right heirs of I. S. and the Lessor make livery to the Lessee secundum formam chartæ, this livery is void, because during the life of I.S. his right heir cannot take (for nemo est hæres viventis) and in that case the freehold shall not remain in the Lessor, and expect the death of I.S. during the term; for albeit I.S. dye during the term, yet the remainder is void, because a livery of seisin cannot expect.

And they ſay further, that ſeeing all the Books aforeſaid prove that ſuch a condition is good, and that the livery made to the Leſſee is effectual, by conſequence the Freehold and Inheritance muſt paſs preſently, or not at all.

(b) Hill & Granges. Pl. Com. 171.

And it is not rare, ſay they, in our Books, that words ſhall be tranſpoſed and marſhalled ſo as the feoffment or grant may take effect. (b) As if a man in the Moneth of February make a leaſe for years reſerving a yearly rent payable at the feaſts of St. Michael the Archangel, and the Annunciation of our Lady, during the term; the Law (in this caſe of reſervation) ſhall make tranſpoſition of the Feaſts, viz. at the Feaſts of the Annunciation, and of St. Michael the Archangel, that the rent may be paid yearly during the term. And ſo it is (c) in caſe of a grant of Annuity. And further they take a diverſity in this caſe between a Leaſe for life, and a Leaſe for years: For in caſe of a Leaſe for life with ſuch a condition to have fee, they agree that the fee ſimple paſſeth not before the performance of the condition, for that the livery may preſently work upon the freehold: but otherwiſe it is in the caſe of a Leaſe for years. Alſo they take a diverſity between Inheritances that lie in grant, and Inheritances that lie in livery: For they agree that if a man grant an Advowſon for years, upon condition that if the Grantee pay twenty ſhillings, &c. within the term, that then he ſhall have fee, the Grantee ſhall not have fee until the condition be performed, Et ſic de ſimilibus. But otherwiſe it is where livery of ſeiſin is requiſite; and therefore if the King make ſuch a Leaſe for years, upon ſuch a condition, the fee ſimple ſhall not paſs preſently, becauſe in that caſe no livery is made.

(c) 10. E. 3. Seignior Staffords caſe, lib. 8. fol. 74. Pl. Co. Nichols caſe, 487

They alſo make ſeveral anſwers to the authorities before cited: For as to the caſe in 31 E. 1. they ſay that either the caſe is miſreported, or elſe the Law is againſt the judgement. For the Caſe is but this, that a man make a leaſe of a Mannor to B. for 20. years, and that after the 20. years B. ſhall hold the Mannor to him and his heirs by 12. pound rent, and (as it muſt be intended) maketh livery of ſeiſin, in this caſe it is clear (ſay they) that B. hath a fee ſimple Maintenant; for there is no condition precedent in the caſe.

Seignior ſtaffords caſe, ubi ſupra.

As for the caſe in 12. E. 2. the caſe (as it is put in the Book) is, that John de Marre made a Charter to John de Burford of Fee ſimple, and the ſame day it was covenanted between them that John de Burford ſhould hold the ſame tenements for 8. years, and if he did not pay a hundred Marks at the end of the term, that the land ſhall remain to John de Burford and his heirs: In which caſe, ſay they, there is direct repugnancy; for firſt the Charter of the fee ſimple was abſolute, and after the ſame day it was covenanted between them, &c. this covenant being made after the Charter, could neither alter the abſolute Charter, nor upon a Condition precedent give him a Fee ſimple that had a Fee ſimple before.

To all the other Books, viz. 7. E. 3. 10. E. 3. Aſſ. 44. E. 3. 43. & 6. R. 2. they ſay that being rightly underſtood, they are good Law; for in ſome of thoſe Books, as namely in 10 E. 3. 10. Aſſ. &c. it appeareth that there was a charter made in ſurety of the term, which, ſay they, muſt be intended thus, viz. A man maketh a Leaſe for years, the Leſſee enters, and the Leſſor makes a Charter to the Leſſee, and thereby doth grant unto him, that if he pay unto the Leſſor a hundred Marks during the term, that then he ſhall have and hold the Lands to him and to his heirs.

Pl. Co. in Nichols caſe. 487.

In this caſe, ſay they, there need no livery of ſeiſin, but doth enure as an executory grant by increaſing of the ſtate; and in that caſe, without queſtion, the fee ſimple paſſeth not before the condition performed.

And therefore Littleton warily putteth his caſe of an eſtate made all at one time by one conveyance, and a livery made thereupon.

For Littleton himſelf in the Section before ſaith, That in that caſe without a livery nothing paſſeth of the Freehold and Inheritance.

(d) 10. E. 3. 54.

And this diverſity (ſay they) is proved by Books, and thereupon they cite (d) 10. E. 3. 54. in a Writ of Dower, the tenant vouched to warranty, the vouchee as to part pleaded, that the husband was never ſeiſed of any eſtate whereof ſhe might be endowed, as to the reſidue the Tenant pleaded that he leſſed to the husband in gage, upon Condition that if the Leſſor paid ten Marks at a certain day, that he ſhould re-enter, and if he failed of payment, that the Land ſhould remain to the husband and his heirs, which muſt be intended to be done by one entire act, and pleaded that he paid the mony at the day, which is allowed to be a good plea; Ergo, the Fee-ſimple paſſed by the Livery, otherwiſe the plea had amounted that the husband was never ſeiſed, &c. And, ſay they, it cannot be intended, that the Judges ſhould be of one opinion in Trinity Term, and of another opinion in Michaelmaſs Term in the ſame year; and therefore (they hold) their ſeveral opinions are in reſpect of the ſaid diverſity of the caſes.

(e) 32. E. 3. tit. garr. 30.

(e) 32. E. 3. tit. gar. 30. A tenant by the courteſie made a Leaſe for years, & in ſurety of the term, &c. made a Charter in Fee ſimple, and made livery according to the Charter, (note a ſpecial mention made of Livery in this caſe) and iſſue being taken in an Aſſiſe whether the

Tenant

tenant by the courteſie demiſed in fee upon the ſpecial matter found, it was adjudged that a Fee ſimple paſſed, and that the heir might enter for a forfeiture, which ſay they, in caſe of Livery is an expreſs judgment in the point agreeing with the opinion of Littleton.

(f) 43. E. 3. 35. (f) In an Action of waſt againſt one in Lands which he held for term of years, Belknap pleaded thus for the Defendant, That the Defendant was ſeiſed in fee, and infeoffed the Plaintiff, &c. and after the Plaintiff demiſed the Land back again to the Defendant for years upon condition, that if the Defendant paid certain mony, &c. that then the Defendant might retain the Land to him and to his heirs, and if not, the Plaintiff might enter, &c. and pleaded that the term endured, and that the day of payment was not come, and demanded judgment, if the Plaintiff may maintain an Action of Waſte, inaſmuch as the Defendant had now a fee ſimple, and ſhewed forth the Indenture of Leaſe with the condition (which agreeth with Littletons caſe) all being done at one time, and by one Deed, and a livery intended, and with Littletons opinion alſo. It is true, ſay they, that Cavendiſh of counſel with the Plaintiff offered to demur, but never proceeded. (g) Vide 20. Aſſ. pl. 10. (g) 20 Aſſ. pl. 20.

Other authorities they cite, but theſe (as I take it) are the principal, and therefore for avoiding of tediouſneſs, having I fear been too long upon this point, the others I omit. Only this they adde, that Littleton had ſeen and conſidered of the ſaid Books, and have ſet down his opinion where livery of ſeiſin is made upon a Conveyance made at one time, as hath been ſaid, that he hath fee-ſimple conditional.

Benigne lector utere tuo judicio, nihil enim impedio. Conditio beneficialis quæ ſtatum conſtruit benigne ſecundum verborum intentionem eſt interpretanda, odioſa autem quæ ſtatum deſtruit ſtricte ſecundum verborum proprietatem eſt accipienda. Li. 8. fo. 9. Frances caſe.

A Leaſe is made to a man and a woman for their lives, upon condition, that which of them two ſhall firſt marry, that one ſhall have fee; they enter-marry, neither of them ſhall have fee, for the incertainty.

Note, if the condition be to increaſe an eſtate (that is to ſay) to have fee upon payment of mony to the Leſſor, or his heirs, at a certain day, before the day the Leſſor is attainted of treaſon or felony, and alſo before the day is executed; now is the condition become impoſſible by the act and offence of the Leſſor, and yet the Leſſee ſhall not have fee becauſe a precedent condition to increaſe an eſtate muſt be performed; and if it become impoſſible, no eſtate ſhall riſe.

¶ *Pur ceo que le grantor ne poit entrer*, &c. Regularly when any man will take advantage of a condition, if he may enter he muſt enter; and when he cannot enter he muſt make a claim, and the reaſon is, for that a Freehold and inheritance ſhall not ceaſe without entry or claim, and alſo the Feoffor or Grantor may waive the condition at his pleaſure. Pl. Com. Browning and Beſtons caſe-133. b.

As if a man grant an Advowſon to a man & to his heirs upon condition, that if the Grantor, &c. pay 20. pound on ſuch a day, &c. the ſtate of the Grantee ſhal ceaſe or be utterly void. The Grantor payeth the mony, yet the ſtate is not reveſted in the Grantor before a claim, and that claim muſt be made at the Church. (d) And ſo it is of a reverſion or remainder of a Rent or Common, or the like, there muſt be a claim before the ſtate be reveſted in the Grantor by force of the condition, and that claim muſt be made upon the Land. v. Liittleton-ca. Villein (d) Pl. Com. Brownings caſe, 133. b.

A fortiori, in caſe of a feoffment which paſſeth by Livery of ſeiſin, there muſt be a re-entry by force of the condition before the ſtate be void. 42 E. 3. 1.

If a man bargaineth and ſelleth land by deed indented and inrolled, with a Proviſo that if the bargainor pay, &c. that then the ſtate ſhall ceaſe and be void, he payeth the mony, the ſtate is not reveſted in the bargainor before a re-entry; and ſo it is if a bargain and ſale be made of a Reverſion, Remainder, Advowſon, Rent, Common, &c. And ſo it is if lands be deviſed to a man and to his heirs upon condition, that if the Deviſee pay not 20. pound at ſuch a day, that his eſtate ſhall ceaſe and be void, the mony is not paid, the ſtate ſhall not be veſted in the heir, before an entry. And ſo it is of the Reverſion or Remainder, an Advowſon, Rent, Common, or the like. Lib. 2. fol. 50. Sir Hugh Cholmleys caſe.

But the ſaid rule hath divers exceptions. First, in this preſent caſe of Littleton, for that he can make no entry, he ſhall not be driven to make any claim to the reverſion; for ſeeing by conſtruction of Law the Freehold and Inheritance paſſeth Maintenant out of the Leſſor: by the like conſtruction the Freehold and Inheritance by the default of the Leſſee ſhall be reveſted in the Leſſor without entry or claim. Vide Lib. 1. fol. 174. Digs caſe. 20 E. 4. 18, 19.

2. If I grant a rent charge in fee out of my land upon condition, there if the condition be broken, the rent ſhall be extinct in my land, becauſe I (that am in poſſeſſion of the land) need make no claim upon the land, and therefore the Law ſhall adjudge the Rent void without any claim. Pl. Com. Brownings caſe. 133. b. 20 E. 4. 19.

3. If a man make a feoffment unto me in fee upon condition that I ſhal pay unto him 20. Pound at a day, &c. before the day I let unto him the land for years, reſerving a Rent, and 20 E. 4. 19. 20 H. 7. 4. 2.

after tail of payment, the Feoffee ſhall retain the land to him and to his heirs, and the rent is determined and extinct, for that the Feoffor could not enter, nor need not claim upon the land, for that he himſelf was in poſſeſſion, and the condition being collateral, is not ſuſpended by the Leaſe, otherwiſe it is of rent reſerved.

Lib. 1. 174. Digges caſe. 4. If a man by his deed in conſideration of fatherly love, &c. covenant to ſtand ſeiſed to the uſe of himſelf for life, and after his deceaſe to the uſe of his eldeſt ſon in tail, the remainder to his ſecond ſon in tail, the remainder to his third ſon in fee, with a Proviſo of revocation, &c. the father doth make a revocation according to the Proviſo, the whole eſtate is maintenant reveſted in him without entry or claim for the cauſe aforeſaid.

¶ *Le grantee ad uncore title pur* 3. *ans.* By this it appeareth, that albeit the leſſee had Pro tempore a fee ſimple, yet after that fee ſimple is diveſted out of him, and veſted in the leſſor, he ſhal hold the lands for three years by the expreſs limitation of the parties.

Pl. Com. in Fulmerſtons caſe. 207. b. If a man make a Leaſe for 40. years, the Leſſee afterwards taketh a Leaſe for 20. years, upon condition that if he doth ſuch an act, that then the Leaſe for 20. years ſhall be void, and after the Leſſee break the Condition, by force whereof the ſecond Leaſe is void, notwithſtanding the leaſe for forty years is ſurrendred, for the condition was annexed to the leaſe for 20. years, but the ſurrender was abſolute. So it is if a man make a leaſe for 40. years, and the Leſſor grant the reverſion to the Leſſee upon condition, and after the condition is broken, the tearm was abſolutely ſurrendred. And the diverſity is when the Leſſor grants the reverſion to the Leſſee upon condition, and when the Leſſee grants or ſurrenders

7. E. 4. 29. 14. E. 4. 6. 45. E. 3. his eſtate to the Leſſor: for a condition annexed to a ſurrender may reveſt the particular eſtate, becauſe the ſurrender is conditional. But when the Leſſor grants the reverſion to the Leſſee upon condition, there the condition is annexed to the reverſion, and the ſurrender abſolute.

8. E. 2. Aſſ. 395. A gardian in Chivalry took a feoffment of the infant within age that was in ward, and the infant brought an Aſſiſe, and the Gardian ſhalbe adjudged a diſſeiſor, which proveth that the feoffment as againſt the Infant was void, and yet by acceptance thereof the intereſt of the Gardian was ſurrendred.

50. E. 3. 27. A man maketh a leaſe for term of life by Deed, reſerving the firſt ſeven years a Roſe, and if the Leſſee will hold the land after the ſeven years, to pay a rent in money; the Leſſee will not hold over, but ſurrender his term: In this caſe, in judgment of Law, he had but a term for ſeven years. And ſo it is if a man make a leaſe for life, and if the Leſſee within one year pay not 20. ſhillings, that he ſhall have but a term for two years, if he pay not the money, the eſtate for life is determined, and he ſhall have the land but for two years.

¶ *Ceo eſt bone proofe adonques que le reverſion eſt en luy*, &c. Here is implyed, that no man can have an action of waſte, unleſs the reverſion be in him, and by the Authority of our Author the reaſon of a caſe, and well applyed, is a good proof in Law.

## *Sect.* 351.

¶ Mes en tiels cases de feoffment ſur condition lou le feoffor poit loyalmēt entrer p̄ le condition enfreint, &c. la le feoffor nad le franktenement devant ſon entrie, &c.

But in ſuch caſes of Feoffment upon condition, where the feoffor may lawfully enter for the condition broken. *&c.* there the feoffor hath not the freehold before his entry, *&c.*

This, upon that which hath been ſaid, is evident, and needeth no further explanation.

## *Sect.* 352.

3. Mar. 134. Dyer. 14. Eliz. Dyer 311. b. 2. H. 4. 5. 44. E. 3. 9. Lib. 2. fol. 79, 80, 81. in Seignior Cromwels caſe. ¶ Que le feoffee donera, &c. Here is no time limited, therefore the Feoffee by the Law hath time du-

¶ Item ſi feoffment ſoit fait ſur tiel conditiō, que l' feoffee donera le terre al feoff-

Alſo if a feoffment be made upon ſuch condition that the feoffee ſhall give the land to

for

foz, & ala feme del feoffoz, aver & tener a eux, & a les heires de lour deux corps ẽgẽdrez, & pur default de tiel iſſue, le remainder al droit heires le feoffoz. En ceo cas ſi l' baron deby vivãt la feme devant aſcun eſtate en le taile fait a eux, &c. donques doit le feoffee per la ley faire eſtate a la feme cy pres le condition, & auxy cy pres lentent de le condition que il poit faire, ceſtaſcavoir, de leſſer la terre al feme pur terme de vie ſans impeachment de waſt, l'remainder apres ſon deceaſe a les heires de corps ſa baron de luy engendrez, & pur default de tiel iſſue, le remainder as droit heires le Baron. Et la cauſe pur que le leaſe ſerra en ceſt cas a la feme ſole ſans impeachment de waſt, eſt, pur ceo q̃ le condition eſt, q̃ leſtate ſerra fait al baron & a la feme en taile. Et ſi tiel eſtate uſt eſte fait en le vie le baron, donques apres le mort le baron el uſt ewe eſtate ent en le taile: quel eſtate eſt ſans impeachment de waſt. Et iſſint il eſt reaſon, que cy pres que the feoffor, and to the wife of the Feoffor, to have and to hold to them and to the heirs of their two bodies engendred, and for default of ſuch iſſue, the remainder to the right heirs of the Feoffor. In this caſe if the Husband dyeth, living the wife, before any eſtate in taile made unto them, *&c.* then ought the Feoffee by the Law to make an eſtate to the wife as near the condition, and alſo as near to the intent of the condition as he may make it; That is to ſay, to let the Land to the wife for terme of life without impeachment of waſte, the remainder after his deceaſe to the heires of the body of her Husband on her begotten, and for default of ſuch iſſue the remainder to the right heires of the husband. And the cauſe why the leaſe ſhall bee in this caſe to the wife alone without impeachment of waſte is, for that the Condition is, that the eſtate ſhall be made to the Husband and to his Wife in taile. And if ſuch eſtate had been made in the life of the Husband, then after the death of the Husband ſhee ſhould have ring his life, unleſs he be haſtned by the requeſt of the Feoffor or the heirs of his body, as Littleton ſaith in the next Section.

¶ *Si le baron deceſt*, &c. But in this caſe if the Feoffee dyeth before any Feoffment made, then is the condition broken, becauſe he made not the eſtates, &c. within the time preſcrib'd by the Law. But if the feoffment be made upon condition that the Feoffee before the feaſt of St. Michael the Archangel next following give the land to the Feoffor & to his wife in taile, ut ſupra, and before the day the Feoffee dyeth, the ſtate of the heir of the Feoffee ſhall be abſolute, becauſe a certain time is limited by the mutual agreement of the parties, within which time the condition becometh impoſſible by the act of God, as hath been ſaid before; and therefore it is neceſſary when a day is limited, to adde to the condition, that the Feoffee or his heirs do perform the condition: but when no time is limited, then the Feoffee at his peril muſt perform the condition during his life (though there be no requeſt made) or elſe the Feoffor or his heirs may re-enter. 15.H.7: 13. 33.H.6. 26, 27. 9.Eliz.Dyer 262. Pl.Com.456. Lib.2.fo.76. Seignior Cromwels caſe.

¶ *Faits eux*, &c. Here the (&c.) implyeth according to the Condition with the remainder ober.

¶ *Al feoffor & a la feme*, &c. Here it appeareth that albeit the Feme be a Stranger, yet the Feoffee is not bound to make it within convenient time, becauſe the Feoffor who is privy to the condition is to take joyntly 27.E.3.Dower 135. Seigneior Cromwels caſe, ubi ſupra.

joynty with her. And so it is if the condition be to enfeoffe the feoffor and an stranger, the feoffee hath time during his life unlesse he be hastned by request. Otherwise it is (as hath been said) where the condition is to enfeoffe a stranger or strangers only.

home poit faire estate a lentent ou condition &c. q̃ il serroit fait, &c. coment que el ne poit aver estate en taile tũc el puissoit aver q̃ le done en le taile ust estre fait a sa baron & a luy en le vie sa baron.

had an estate in taile, which estate is without impeachment of waste. And so it is reason that as near as a man can make the estate to the intent of the condition, &c. that it should be made, &c. albeit she cannot have estate in taile, as she might have had it if the gift in taile had been made to her husband and to her in the life of her husband, &c.

If a man make a feoffment in fee upon condition that the feoffee shall make a gift in taile to the feoffor, the remainder to a stranger in fee, there the feoffee hath time during his life, as is aforesaid, because the feoffor who is party, and privy to the condition is to take the first estate: But if the condition were to make a gift in taile to a stranger, the remainder to the feoffor in fee, there the feoffee ought to do it in convenient time, for that the stranger is not privy to the condition, and he ought to have the profits presently, as before hath been said.

Seignior Cromwels case, ubi supra.

¶ *De faire estate al feme ey pres le condition, & auxy cy pres lentent del condition que il poit faire*, &c.

A. infeoffs B. upon condition that B. shall make an estate in frank-marriage to C. with one such as is the daughter of the feoffor; in this case he cannot make an estate in frankmarriage, because the estate must move from the feoffee, and the daughter is not of his blood, but yet he must make an estate to them for their lives, for this is as near the condition as he can. And so it is if the condition be, to make to A. (which is a meer lay man) an estate in frankalmoign, yet must he make an estate to him for his life, for the reason here yelded by Littleton.

A diversity is to be understood between conditions that are to create an estate, and conditions that are to destroy an estate; for here it appeareth, That a condition that is to create an estate, is to be performed by construction of Law, as near the condition as may be, and according to the intent and meaning of the condition, albeit the letter and words of the condition cannot be performed: but otherwise it is of a condition that destroyeth an estate, for that is to be taken strictly, unless it be in certain special cases: and of this somewhat hath been said before in this Chapter.

30. H. 8. tit. Condi. Br. 190. v. 33. H. 8. tit. Joynt. Br. 62.

As if a man morgage his land to W. upon condition that if the Morgagor and I. S. pay 20. shillings at such a day to the Morgagee, that then he shall re-enter, the Morgagor dyeth before the day, I. S. pays the mony to the Morgagee, this is a good performance of the condition, and yet the letter of the condition is not performed. But if the Morgagor had been alive at the day, and he would not pay the mony, but refused to pay the same, and I. S. alone had tendred the mony, the Morgagee might have refused it. But if a man make a lease to two for years, with a proviso, If the Lessees dye during the term, the Lessor shall re-enter, one Lessee alien his part and dye, the Lessee cannot re-enter, but the Assignee shall enjoy the term so long as the survivor liveth, and the reason is, because the lease by the proviso is not to cease till both be dead. But in the former case, albeit the Morgagor be dead, yet the act of God shall not disable I. S. to pay the mony, for thereby the Morgagee receives no prejudice. And so it is in that case, if I. S. had dyed before the day, the Morgagor might have paid it.

Lib. 2. f. 79. 82, 81. Seignior Cromwels case. 2. H. 4. 51.

And here is to be observed a diversity when the feoffee dyeth, for then (as hath been said) the condition is broken, and when the feoffor dyeth; for then the estate is to be made as near the intent of the Condition as may be.

¶ *Al feme pur terme de vie sans impeachment de wast.*

Here it appeareth, That this estate for life ought to be without impeachment of wast; and yet if the wife doth accept of any estate for life, without this clause, without impeachment of wast, it is good, because the state for life is the substance of the Grant, and the privilege to be without impeachment of wast is collateral and only for the benefit of the wife, and the omission of it only for the benefit of the heir.

2. H. 4. 5. Seignior Cromwels case, ubi supra.

Also if the wife take husband before request made, and then they make request, & the state is

is made to the husband and wife during the life of the wife, this is a good performance of the condition, albeit the estate be made to the husband and wife, where Littleton saith it is to be made to the wife, but it is all one in substance, seeing that the limitation is during the life of the wife.

¶ *Sauns impeachment de Waste.* Absque impetitione vasti, (that is) without any challenge or impeachment of Waste; and by force hereof the Lessee may cut down the trees and convert them to his own use. Otherwise it is if the words were, Sauns impeachment per ascun action de Waste, for then the discharge extends but to the action, and not to the trees themselves, and in that case the Lessor shall have them. See in my reports lib. 12. fo. 83. Lib. 9, fo. 9. li. 2. 23.

And it is to be observed, That after the decease of the husband, the state is not to be made to the wife and the heirs of her body by her late husband ingendred, and so to have an estate of Inheritance as she should have had by curtesie, if the estate had been made according to the condition, but only an estate for life without impeachment of Waste, &c. for that by the authority of Littleton is not so neer the intent of the condition, as the case that Littleton putteth. But I will search no further into this case, but leave it to the learned and judicious Reader.

¶ *Et apres son decease a les heires del corps le baron de luy engendres.* Note here, admit that there were two Issues in taile, the remainder shall presently vest only in the eldest, and yet if he dieth without Issue, it shall per formam doni vest in the youngest, as hath been said in the Chapter of estate taile: and so it is to be proved here; for otherwise the condition (if there were two Issues) could not be performed.

## Sect. 353.

¶ ITem en cell case si le baron & la feme ont issue, & deviont devant le done en le taile fait a eux, &c. donques le Feoffee doit faire estate al Issue & a les heires de corps son pere & son mere engendres, & pur default de tiel Issue le remainder a les droit heires le Baron, &c. Et mesme la Ley est en auters cases semblables. Et si tiel Feoffee ne voet faire tiel estate, &c. quelit il est reasonablement requise per eux & devoyent aver estate per force de le condition, &c. donque poit le Feoffor ou les heires entrer.

ALso in this case if the husband and wife have issue, and die before the gift in taile made to them, *&c.* then the Feoffee ought to make an estate to the Issue, and to the heires of the body of his father and his mother begotten, and for default of such issue, *&c.* the remainder to the right heires of the husband, *&c.* And the same Law is in other like cases: and if such a Feoffee will not take such estate, *&c.* when he is reasonably required by them which ought to have the state by force of the Condition, *&c.* then may the Feoffor or his heires enter.

¶ *Quant il est reasonablement requise per eux quenx devoyent aver estate per force de le condition.* Note, here it appeareth, that the Feoffee hath time during his life to make the estate, unlesse he be reasonably required by them that are to take the estate. This is to be intended of parties or privies, and not of meer Strangers; for there (as hath been said) the state must be made in convenient time.

And concerning the request it is to be known, that when the request is made, the party or privy must request the feoffee at a time certaine to be upon the land, and to make the state according to the condition; for seeing no time certain is prescribed for the making of the state, and so is uncertain when the required shall be made, such request and notice must be made as hath been said before in this Chapter.

And of this Section, with the (&c.) there needeth not, upon that wholly hath been said, any further explication.

Sect.

## Sect. 354.

¶ *Que le feoffee re-enfeoffera pluſors homes.* By the refeoffment it is implied, to be made to the Feoffors: for a feoffement over to ſtrangers cannot be ſaid a Re-feoffment, and if the feoffment ſhould be made over to ſtrangers only, then as hath been often ſaid, it muſt be made in convenient time.

¶ *Al Heire celuy que ſurveſquiſt, a aver & tener a luy & a les heires celuy que ſurveſquiſt.* Hereupon queſtions have been made, wherefore the Habendum is not to the heirs of the heire, and for what reaſon it is by Littleton limited to the heirs of the ſurvivor. And the cauſe is, for that if it were made to the heirs of the heire, then ſome perſons by poſſibility ſhould be inheritable to the land which ſhould not have inherited if the eſtate had been made to the Survivor and his heirs, and conſequently the condition broken.

For example, If the ſurvivor took to wife Alice Fairefield, in this caſe if the limitation were to the ſon and his heirs, then if the ſon ſhould die without heirs of his father, the blood of the Fairefields (being the blood of his mother) ſhould inherit. But if the limitation be to the right heirs of the father, then ſhould not the blood of the Fairefields by any poſſibility inherit: for then it is as much as if the ſtate had been made to the ſurvivor and his heirs: And therefore theſe words (Et a les heires celuy que ſurveſquiſt) which many have thought ſuperfluous, are very material. Note well this kind of fee ſimple, for it is worthy the obſervation: But ſufficient hath been ſaid to open the meaning of Littleton, and therefore I will dive no deeper into this point, but leave it to the further conſideration of the learned Reader.

Vide Sect. 4.

¶ Item ū feoffment ſoit fait ſur cōdition que le feoffee re-infeoffet pluſs hōes a aver & tener a eux & a lour heires a touts jours, & touts ceux que devoient aver eſtat morront devant aſcun eſtat fait a eux, donque doit l' feoffee fait eſtat al heir celuy q̄ ſurveſquiſt de eux, a aver & tener a luy & a les heires celuy que ſurveſquiſt.

Also if a feoffement be made upon condition, that if the Feoffee ſhall re-enfeoffe many men, to have and to hold to them and to their heirs for ever, and all they which ought to have eſtate dye before any eſtate made to them, then ought the Feoffee to make eſtate to the heir of him which ſurvives of them, to have and to hold to him and to the heirs of him which ſurviveth.

## Sect. 355.

¶ Littleton having ſpoken of defaults of performance, or expreſs breaches of conditions, ſpeaketh now in what caſes the feoffee in judgment of law doth diſable himſelfe to performe the Condition; And of diſabilities ſome be by act of the party, and ſome by act in Law.

¶ *Ou a doner en taile a un auter*, &c. Here is implied an eſtate for life, or for years, &c.

¶ Item ū feoffment ſoit fait ſur condition, denfeoffer un auter, ou dōner en tail' a un auter. ū l' feoffee dvant l' performance del condition enfeoffa un eſtranger, ou fait un leaſe pur term̄ de vie, donques poet l' feoffor

Also if a Feoffement be made upon condition, To enfeoffe another, or to make a gift in tail to another, &c. if the Feoffee before the performance of the Condition, enfeoffe a ſtranger, or make a Leaſe for life, then

for

for ¶ ſes heires entrer, &c. pur ceo q̄ il ad luy meſme diſable de performer le condition, entant que il ad fait eſtate a un auter, &c.

may the Feoffor and his heires enter, &c. becauſe he hath diſabled himſelfe to performe the condition, inaſmuch as he hath made an eſtate to another, &c.

¶ *Enfeoffe un Eſtranger un fait un Leaſe pur terme de vie.* This is a diſability by the act of the party, for herein the Feoffee hath diſabled himſelfe to make the feoffement or other eſtate according to the Condition. 13.H.7.23.b.34.E.3. barre 264.21.Aſſ.28. 38.Aſſ.pl.7.

And to ſpeak once for all, the Feoffee is diſabled when he cannot convey the land over according to the Condition, in the ſame plight, quality and freedome as the land was conveyed to him; for ſo the Law requireth the ſame, as ſhall manifeſtly appeare hereafter. And here where our Author ſpeaketh of a feoffment, he includeth an eſtate taile as well as the fee ſimple.

## *Sect.* 356.

¶ EN meſme le manner eſt, q̄ le feoffee devant le condition performe leſſa meſme la terre a un eſtranger pur terme des ans, en ceſt caſe le Feoffor & ſes heirs poyent entrer, &c. pur ceo que le feoffee ad luy diſable de faire eſtate de les tenements accordant a ceo que eſtoit en les tenements, quant eſtate ent fuit fait a luy. Car il poile faire eſtate de les tenements accordant a le condition, &c. donques poit le leſſee p̄ terme dans entrer & ouſter meſme celuy a que leſtate eſt fait, &c. & occupier ceo durant ſon terme.

IN the ſame manner it is if the Feoffee before the Condition performed letteth the ſame land to a ſtranger for terme of years, in this caſe the feoffor and his heirs may enter, *&c.* becauſe the feoffee hath diſabled him to make an eſtate of the tenements according to that w^ch was in the tenements, when the ſtate thereof was made unto him. For if he will make an eſtate of the tenements according to the condition, *&c.* then may the Leſſee for years enter & ouſt him to whom the eſtate is made, *&c.* and occupy this during his term.

¶ *Si le feoffee devant le condition perform leſſa meſme la terre a un eſtranger per terme des ans, &c.* Here the &c. implieth a leaſe to take effect in futuro as well as in præſenti, alſo a Leaſe for one year, or halfe a year, &c.

The reaſon of this is evidently ſet down before. And again of diſabilities, ſome be by Act in præſenti, whereof Littleton hath put two examples, and ſome in futuro, whereof now he will ſpeak in the next Section.

## *Sect.* 357.

¶ ET Pluſors ont dit que ſi tiel feoffement ſoit fait a un home ſole ſur ſi le condition, & devant q̄ il ad per-

AND many have ſaid that if ſuch feoffment be made to a ſingle man upon the ſame condition, and before he hath per-

¶ Firſt, here is an example of a diſability both by act in Law, and in futuro; for by marriage the wife is intitled in Law to Dower, after the death of her husband. (a)13.H.7.23.b.34.E.3. Dower 12. M.27.E.2. tit.dower 135.27. Aſſ. Pl.4.11. H.7.76. lib.2. f.59.b.

Secondly, it (a)appeareth that albeit the wife by the marriage is but intitled to have

have dower, and the eſtate which ſhe is to have in futuro, viz. after the deceaſe of her Husband, yet it is a preſent cauſe of entry. As a leaſe for years to begin at a day to come is a preſent diſability and cauſe of re-entry, for that the Land is not in that freedome and plight, as it was conveyed to the Feoffee, and after the ſtate made over according to the Condition, the Land ſhall be charged therewith.

Julius Winningtons caſe, lib. 2. fol. 59, 60.

¶ *En un auter plight.* Plight is an old Engliſh word, and here ſignifieth not onely the eſtate, but the habite and quality of the land, and extendeth to rent charges, and to a poſſibility of Dower. Vide Sect. 289. where Plight is taken for an eſtate or intereſt of and in the land it ſelf, and extendeth not to a Rent Charge out of the land.

¶ *A un home ſole.* For if the Feoffee were married at the time of the feoffement, then the Dower can be no diſability, becauſe the Land ſhall remaine in ſuch Plight as it was at the time of the feoffment made unto him.

forme-meſme la condition il prent feme, donques le Feoffor et ſes heires maintenant poyēt entrer, pur ceo que ſil ſeſoit eſtate accordant a la condition, et puis mozuſt, donques la feme ſerra endowe, et poit retober ſa dower per briefe de dower, &c. et iſſint per le priſel del feme les tenements ſont mis en un auter plit que ne fueront al temps del feoffment ſur condition, pur ceo que adonques nul tiel feme fuit dowable, ne ſerroit dowe per la ley, &c.

formed the ſame Condition he taketh wife, then the Feoffor and his Heires maintenant may enter, becauſe if he hath made an eſtate according to the condition, and after dieth, then the wife ſhall be endowed, and may recover her dower by a Writ of Dower, *&c.* and ſo by the taking of a wife, the Tenements be put in another plight then they were at the time of the feoffment upon condition, for that then no ſuch Wife was dowable, nor ſhould be endowed by the Law, *&c.*

¶ *Donques le feoffor & ſes heires maint enant poyent entrer.* Here it appeareth, that ſeeing that for this title or poſſibility the feoffor may preſently enter, that albeit the wife happen to dye before the husband, ſo as this title or poſſibility took no effect, yet the Feoffor may re-enter, for the Feoffee being diſabled at any time, though the ſame continue not, yet the Feoffor may re-enter; for in that caſe, he that is once diſabled is ever diſabled. And herein a diverſity is to be obſerved between a diſability for a time on the part of the Feoffee, and a diſability for a time of the part of the Feoffor. For if a man maketh a feoffment in fee upon condition, that the Feoffee before ſuch a day ſhall re-enfeoffe the Feoffor, the Feoffee taketh wife, and the wife dieth before the day, yet may the Feoffor re-enter.

So it is if the Feoffee before the day entreth into Religion, and is profeſſed, and before the day is deraigned, yet the Feoffor may re-enter. 21. E. 4. 55.

So it is if the Feoffee before the day make a feoffment in fee, and before the day take back an eſtate to him and his heirs, yet the Feoffee may re-enter.

Albeit in theſe caſes a certain day be limited, yet the Feoffee being once diſabled is ever diſabled. And ſo it is when no time is limited by the parties, but the time is appointed by the Law.

But if a man make a feoffment in fee upon Condition, that if the Feoffee or his heirs pay a certain ſum of money before ſuch a day, the Feoffor commit treaſon, is attainted and executed, now is there a diſability on the part of the Feoffor, for he hath no heir; but if the heir be reſtored before the day, he may perform the condition; as it was reſolved. (*) Trin. 18. Eliz. in Communi Banco, in Sir Thomas Wiats caſe, which I heard and obſerved. Otherwiſe it is, if ſuch a diſability had grown on the part of the feoffee: and the reaſon of the diverſity is, for that as Littleton ſaith, maintenant by the diſability of the feoffee, the Condition is broken, and the Feoffor may enter: but ſo it is not by the diſability of the feoffor or his heirs: for if they perform the Condition within the time, it is ſufficient, for that they may at any time perform the Condition before the day. And ſo it is if the Feoffor

(*) Trin. 18. Eliz. in Communi Banco, in Sir Thomas Wiats caſe.

offor enter into religion and before the day is arraigned, he may perform the condition for the cause aforesaid. Et sic de similibus. The (&c.) in this Section are sufficiently explained.

## *Sect.* 358.

¶ EN meisme le manner est, ũ le feoffee charge la terra per son fait dun rent charge devant le performance del condition, ou soit oblige en un estatute de le Staple, ou statute Merchant, en tiels cases le feoffor & ses heires poyent entrer, &c. Causa qua supra Car quecunque que venust a les tenemẽts per le feoffment de le feoffee, eux covient estre liables, & estre mis en execution per force de lestatute Merchant, ou de statute del Staple Quære. Mes quant le feoffor ou ses heires, pur les causes avantdits, averont entrer, come ils devoyẽt, cõe il semble, &c. dõques touts tiels choses q̃ devãt tiel entrie puissent troubler ou encumberles tenemẽts issint dones sur condition, &c. quant a meismes l's tenemẽts sont outterment defeats.

¶ IN the same manner it is if the Feoffee charge the Land by his Deed with a Rent charge before the performance of the Condition, or be bound in a Statute Staple or Statute Merchant, in these cases the Feoffor and his heires, may enter, &c. *Causa qua supra.* For whosoever cometh to the Lands by the feoffement of the Feoffee, they ought to be lyable and put in execution by force of the Statute Merchant, or of the Statute Staple, *Quære.* But when the Feoffor or his heires for the causes aforesaid, shall have entred, as it seems they ought, &c. then all such things which before such entry might trouble or incumber the Land so given upon condition, &c. as to the same Land, are altogether defeated.

¶ *Poyent entrer, &c.* And here it is to be understood, that the grant of the rent charge is a present disability of the feoffee: and therefore albeit the grantee doth bring a writ of Annuity, and discharge the land of it ab initio, yet the cause of entry being once given by the act of the Feoffee, the Feoffor may reenter. And so it is if the grant of the rent charge were made for life, and the Grantee died before any day of payment, yet the feoffor may reenter. 13. H.7.23.b.44.E.3.9. b.26.E.3.73.20.H.6. 34. Julius Winningtons case, ubi supra.

The like Law is of any judgment given against the Feoffee wherein debt or damages are recovered.

¶ *Ou soit oblige in un Statute de le Staple, &c.* If the feoffee be disseised, and after bind himselfe in a Statute Staple, or Merchant, or in a Recognisance, or take wife, this is no disability in him, for that during the disseisin, the land is not charged therewith, neither is the Land in the hands of the Disseisor liable thereunto. And in that case if the wife die, or the Comisee release the Statute or Recognisance, and after the disseisee doth enter, there is no disability at all, because the Land was never charged therewith, and therefore in that case the feoffee may enter and performe the condition in the same plight and freedome as it was conveyed unto him. Lib.2.fol.59,60. Julius Winningtons case.

And it is to be observed, that Littleton putteth these cases as examples: for there are some other disabilities implied that are not here expressed. The Lord Clifford did hold his Barony and the Sheriefwick of Westmerland of the King by grand Serjeanty in capite, and the King gave him licence that he might infeoffe thereof divers Chaplains in fee, so that they should give the same to the Lord Clifford and the heirs 18.Ass.Pl.ultimo 19.E. 3. 39.Lib.2. fol.80.b. Sir Cromwels case.

males

males of his body the remainder over, &c. the Lord Clifford according to the Licence infeoffed the Chaplains, and before they made the reconveyance the Lord Clifford died, and it was adjudged that the heire might enter for the condition broken. For in this case the feoffees were bound by Law to have made the gift in taile to the Lord Clifford himselfe, albeit he never made any request, for otherwise they pursued not the Licence: and if they should make the state to the issue of the Lord Clifford, then might the King seize the Barony, &c. for default of a licence, and that in default of the feoffees. And then the same should not be in the same plight and freedome as it was at the time of the feoffment made upon condition, which is worthy of observation.

If a man grant an Advowson, upon condition, that the grantee shall regrant the same to the Grantor in taile, In this case if the Church become void before the regrant or before any request made by the Grantor, he may take advantage of the condition, because the Advowson is not in the same plight as it was at the time of the grant upon condition. And so was it resolved, (*)Pasch. 14. Eliz. in communi Banco, between Andrewes and Blunt, which I heard and observed, and which my Lord Dyer hath omitted out of his report of that case: and therefore the Grantee in that case at his peril must regrant it before the Church become voyd, or else he is disabled: otherwise he hath time during his life if he be not hastned by request.

(*)Pasch. 14. Eliz. 311. Dyer.

44.E.3.9. If the feoffee suffer a recovery by default upon a fained title, before execution sued the Feoffor may re-enter for this disability. Et sic de similibus.

## Sect. 359.

¶ *ET en le fait est nul condition, &c.* either in deed or in Law.

¶ *Et le feoffment est en tiel force si come nul tiel fait ust este fait.* And the reason hereof is, for that the estate passeth by the Livery of seisin. And in this case the feoffor upon the delivery of seisin must expresse the state to him and his heires, or to the heires of his body, &c.

18.E.3.19.36.17. Ass.p. 20.8.H.5.8.27. H.6.

34.Ass.pl.1. If an agreement be made between two, that the one shall infeoffe the other upon condition in surety of the payment of certaine money, and after the livery is made to him and his heirs generally, the state is holden by some to be upon condition, inasmuch as the intent of the parties was not changed at any time, but continued at the time of the Livery.

¶ ITem, si un homm fait un fait de feoffmēt a un auter, & en le fait est nul condition, &c. & quāt le feoffor a luy voyle faire livery de seisin per force de melm le fait, il fait a luy le livery de seisin sur certain condition, & cest cas rien de les tenements passa per le fait, pur ceo que le condition nest compris deins le fait, & le feoffment est en tiel force sicōe nul tiel fait ust este fait.

ALso if a man make a deed of Feoffment to another, and in the deed there is no condition, &c. and when the Feoffor will make livery of seisin unto him by force of the same deed, he makes livery of seisin unto him upon certain condition; in this case nothing of the tenements passeth by the deed, for that the condition is not comprised within the deed, and the feoffment is in like force as if no such deed had been made.

13.E.3. tit. estoppell. 177.19.E.3.ibid.184. If a man make a charter of feoffment in fee, and the feoffor deliver seisin for life, the Feoffee shall hold it but for life: but if the livery be expressly for life, and also according to the deed, the whole fee simple shall passe, because it hath a reference to the Deed.

## Sect. 360.

¶ *ITem si feoffment soit fait*, &c. And

¶ ITem si feoffment soit fait sur tiel

ALSO if a feoffment be made con-

condition, q̄ le feoffee ne alienera la terre a nulluy, ceſt condition eſt voide, pur ceo que quant home eſt enfeoffe de terres ou tenements il ad power de eux alener a altun perſon per la ley. Car ſi tiel condition ſerroit bone donque la condition luy ouſteroit de tout le power que la ley luy dona, le quel ſerroit enconter reaſon, & pur ceo tiel condition eſt voyde.

upon this condition, that the feoffee ſhall not alien the land to any, this condition is void; becauſe when a man is infeoffed of lands or tenements, he hath power to alien them to any perſon by the law: for if ſuch a condition ſhould bee good, then the condition ſhould ouſt him of all the power which the Law gives him, which ſhould be againſt reaſon; and therefore ſuch a condition is void.

the like Law is of a devise in fee, upon condition that the Devisee ſhall not alien, the condition is void; and ſo it is of a grant, releaſe, confirmation, or any other conveyance whereby a fee ſimple doth paſſe. For it is abſurd and repugnant to reaſon, that he that hath no poſſibility to have the land revert to him, ſhould reſtrain his feoffee in fee ſimple of all his power to alien. And ſo it is, if a man be poſſeſſed of a Leaſe for years, or of a horſe, or of any other chattel real or perſonal, and give or ſell his whole intereſt or property therein, upon condition that the Donee or Vendee ſhall not alien the ſame, the ſame is void, becauſe his whole intereſt and property is out of him, ſo as he hath no poſſibility of a Reverter; and it is againſt Trade and traffique, and bargaining and contracting between man and man: and it is within the reaſon of our Author that it ſhould ouſter him of all power given to him. Iniquum eſt ingenuis hominibus non eſſe liberam rerum ſuarum alienationem; and Rerum ſuarum quilibet eſt moderator & arbiter. And again, Regulariter non valet pactum de re mea non alienanda. But theſe are to be underſtood of conditions annexed to the grant or ſale it ſelf in reſpect of the repugnancy, and not to any other collateral thing, as hereafter ſhall appear. Where our Author putteth his caſe of a Feoffment of Land, that is put for an example: for if a man be ſeiſed of a Seigniory, or a Rent, or an Advowſon, or common, or any other inheritance that lyeth in grant, and by his Deed granteth the ſame to a man and to his heirs, upon condition that he ſhall not alien, this condition is void. But ſome have ſaid, that a man may grant a Rent charge newly created out of Lands to a man and to his heirs, upon condition that he ſhall not alien that, that is good, becauſe the rent is of his own creation; but this is againſt the reaſon and opinion of our Author, and againſt the height and purity of a fee ſimple.

21.H.6.34.2.8.H.7.10.b 33.Aſſ.11.24.Doct. & Stud.39.124.13.H.7.23

Argument.ex abſurdo, Vid. Sect. 722.

A man before the Statute of Quia emptores terrarum might have made a feoffment in fee, and added further, That if he or his heirs did alien without license, that he ſhould pay a fine, then this had been good. And ſo it is ſaid, that then the Lord might have reſtrained the alienation of his Tenant by condition, becauſe the Lord had a poſſibility of reverter, and ſo it is in the Kings caſe at this day, becauſe he may reſerve a tenure to himſelf.

14.H.4.13.H.7.25.

21.H.7.8.Lib.5. 56.Knights caſe.

If A. be ſeiſed of Black-acre in fee, and B. infeoffeth him of White-acre, upon condition that A. ſhall not alien Black-acre, the condition is good, for the condition is annexed to other land, and ouſteth not the feoffee of his power to alien the land whereof the feoffment is made, and ſo no repugnancy to the ſtate paſſed by the feoffment: and ſo it is of gifts, or ſales of chattels reals or perſonals.

## *Sect.* 361.

¶ Mes ſi l' condition ſoit tiel, que le feoffee ne alienera a un tiel, noſmant ſon noſme, ou

But if the condition be ſuch, that the feoffee ſhall not alien to ſuch a one, naming his name, or to any of his

¶ If a feoffment in fee be made upon condition that the Feoffee ſhall not infeoffe I. S. or any of his heires or iſſues, &c. this is good; for he doth not reſtrain the feoffee of all his power: the reaſon here yielded by our Author

Pl.Com.77.2.8.H.7. 12.b.21.E.4.47.2.

Author is worthy of obſervation. And in this caſe if the Feoffee infeoffe I. N. of intent and purpoſe that he ſhall infeoffe I. S. ſome hold that this is a breach of the Condition, for, Quando aliquid prohibetur fieri, ex directo prohibetur & per obliquum.

a alcun ď ſes heires ou de iſſues ď un tiel, &c. ou hujuſmodi, les quix conditiõs ne tollent tout la power dalienation del feoffee, &c. donez tiel condition eſt bone.

heirs, or of the iſſues of ſuch a one, *&c.* or the like, which conditions do not take away all power of alienation from the feoffee, *&c.* then ſuch condition is good.

10. *H.* 7. 11. Doct. & Stud. 224-14. *H.* 7. 23. If a Feoffment be made, upon condition that the feoffee ſhall not alien in Mortmain, this is good, becauſe ſuch alienation is prohibited by law: and regularly whatſoever is prohibited by the Law, may be prohibited by condition, be it malum prohibitum, or malum in ſe. In ancient deeds of feoffment in fee there was moſt commonly a clauſe, Quod licitum ſit donatorio rem datam vel vendere cui voluerit, exceptis viris religioſis & Judæis. Bracton, lib. 1. fol. 13 2.

## Sect. 362.

33. Aſſ. 11. 24. lib. 6. 40. 41. Mildmays caſe. 21. *H.* 6. 33. 13- *H.* 7. 23. 21. *H.* 7. 11. 2 Vid. Sect. 220 Acc. ¶ Note here, the double negative in legall conſtruction ſhall not hinder the negative, viz. Sub conditione quod ipſi nec hæredes ſui non alienarent. And therefore the Grammatical conſtruction is not always in judgment of law to be followed.

¶ Item ſi Tenements ſoient dones en le taile ſur tiel condition, que le tenant en le taile ne ſes heires ne alieneront en fee, ne en le taile, ne pur terme dauter vie, forſque pur lour vies demeſne, &c. tiel condition eſt bone. Et la cauſe eſt, pur ceo que quant il fuit tiel alienation & diſcontinuance de l' taile, il fait le contrarie a lentent le donor, pur que leſtatute de W. 2. cap. 1. fuit fait, per quel eſtatute les eſtates en le taile ſont ordeines.

Alſo if lands be given in tail, upon condition, that the tenant in taile nor his heires ſhall not alien in fee, nor in taile, nor for term of anothers life, but only for their own lives, &c. ſuch Condition is good. And the reaſon is, for that when he maketh ſuch alienation and diſcontinuance of the entail, he doth contrary to the intent of the Donor, for which the Statute of *W.* 2. *cap.* 1. was made, by which Statute the eſtates in taile are ordained.

¶ *Forſque pur lour vies demeſme.* &c. And yet if a man make a gift in taile, upon condition that he ſhall not make a leaſe for his own life, albeit the ſtate be lawfull, yet the condition is good, becauſe the reverſion is in the Donor. As if a man make a leaſe for life or years, upon condition, that they ſhal not grant over their eſtate, or let the land to others; this is good, and yet the Grant or Leaſe ſhould be lawfull. 21. *H.* 6. 33 13. *H.* 7. 23. 24. 27. *H.* 8. 17. 19. 31. *H.* 8. *Dyer* 45.

* Dyer 33 *H.* 8. f. 48, 49. (*) If a man make a gift in taile, upon condition that he ſhall not make a leaſe for three lives, or 21. years, according to the Statute of 32. H. 8. the condition is good, for the ſtatute doth give him power to make ſuch leaſes, which may be reſtrained by condition, and by his own agreement; for this power is not incident to the eſtate, but given to him collaterally by the Act, according to that rule of Law, Quilibet poteſt renunciare juri pro ſe introducto.

¶ *Quant il fiſt tiel alienation & diſcotinuance del ſtate taile.* And therefore if a gift in tail be made upon condition, That the Donee, &c. ſhall not alien, this condition is good to ſome intents, and void to ſome: for as to all thoſe alienations which amount to any diſcontinuance of the ſtate taile, (as Littleton here ſpeaketh) or is againſt the Statute of Weſtminſter 2. the condition is good without queſtion. But as to a common recovery, the condition is void, becauſe this is no diſcontinuance, but a bar; and this common

Vid. Lib. 6. 40, 41. Sir Anth. Mildmays caſe.

recovery

recovery is not reſtrained by the ſaid Statute of W. 2. And therefore ſuch a condition is repugnant to the eſtate taile; for it is to be obſerved, that to this eſtate taile there be divers incidents. First, to be diſpunished of Waſte. Secondly, That the wife of the Donee in Taile ſhall be endowed. Thirdly, That the husband of a Feme Donee after Iſſue ſhall be tenant by the courteſie. Fourthly, That Tenant in taile may ſuffer a common recovery: and therefore if a man make a gift in taile, upon condition to reſtrain him of any of theſe incidents, the condition is repugnant and void in law. And it is to be obſerved, (*) that a collateral warranty, or a lineal with aſſets in reſpect of the recompence, is not reſtrained by the ſtatute of Donis conditionalibus; no more is the common recovery in reſpect of the intended recompence. And Littleton to the intent to exclude the common recovery, ſaith, Tiel alienation & diſcontinuance, joyning them together. 22.E.3.19.17.El.343. Dyer. (*) 13.H.7.24.b.

If a man before the Statute of Donis conditionalibus, had made a gift to a man and to the heirs of his body upon condition, That after Iſſue he ſhould not have power to ſell, this condition ſhould have been repugnant and void: Pari ratione, after the Statute a man makes a gift in tail, the law tacitè gives him power to ſuffer a common recovery; therefore to adde a condition, that he ſhall have no power to ſuffer a common recovery, is repugnant and void.

If a man make a feoffment to a Baron and Feme in fee, upon condition, That they ſhall not alien, to ſome intent this is good, and to ſome intent it is void; for to reſtrain an alienation by feoffment, or alienation by deed, it is good, because ſuch an alienation is tortious and voidable: but to reſtrain their alienation by Fine is repugnant and void, becauſe it is lawful and unavoidable. 10.H.7.11.13.H.7.23. Lib.6.41.b.in Sir Anth. Mildemays caſe, ubi ſupra.

It is ſaid, That if a man infeoffe an Infant in fee, upon condition, That he ſhall not alien, this is good to reſtrain Alienations during his minority, but not after his full age.

It is likewiſe ſaid, That a man by Licence may give land to a Biſhop and his Succeſſors, or to an Abbot and his Succeſſors, and adde a condition to it, that they ſhall not without the conſent of their Chapter or Covent, alien, becauſe it was intended a Mortmain, that is, that it ſhould for ever continue in that See or houſe, for that they had it en auter droit, for religious and good uſes. Doctor & Stud.124.

¶ *Leſtatute de W.* 2. *cap.* 1. Hereby it appeareth, That whatſoever is prohibited by the intent of any Act of Parliament, may be prohibited by condition, as hath been ſaid. 10.H.7.11. Doct. & Stud.124.13.H.7.23.

## *Sect.* 363.

¶ CAr il eſt prove per les parols compriſes en meſme Leſtatute, que la volũt deldonor in tiels cales ſerroit obſerũ, & quant le Tenant en le Taile fait tiel diſcontinuãce, il fait le contrary a ceo, &c. Et auxy en eſtates en l'tail dalcun Tenements, quant l'reverſion de fée ſimple, ou remainder in Fée ſimple eſt en auters perſons, quant tiel diſcontinuanc̃ è fait, donques le fée ſimple

FOr it is proved by the words compriſed in the ſame ſtatute, That the will of the Donor in ſuch caſes ſhall be obſerved, and when the Tenant in Taile maketh ſuch diſcontinuance, he doth contrary to that, *&c.* And alſo in eſtates in Taile of any Tenements, when the Reverſion of the fee ſimple, or the remainder of the fee ſimple is in other perſons, when ſuch diſcontinuance is made, then the fee ſim-

¶ *Quant le reverſion ou rem' en fee eſt en auters perſons.*

Put the caſe that a man make a gift in Taile to A. the remainder to him and to his heires, upon condition that he ſhall not alien, as to the ſtate taile the condition is good, for ſuch alienation is prohibited, as hath been ſaid, by the ſaid Statute. But as to the Fee ſimple, ſome ſay it is repugnant and void, for the reaſon that Littleton hath yielded: and therefore ſome are of opinion, That this is a good Condition, and ſhall defeat the alienation for the eſtate taile onely, and leave the Fee ſimple in the alienee, For that the condition did in Law extend only to the ſtate tail, and not to the remainder. 11.H.7.6.13.H.7.23,24 Dyer 2.& 3.Phil.&Mar. 127.b.

¶ *Encounter le pro-*

*fit de ſes iſſues.* Hereby it appeareth, that to reſtrain tenant in taile from alienation againſt the profit of his Iſſues, is good, for that agreeth with the will of the Donor, and the intent of the Statute.

* 46. E. 4.

But a gift in tail may be made upon condition, That tenant in tail, &c. may alien for the profit of his iſſues, and that hath been holden to be good, and not reſtrained by the ſaid Statute, and ſeemeth to agree with the reaſon of Littleton, becauſe in that caſe Voluntas Donatoris obſervetur, &c. and it muſt be for the profit of the iſſues.

en le remainder eſt diſcontinue. Et pur ceo que l' Tenant en tail ne ferr̃ tiel choſe encounter le profit d̃ ſes iſſues & don̄ droit, tiel condition eſt don̄ come eſt avaundit, &c.

ple in the remainder is diſcontinued. And becauſe Tenant in Taile ſhall do no ſuch thing againſt the profit of his iſſues, and good right, ſuch Condition is good, as is aforeſaid, *&c.*

## *Sect.* 364.

21. H. 7. 11.

¶ A *Lienont, &c. Et auxy ſi touts les Iſſues ſoient morts,* &c. Note, Littleton purpoſely made parcell of the Condition in the Copulative, that the Tenant in Tail ſhould alien, &c. For if a gift in Taile be made to a man and to the heires of his body, and if he die without heirs of his body, that then the Donor and his Heires ſhall re-enter, this is a void Condition; for when the iſſues faile, the eſtate determineth by the expreſs limitation, and conſequently the adding of the condition to defeat that which is determined by the limitation of the eſtate is void, and in that caſe the wife of the Donee ſhall be endowed, &c. And therefore Littleton to make the Condition good, added an alienation, which amounted to a wrong, and he reſtrained not the alienation onely, (for then preſently upon the alienation the Donor, &c. might re-enter, and defeat the eſtate Taile)

¶ Item home poit doner Terres en taile, ſur tiel condition, Que ſi le tenant en le Tail ou ſes heirs alienont en fee ou en taile ou pur terme dauter vie, &c. & auxy que ſi touts liſſues deignants del Tenant en le taile ſoient morts ſans Iſſue que adonques bñ lirroit al Donor & a ſes heires de entrer, &c. Et per tiel voy le droit de le taile poit eſtre ſalve apres diſcontinuance al iſſue en le taile, ſi alcun y ſoit, iſſint que per voy dentre del Donor, ou de ſes heires le taile ne ſer̃ my defeat per tiel condition: Quære hoc. Et uncore ſi le Tenant en l' taile en ceo caſe, ou ſes heires font alcun diſcontinuance celuy en le reverſion ou ſes heires, apres ceo que le taile eſt determine, pur default de iſſue, &c. poient entrer

ALſo a man may give lands in Taile upon ſuch Condition, that if the Tenant in Taile or his heires alien in fee or in taile, or for term of another mans life, *&c.* and alſo that if all the Iſſue coming of the Tenant in Taile be dead without Iſſue, that then it ſhall be lawfull for the Donor and for his heires to enter, *&c.* And by this way the right of the taile may be ſaved after diſ-continuance, to the iſſue in taile, if there be any: ſo as by way of entry of the Donor or of his heirs, the tail ſhall not be defeated by ſuch condition: *Quære hoc.* And yet if the tenant in taile in this Caſe, or his heires, make any diſ-continuance, he in the reverſion or his heires, after that the Taile is determined for default of Iſſue, *&c.* may enter into

en

en le terre per force de meſme le condition, & ne ſerront my cohert de ſuer briefe de formedon en le reverter.

the Land by force of the ſame Condition, and ſhall not be compelled to ſue a Writ of Formedon in the reverter.

but added, and die without iſſue, to the end that the right of the eſtate in taile might be preſerved and not defeated by the Condition, but might be recovered again by the iſſue in tail in a Formedon.

And Littleton expreſſly ſaith, that the Donor and his heirs after the diſcontinuance, and after that the eſtate tail is determined, may re-enter, which is the intent and true meaning of Littleton in this place. And where it is ſaid in this Section (Quære hoc) this is added by ſome that underſtood not this caſe, and is not in the original.

Note, that in a Condition conſiſting of divers parts in the conjunctive, as here in the caſe of Littleton, both parts muſt be performed, according to the old rule. (a) Si plures conditiones aſcriptæ fuerunt donationi conjunctim, omnibus eſt parendum, & ad veritatem copulativè requiritur quòd utraq; pars ſit vera. But otherwiſe it is when the condition is in the diſjunctive, for the ſame Author in that caſe ſaith, Si diviſim cuilibet, vel alteri eorum ſatis eſt obtemperare. Et in diſjunctivis ſufficit alteram partem eſſe veram. What then if the Condition or Limitation be both in the Conjunctive and Diſjunctive: as if a man make a Leaſe to the Huſband and Wife for the term of one and twenty years, if the Huſband and Wife, or any Child between them ſo long ſhall live, and then the wife dyeth without iſſue: ſhall the Leaſe determine or continue during the life of the Huſband? And the anſwer is, that it ſhall continue, for the diſjunctive referreth to the whole, and diſjoyneth not only the latter part, as to the Child, but alſo to the Baron and Feme; ſo as the ſenſe is, if the Baron, Feme, or any Child ſhall ſo long live.

(a) Bracton lib. 2. fo. 19 vid. Pl. Com. 76. in Wimbeſhes caſe & fol. 107. in Fulmerſtons caſe Bracton ubi ſupra.

So it was adjudged in Com. Banco paſch. 30. Eliz. inter Baldwyn & Cook. commonly called Trupennies caſe.

(b) And ſo it is, if an uſe be limited to certain perſons, until A. ſhall come from beyond Sea, and attain unto his full age or dye, if he doth come from beyond Sea, or attain to his full age, the uſe doth ceaſe.

(b) Hill 35. Eliz. en treſpas pet le Seignior Mordant vers George Vaux, ſo adjudged in the Kings Bench.

## *Sect.* 365.

ITem, home ne poit pleder en aſcun action, que eſtate fuit fait en fée, ou en fée taile, ou pur terme de vie, ſur condition ſil ne voucha un record de ceo, ou monſtra un eſcript ſouth ſeale, prevant meſme la condition. Car il eſt un common erudition, que home per pleé ne defeatera aſcun eſtate d frank-tenement per force daſcun tiel conditiõ, ſinon que il monſtra le preuve de condition en eſcript, &c. ſi-

ALſo a man cannot plead in any action, that an eſtate was made in fee, or in fee taile, or for term of life upon Condition, if he doth not vouch a Record of this, or ſhew a writing under Seale, proving the ſame Condition. For it is a common learning, that a man by plea ſhall not defeat any eſtate of free-hold by force of any ſuch Condition, unleſs he ſheweth the proof of the condition in writing, *&c.* unleſs it be

EN *aſcun action*, Be the action real perſonal, or mixt, if a condition be pleaded to defeat a freehold, it is regularly true, that a Deed muſt be ſhewed forth (a) in Court: And the reaſon why the deed ſhall be ſhewed forth to the Court is, for that to every deed there be two things requiſite; the one that it be ſufficient in Law, and this is called the Legal Part, and therefore the judgement of that belongeth to the Judges of the Law: the other concernes matter of fact, as ſealing and delivery, and this belongs to the Jurors. And becauſe every Deed ought to approve it ſelf, and be proved by others too, it muſt approve it ſelfe upon the ſhewing of it forth in Court in tow manners.

39. E. 3 22. 4. E. 4. 35. 2. 9. E. 4. 25 b. 26. 2. 6. H. 7. 8. b. 11. H. 7. 22. b. 7. H. 6. 7. 14. H 8 22. b. 28. Aſſ. p. 1.

(a) Lib. 10. fo. 92 Doctor Layfields caſe. 7. E 3 57. 25. E 3. 41. 41. E. 3. 10. Ac..

Firſt, as to the compoſition of the words, that it be ſuf-

ſufficient in Law, and that the Court ſhall adjudge.

Secondly, of ancient time if the Deed appeared to be raſed or interlined in places material, the Judges adjudged upon the view, the Deed to be void. But of later time, the Judges have left that to the Jurors to try, whether the raſing or interlining were before the delivery.

45.E.3.21.2. And there is a difference between a rent, and a re-entry; for upon a gift in tail, or a leaſe for life, a rent may be reſerved without Deed, but a Condition with a re-entry cannot be reſerued in thoſe caſes without deed.

non que ceo ſoit en aſcuns eſpecial caſes, &c. Mes de chattels reals ſicome de leas fait a terme dans, ou de graunts de gards fait per gardeins in chivalrie & hujuſmodi, &c. home poit pleder que tiels leaſes ou grants fueront fait ſur condition, &c. ſans monſtre aſcun eſcript de l'condition. Iſſint en meſme le maner home poit faire de dões & grants de chattels perſonals & de contracts perſonals, &c.

in ſome ſpecial caſes, *&c.* But of Chattels reals, as of a Leaſe for years, or of grants of Wards made by Gardians in Chivalry and ſuch like, *&c.* a man may plead that ſuch Leaſes or grants were made upon Condition, *&c.* without ſhewing any writing of the Condition. So in the ſame manner a man may do of Gifts and Grants of Chattels perſonals, and of Contracts perſonals, *&c.*

Lib.5.fol.52,53,&c. Pages caſe. 6.R.2.cap.4. ¶ *Eſcript deſouth ſeale.* Which Littleton intendeth to be a Deed under Seal:

And well ſaid Littleton, A Deed under Seal, For though the deed be inrolled, yet he cannot plead the inrolment thereof though it be of record. And though it be exemplified under the great Seal, (b) yet muſt he ſhew forth the Deed it ſelf under Seal, as Littleton here ſaith, and not the exemplification. And ſo when Littleton wrote, no Conſtat or Inſpeximus of the Kings Letters Patents were available to be ſhewed forth in Court, but the Letters Patents themſelves under Seal. For both the Conſtat and Inſpeximus are but exemplifications of the inrolment of the Charters or Letters Patents: and this appeareth by the reſolution of two ſeveral (c) Parliaments, one holden in the third and fourth year of King Edward the ſixt: and the other in the thirteenth year of Queen Elizabeth. But now by thoſe Statutes the exemplification or Conſtat under the great Seal of the inrolment of any Letters Patents made ſince the fourth day of February, Anno 27. H. 8. or after to be made, ſhall be ſufficient to be pleaded and ſhewed forth in Court, as well againſt the King as any other perſon, by the Patentees themſelves (wherof there was ſome doubt (d) conceived upon the ſaid ſtatute of E. 6.) and by all and every other perſon and perſons claiming by, from, or under them. Which Statutes are general and beneficial, and eſpecially the Act of 13. Eliz. for that extends not only to Lands, Tenements and Hereditaments, but to every other thing whatſoever, and ought to be favourably conſtrued for advancement of the remedy and right of the ſubject.

(b) Vid.32.H.8.in Patents, Br.12.H.7.12.b.

(c) 3.& 4.E.6.cap.4. & 13.El. cap.6.

(d) Dyer, 1.Eliz, 167.

(e) Lib.8.fol.8. in the Princes caſe. Vid.Pages caſe, ubi ſupra. The difference between a Conſtat Inſpeximus, and a Vidimus, you may read (e) at large in Pages caſe. But none of them by Law ought to be had, but only of the inrolment of record, and not of a Deed or any other writing that is not of Record; and no Deed, &c. can be inrolled, unleſs it be duly and lawfully acknowledged.

33.E.3.gard.162.20.E. 3. darrein preſent. 13. 35.H.6.tit. monſtrans des faits 118. (f) 20.H.7.5. ¶ *Si non que ſoit en aſcun eſpecial caſes*, &c. Hereby is implyed that if a Gardian in Chivalry in the right of the heir entreth for a condition broken, he ſhall plead the ſtate upon condition, without ſhewing of any Deed, becauſe his intereſt is created by the Law. And ſo it is (f) of a Tenant by Statute Merchant or Staple, or Tenant by Elegit.

5.E.3.37.11.H.4.83. 35.H.6. tit. monſtrans des faits.11.b.7.H.6. 17.H.5.5.3.H.6.21. 33. H.6.1.14.H.8. Likewiſe Tenant in Dower ſhall plead a Condition, &c. without ſhewing of the Deed. And the reaſon of theſe and the like caſes, is, for that the law doth create theſe eſtates, and they come not in by him that entered for the Condition broken, ſo as they might provide for the ſhewing of the Deed, but they come to the Land by authority of Law, and therefore the law will allow them to plead the Condition without ſhewing of it.

(g) But

(f) But the Lord by eſcheat, albeit his eſtate be created by Law, ſhall not plead a Condition to defeat a freehold without ſhewing of it, becauſe the deed doth belong unto him. (f) 35.H.6. ubi ſupra.

A Tenant by the courteſie ſhall not (g) plead a condition made by his wife, and a re-entry for a condition broken without ſhewing the Deed: for albeit his eſtate be created by Law, yet the Law preſumeth that he had the poſſeſſion of the Deeds and Evidences belonging to his wife. (g) 35.H.6. ubi ſupra.

(h) But Leſſees for years, and all others that claime by any Conveyance from the party, or juſtifie as ſervant by commandement, &c. muſt ſhew the Deed. (h) 14.H.8.8.Pl.Com. 149.

(i) R. Brought an Ejectione firmæ againſt E. for ejecting him out of the Mannor of N. which he held for term of yeers of the demiſe of C.E. the defendant pleaded that E. gave the ſaid mannor to P. and Katherine his wife in taile, who had iſſue, E. the defendant, and after the Donees infeoffed G. of the Mannor, upon condition that he ſhould demiſe the mannor for yeers to R. the Plaintiff, the remainder to the husband and to the wife, &c. C. did demiſe the land to R. the Plaintiff for yeers, but kept the reverſion to himſelfe, wherefore Katharine after the deceaſe of her husband entred upon the Plaintiff, &c. for the condition broken, and died, after whoſe deceaſe the land deſcended to E. the iſſue in taile, &c. now defendant, judgment if action: exception was taken againſt this plea, becauſe E. the Defendant maintained his entry by force of a condition broken, and ſhewed forth no Deed: and the plea was ruled to be good, becauſe the thing was executed, and therefore he need not ſhew forth the Deed. Nota, the defendant being iſſue in taile, was remitted to the eſtate taile. (i) 44.E.22. See after this chapter Sect.366.

In a Præcipe quod reddat againſt S. who pleaded that R. was ſeiſed, and infeoffed him in Mortgage upon condition of payment of certain money at a day, and ſaid that R. paid the money at the day, and entred judgment of the Writ: exception was taken to this plea, for that he ſheweth forth no Deed of the condition; and it was ruled that he need not ſhew forth the Deed, for two cauſes. 1. That he ought not to ſhew any Deed to the Demandant, becauſe the Demandant is a ſtranger. 2. It might be when R. paid the money, and the condition performed, that the Deed was redailed to R. and thereupon the plea was adjudged good, and the Writ abated. 11.E.3.tit. Mon. des faits. 175. 45.E.3.8.

If land be mortgaged upon condition, and the Mortgagee letteth the lands for yeers, reſerving a rent, the condition is performed, the Mortgagor re-enters, in an action of debt brought for the rent, the Leſſee ſhall plead the condition and the re-entry without ſhewing forth any Deed. 45.E.3.8.b. Finch.

In an aſſiſe the Tenant pleads a feoffment of the Anceſtor of the Plaintiff unto him, the Plaintiff ſaith that the feoffment was upon condition, &c. and that the condition was broken, and pleads a re-entry, and that the Tenant entred and took away the Cheſt in which the Deed was, and yet detaineth the ſame, the Plaintife ſhall not in this caſe be enforced to ſhew the Deed. 10.H.4.9.b.43.E.3. Vid.1c.E.3.41. Simile in dower.

If a woman give lands to a man and his heirs by Deed or without, generally, ſhe may in pleading averre the ſame to be Cauſa matrimonii prælocuti, albeit ſhe hath nothing in writing to prove the ſame: the reaſon whereof ſee Sect.330. 12.E.1.Feoffments & Faits 114. F.N.B.105.b. 13.R.2.Monſtrant des faits 165. 4.E.3,5. &c.

¶ *Mes des chattels reals ſicome leaſe fait a volunt a terme des ans, &c.* This is apparent. 11.H.7.22.b.6.H.7.8.9. E.4.25.26.14.H.8. 22.b.

## *Sect.* 366.

¶ Item coment que home en aſcun action ne poit pleder un condition que touche & conterna frank-tenement ſaunz monſtrer eſcript de ceo, come eſt avantdit, uncore home poit eſtre aide ſur tiel condition per verdit de xii. hões

ALſo albeit a man cannot in any action plead a condition which toucheth and concernes a freehold, without ſhewing writing of this, as is aforeſaid, yet a man may be aided upon ſuch a condition by the verdict of twelve men taken at large in an Aſſiſe

¶ *Verdit or verdict de* 12. *homes.* Veredictum quaſi dictum veritatis, as Judicium eſt quaſi juris dictum. Et ſicut ad quæſtionem juris non reſpondent juratores ſed judices; ſic ad quæſtionem facti non reſpondent judices ſed juratores. For Jurors are to try the fact, and the Judges ought to judge according to the Law that riſeth upon the fact, Lib.8.fol 155. Lib.9.fol.13. Lib.11.fol.10.

fact, for Ex facto jus oritur.

¶ *Priſe a large.* There be two kinds of verdicts; viz. one generall, and another at large or eſpecial. As in an Aſſiſe of Novel diſſeiſin brought by A. againſt B. the Plaintiff makes his plaint, Quod *B.* diſſeiſivit eum de 20. acris terræ cum pertinentiis, the Tenant pleads, Quod ipſe nullam injuriam ſeu diſſeiſinam præfato A. inde fecit, &c. the Recognitors of the Aſſiſe do find Quod prædict. A. injuſte & ſine judicio diſſeiſivit prædict. *B.* de prædict. 20. acris terræ cum pertinent. &c. This is a generall verdict. The like law it is if they find it negatively. And Littleton here putteth a caſe of a Verdict at large or a ſpecial Verdict; and it is therefore called a ſpecial Verdict or a Verdict at large becauſe they find the ſpecial matter at large, and leave the judgment of Law thereupon to the Court: of which kind of Verdict it is ſaid, (l) Omnis concluſio boni & veri judicii ſequitur ex bonis & veris præmiſſis & dictis Juratorum.

(l) Tim.33.E.1.Coram. Rege Nort. in Theſaur.

And though Littleton here putteth his caſe of a Verdict at large upon a generall iſſue (which in the caſe he puts it was neceſſary for the Tenant to plead, yet when Iſſue is joyned upon ſome ſpecial point, the Jury, as ſhall be ſaid hereafter in this Section, may find the ſpecial matter, if it be doubtful in Law, forasmuch as doubt may ariſe upon one point upon the generall Iſſue as upon the generall Iſſue. And as a ſpecial Verdict may be found in Common

45.Aſſ.31.Stanf.pl.cor. 164.165.3.E.3.coron. 284.280.287.44. E.44. 41.E.3.Coron.451.

priſe a large en Aſſiſe de Novel diſſeiſin, ou en alcun auter action, lou les Juſtices voylent prender le verdict de xii. Jurors a large, Sicome mittimus q̄ home feiſe de certain terre en fee, laſſa meſm̄ la terre a un auter pur terme de vie ſans fait, ſur condition d̄ render al Leſſor un certaine rent, & pur default de payment un re-entrie &c. per force de quel le leſſee eſt leiſe come de franktenement, & puis l'rent eſt aderere, p̄que le leſſor enter en la t̄re & puis le leſſee arraign un Aſſiſe de Novel diſſeiſin, de la terre envers le Leſſor, le quel plead, q̄ il fiſt nul tort, ne nul diſſeiſin̄, & ſur ceo laſſiſe ſoit priſe, en ceſt caſe les Retognitors del aſſiſe poyent dire & render a les Juſtices lour verdict a large ſur tout le matter, come adire que le defendant fuit ſeiſe de la terre en ſon demeſn̄ come de fee, & iſſint ſeiſe meſme la terre leſſe al plaintife pur terme de ſa vie, rendāt al leſſour tiel annuel rent payable a tiel feaſt, &c. ſur tiel condition, que ſi le rent fuit aderere a alcun tiel feaſt a que

of *Novel diſſeiſin*, or in any other action where the Juſtices will take the verdict of 12 Jurors at large. As put the caſe, a man ſeiſed of certain land in fee, letteth the ſame land to another for terme of life without deed, upon condition to render to the Leſſor a certaine rent, and for default of payment, a re-entrie, &c. by force whereof the leſſee is ſeiſed, as of free-hold, and after the rent is behind, by which the leſſor entreth into the land, and after the leſſee arraigne an Aſſiſe of *Novel diſſeiſin* of the land againſt the Leſſor, who pleads that he did no wrong nor diſſeiſin, and upon this the Aſſiſe is taken; in this caſe the Recognitors of the Aſſiſe may ſay and render to the Juſtices their verdict at large upon the whole matter, as to ſay that the defendant was ſeiſed of the land in his demeſne as of Fee, and ſo ſeiſed let the ſame land to the Plaintiff for terme of his life, rendring to the leſſor ſuch a yeerly rent payable at ſuch a feaſt, &c. upon ſuch condition, that if the rent were behind at any ſuch feaſt at which,

doit

doit eſtre pay, donqz; bien lirroit al Leſſor dentrer, &c. per force d̄ quel leaſe le Plaintife fuit ſeiſie en ſon demeſne come de franktenement, & que puis apres le rent fuit adarere a tiel feaſt, &c. per que le Leſſor entra en le terre ſur le poſſeſſion le Leſſee & prierоit le diſcretion de les Juſtices, ſi ceo ſoit un diſſein fait al Plaintife ou nemy, donque pur ceo que appiert a les Juſtices, que ceo fuit nul diſſeiſin fait al Plaintife, entant que lentrie de le Leſſor fuit congeable ſur luy; les Juſtices doyent doner judgment q̄ le Plaintife ne prendra riens per ſon briefe daſſiſe. Et iſſint en tiel cas l' Leſſor ſerra aide, & uncore nul eſcripture unques fuit fait del condition. Car tibien que les Jurors poient aver conuſance de le leaſe, auxy bien il poient aver conuſance de l' condition que fuit declare & rehearſe ſur le leas.

it ought to be paid, then it ſhould be lawfull for the Leſſor to enter, &c. by force of which leaſe the Plaintiff was ſeiſed in his demeſne as of freehold, and that afterwards the Rent was behind at ſuch a feaſt, &c. by which the leſſor entred into the land upon the poſſeſſion of the leſſee, and prayed the diſcretion of the Juſtices, if this be a diſſeiſin done to the Plaintiff or not. Then for that it appeareth to the Juſtices that this was no diſſeiſin to the plaintiff, inſomuch as the entry of the Leſſor was congeable on him; the Juſtices ought to give judgment that the plaintiff ſhall not take any thing by his writ of Aſſiſe. And ſo in ſuch caſe the leſſor ſhall be ayded, and yet no writing was ever made of the Condition. For as well as the Jurors may have conuſance of the leaſe, they alſo as well may have conuſance of the condition which was declared and rehearſed upon the leaſe.

Pleas, ſo may it alſo be found in Pleas of the Crown, or criminal cauſes that concerne life or member.

A Verdict finding matter incertainly or ambiguouſly is inſufficient; and no judgment ſhall be given thereupon; as if an Executor plead Plein-ment adminiſtre, and iſſue is joyned thereupon, and the Jury finde, that the Defendant have goods within his hands to be adminiſtred, but find not to what value, this is uncertain, and therefore inſufficient. 40.E.3.15.20.*E.*3. 2-mendment.57.18. E. 3. 49, in Ceſſavit. 30.E.3.3. 7.*H.*4.39.

A Verdict that finds part of the iſſue, and finding nothing for the reſidue, this is inſufficient for the whole, becauſe they have not tryed the whole iſſue wherewith they are charged. As if an information or intruſion be brought againſt one for intruding into a meſuage, and 100 acres of land, upon the generall iſſue the Jury find againſt the Defendant for the land, but ſaith nothing for the houſe, this is inſufficient for the whole, and ſo was it twice adjudged (m) But if the Jury give a verdict of the whole iſſue, and of more, &c. that which is more in ſurpluſage, and ſhall not (a) ſtay judgment, for Utile per inutile non vitiatur, but neceſſary incidents required by law, the Jury may find. 17.E.3.47. 18.E.3. 48. 22.E.3.1.18.E.36. 15.*E.*3. Judgement 58. 2.*H.*5.3.7.*H.*6.5. 7.*Ed.*4.24.28.*H.*6.10.

(m) *Hill.*25. Eliz. in a writ of Error between Brace and the Queen in the Exchequer Chamber Mich 28 & 29. Eliz. inter Gomerſal & Gomerſal in account in the Bench.

(a) 32.E.3.Ceſſavit.25.

If the matter and ſubſtance of the iſſue be found, it is ſufficient, as Littleton himſelfe ſaith hereafter. Vid. Sect.484,485. Vid.Sect.58.13.E.3. 5a t.26.15.*E.*3.Aſſ.322. 17.E.3.6.18.Aſſ.2. 39.Aſſ.8.

(b) *I.H.*4.6.b.27.*H.*8. 22.b.Pl.Com.515. Lib.4.fol.43.Rawlins caſe & ibid.Pledois caſe. *Hil.*31. Eliz. between Sutton & Dicons in the Common place, the caſe of the Leaſe for yeers by Deed indented. 34.*E.*3 Dwit.29.

Eſtoppels which bind the intereſt of the Land, as the taking of a Leaſe of a mans own Land by Deed indented, and the like, being ſpecially found by the Jury, the Court ought to judge according the ſpeciall matter; for albeit Eſtoppels regularly muſt be pleaded and relied upon by an apt concluſion, and the Jury is ſworn ad veritatem dicendam, yet when they find veritatem facti, they purſue well their oath, and the Court ought to adjudge according to Law. (b) So may the Jury find a warranty being given in evidence, though it be not pleaded, becauſe it bindeth the right, unleſſe it be in a Writ of Right, when the Iſſue is joyned upon the meer right.

(c) After

(c) 7.R.2.Coron.108. Plo. Com. Freemans Caſe. 211.11.H.4.2.20.Aſſ. 12,16.Aſſ.16,22.Aſſ.23. 5.H.7.22. Paſch. 24. H.8. of the Report of Juſtice Spilman in the Kings Bench. 11.H.4.17.35.H.6. Examin.17.29.H.8.37. Dyer. 35.H.8.55.4.& 5.Eliz. 218.14. 7.1.20.H.7.3.

(c) After the verdict recorded the Jury cannot vary from it, but before it be recorded they may vary from the firſt offer of their verdict, and that verdict which is recorded ſhall ſtand: alſo they may vary from a priuy Verdict.

In iſſue found by Verdict ſhall alwaies be intended true until it be reuerſed by attaint, and thereupon upon the attaint no Superſedeas is grantable by Law.

If the Jury after their euidence giuen unto them at the Barre, do at their own charges eat or drink either before or after they be agreed on their Verdict, it is finable, but it ſhall not auoid the Verdict: but if before they be agreed on their Verdict, they eat or drink at the charge of the Plaintiff, if the Verdict be giuen for him, it ſhall auoid the Verdict: but if it be giuen for the Defendant, it ſhall not auoid it, & ſic è converſo. (d) But if after they be agreed on their Verdict, they eat or drink at the charge of him for whom they do paſſe, it ſhall not auoyd the verdict.

(d) Paſch.6.E.6. in the Common place.

(e) If the Plaintiff after euidence giuen, and the Jury reparted from the Barre, or any for him, do deliuer any Letter from the Plaintiff to any of the Jury concerning the matter in Iſſue, or any euidence, or any eſcrowle touching the matter in iſſue, which was not giuen in Euidence, it ſhall auoyd the Verdict, if it be found for the Plaintiff, but not if it be found for the Defendant, & ſic è converſo. But if the Jury carry away any writing unſealed, which was giuen in euidence in open Court, this ſhall not auoyd their Verdict, albeit they ſhould not haue carried it with them.

(e) 11.H.4.16.17. 3.Mar. Jurors Br.8. Vide Dyer ubi ſupra.

Paſch.6. E.6. ubi ſupra.

By the Law of England a Jury after their Euidence giuen upon the Iſſue, ought to be kept together in ſome conuenient place, without meat or drink, fire or candle, which ſome Bookes (f) call an impriſonment, and without ſpeech with any, unleſſe it be the Bailiff, and with him only if they be agreed. After they be agreed, they may in cauſes between party and party giue a Verdict, and if the Court be riſen, giue a priuy Verdict before any of the Judges of the Court, and then they may eat and drink, and the next morning in open Court they may either affirme or alter their priuy Verdict, and that which is giuen in Court ſhall ſtand. But in criminal cauſes of life or member, the Jury can giue no priuy Verdict, but they muſt giue it openly in Court. And hereby appeareth another diuiſion of Verdicts, viz. a publique Verdict openly giuen in Court, and a priuy Verdict, giuen out of the Court before any of the Judges, as is aforeſaid.

(f) 24.E.3.75.

21.E.3.18.

A Jury ſworn and charged in caſe of life or member, cannot be diſcharged by the Court or any other, but they ought to giue a Verdict. And the King cannot be Non-ſuit, for he is in Judgement of Law euer preſent in Court: but a common perſon may be Non-ſuit.

W.2 cap.30.7.H.4.11. 8.E.4.29 9.H.7.13. 23.H.8.tit. verdict. Br. 85.11.Eliz. Dyer 283, 284.3. E.3. Itinere North.284.286.43. Aſſ. 31.26. H.8.5.44. E.44. F.tit.Coron.14.44. Aſſ. 17. 45.E.3.20 pl. Com. 92.9.H.7.3.Vid.lib.9. 13. 13.Dowmans caſe. And ſee there many other authorities. 31.Aſſ.Pl.21.10.H.9.

¶ *En Aſſiſe de Novel diſſeiſin ou en aſcun auter action, &c.* Here it is to be obſerued, That a ſpecial Verdict, or at large, may be giuen in any Action, and upon any iſſue, be the Iſſue general or ſpecial: and albeit there be ſome contrary opinions in our Bookes, yet the Law is now ſetled in this point.

*Per que le Leſſor entra.* Here it appeareth that the condition is executed by re-entry, and yet the Leſſor after his re-entry ſhall not, by the opinion of Littleton, plead the Condition without ſhewing the Deed, becauſe he was party and priuy to the condition: for the parties muſt ſhew forth the Deed, unleſſe it be by the act and wrong of his aduerſary, as hath been ſaid, (m) but an eſtranger which is not priuy to the condition, nor claimeth under the ſame, as in the caſes aboue-ſaid appeareth, ſhall not after the condition is executed in pleading, be inforced to ſhew forth the Deed: and by this diuerſity all the bookes and authorities in law which ſeem to be at variance are reconciled. See alſo for this matter the Section next following.

(m) See more before in this chapter, Sect.365.

¶ *Les Recognitors del Aſſiſe poient dire. &c.* Here it appeareth that the Jurors may find the fact, albeit the Deed be not ſhewed in euidence, and the rather, for that the Condition upon the Liuery (as hath been ſaid) is good albeit there be no Deed at all.

10.Aſſ.p.9.21.Aſſ.23. 17.Aſſ.20.31.Aſſ.21. 33.Aſſ.2.39.E 3.28. 44.E.3.22.10.H.4.9.7. H.5.5.9.E.4.26.18.E.4. 12.15.1E.4-16,17.11.H. 7, 22.

¶ *Et prieront le diſcretion des Juſtices.* That is to ſay, They (having declared the ſpecial matter) pray the diſcretion of the Juſtices, which is as much to ſay, as, That they would diſcern what the Law adjudged thereupon, whether for the Demandant or for the Tenant: for as, by the authority of Littleton, Diſcretio eſt diſcernere per legem, quid ſit juſtum, that is, to diſcern by the right line of law, and not by the crooked cord of priuate opinion, which the vulgar call Diſcretion: Si à jure diſcedas, vagus eris, & erunt omnia omnibus incerta; and therefore Commiſſions that authoriſe any to proceed, ſecundum ſanas diſcretiones veſtras, is as much to ſay, as, Secundum Legem & conſuetudinem Angliæ.

Lib. 10. fo.4. caſe de Sewers.

¶ *Car cibien come les Furors poient aver conuſance, &c.* Hereby it appeareth, That they that haue Conuſance of any thing are to haue Conuſance alſo of all Incidents and Dependants thereupon; for an Incident is a thing neceſſarily depending upon another.

If a Deed be made and dated in a forraine Kingdome, of lands within England, yet if Livery and Seisin be made secundum formam chartæ, the land shall passe, for it passeth by the Livery. 1. E. 3. 17. in Grayes case.

## Sect. 367.

¶ En meisme le manner est de feoffement en fee, ou done en le taile sur Condition; coment que nul escripture unque fuit fait de ceo. Et icome est dit de verdit a large en Assise, &c. En meisme le manner est en briefe dentre fondue sur disseisin, & en touts autes actions, ou les Justices voylent prender le verdit a large y la ou tiel verdit a large est fait, la manner del entry entire est mis en issue &c.

IN the same maner it is of a feoffment in fee, or a Gift in taile, upon condition, although no Writing were ever made of it. And as it is said of a Verdict at large in an Assise, &c. In the same manner it is of a Writ of Entry founded upon a disseisin, and in all other Actions where the Justices will take the Verdict at large, there where such verdict at large is made, the manner of the whole entry is put in the Issue, &c.

¶ And it is to be observed, That the Court cannot refuse a special verdict, if it be pertinent to the matter put in Issue. See the Section next preceding.

¶ *Verdict at large.*

It is called a verdict at large, because it findeth the matter at large, and leaves it to the judgment of the Court: or it is called a special verdict, because it findeth the special matter, &c. So as hereby it appeareth, That a Verdict (as hath been said) is twofold, viz. a Verdict at large, or a special Verdict, (which is all one) whereof Littleton here speaketh; and a general Verdict that is generally found according to the issue, as if the Issue be not guilty, to find the party guilty or not guilty generally, & sic de cæteris. There is also a verdict given in open Court, and a privie Verdict given out of Court, before any of the Judges of the Court, so called, because it ought to be kept secret and privy from each of the parties, before it be affirmed in Court.

See the section next following.

See the next preceding section.

## Sect. 368.

¶ Item en tiel case lou Lenquest poit dire lour verdict a large, ils voilent prit sur eux le Conisance de la ley sur le matter, ils poyent dire lour verdict generalment, come est mis en lour charge, cõe en le case abandit, ils poient bien dire, que le Lessor ne disseisa pas l'Lessee, ils voilent, &c.

ALso in such case where the Enquest may give their verdict at large, if they will take upon them the knowledge of the Law upon the matter, they may give their verdict generally as is put in their charge, as in the case aforesaid they may well say, that the lessor did not disseise the Lessee, if they will, &c.

¶ Although the Jury if they will take upon them (as Littleton here saith) the knowledge of the law, may give a general verdict, yet it is dangerous for them so to doe; for if they doe mistake the law, they run into the danger of an Attaint; therefore to find the special matter is the safest way, where the case is doubtful.

Sect.

## Sect. 369.

¶ *Pur ceo que il nad aſcun eſcripture de ceo.* Hereby it alſo appeareth, That albeit the condition was executed by reentrie, yet the leſſor cannot plead it without ſhewing of a Deed. But of this matter ſufficient hath been ſaid before in the two next preceding Sections.

¶ *Quel eſt bone plea en Barre.* In a caſe where there have been ſome variety of opinions in our Books, Littleton here cleareth the doubt, and that upon a good ground. For he himſelf reporteth in our Books, That it was holden by all the Juſtices of England, That a leaſe for life, the reverſion to the Plaintiff, was a good barre in an Aſſiſe, and alſo that a leaſe for yeers, the reverſion to the plaintiff, might be pleaded in an Aſſiſe: and ſo of a Feoffment in Fee with warrantie. And herein the diverſity of pleading is to be obſerved; for in the caſe here put by Littleton of a leaſe for life, the tenant ſhall plead it in Barre. But in a caſe of a leaſe for

18.E.4.10.12.Aſſ.38. 10.Aſſ.16.26.H.6.Bar. 9.38.Aſſ.3.4.31.Aſſ.26. 39.Aſſ.3.43. Aſſ.18.44. Aſſ.3.18.E.3.Aſſ.77.31. E.3.ibid.97.18.Aſſ. 22.

4.El.Dyer 207. 8.Eliz.Dyer 246.

¶ ITem en meſme le caſe ſi l'caſe fuit tiel, que apres ceo que le Leſſor avoit entrer pur default de payment, &c. que le Leſſee uſt entrer ſur le Leſſor & luy diſſeiſist, en ceſt caſe ſi le Leſſor arraign un Aſſiſe envers l'Leſſee, le Leſſee luy poit barre de laſſiſe. Car il poit pleader envers luy & barrement le Leſſor que eſt Plaintif fiſt un Leaſe al Defendant pur terme de ſa vie, ſavant le reverſion al Plaintife, quel eſt bone plea en Barre, entant que il conuſt l'reverſion eſtre al Plaintife, en ceſt caſe le Plaintife nad alk malk de luy ayd forſque le condition fait ſur le Leas, & ceo il ne poit pleader pur ceo que il nad aſcun eſcripture de ceo. Et entant que il ne poit reſponder al barr, il ſerra barr. Et iſſint en ceſt caſe poyes veier que home eſt diſſeiſie, & uncore il navera Aſſiſe. Et uncore ſi le Leſſee ſoit Plaintife, & le Leſſor Defendant, il barrera le Leſſee per verdit d'aſſiſe, &c. Mes en ceſt caſe lou le Leſſee eſt Defendant, ſi il ne voil' pleader le dit plea en Barre, mes plead nul tort, nul diſſeiſin, donqs le leſſor recovera paſſiſe, Cauſa qua ſupra.

ALſo in the ſame caſe, if the caſe were ſuch, That after that the Leſſor had entred for default of payment, &c. that the Leſſee had entred upon the Leſſor, and him diſſeiſed; in this caſe, if the Leſſor arraign an Aſſiſe againſt the Leſſee, the Leſſee may barre him of the Aſſiſe: for he may plead againſt him in barre, how the Leſſor who is Plaintiff made a leaſe to the defendant for term of his life, ſaving the Reverſion to the Plaintiff, which is a good plea in bar, inſomuch as he acknowledges the reverſion to be to the Plaintiff. In this caſe the plaintiff hath no matter to ayd himſelf, but the condition made upon the leaſe; and this he cannot plead, becauſe he hath not any writing of this: and inaſmuch as he cannot anſwer the bar, he ſhall be barred. And ſo in this caſe you may ſee that a man is diſſeiſed, and yet he ſhall not have aſſiſe: And yet if the leſſee be Plaintiff, and the leſſor defendant, he ſhal bar the leſſee by verdict of the Aſſiſe, &c. but in this caſe where the Leſſee is defendant, if he will not plead the ſaid plea in bar, but plead *nul tort. nul diſſ.* then the leſſor ſhall recover by aſſiſe, *Cauſa qua ſupra.*

yeers

years, or of an eſtate of Tenant by Statute or Elegit, the defendant ſhall not plead in bar, as to ſay, Aſſiſa non, &c. but juſtifie by force of the Leaſe, &c. and conclude, & iſſint ſans tort. And if the Tenant of the Freehold be not named, he ſhall plead Nul tenant de frankteneement noſme en le briefe: and in the caſe of the feoffment with warranty, he muſt rely upon the warranty.

## *Sect.* 370.

¶ Item, pur ceo q̃ tielx conditions ſont plus communement mis & eſpeciſies en faits endentes, alcun perit chooſe ſerra icy dit (a toy mon fits) de endenture & de fait Poll concernãts cõditiõs. Et eſt aſcavoir, que ſi lendẽture ſoit bipartite, ou tripartite, ou quadripartite, touts les partes de lendenture ne ſont q̃ un fait en ley, & cheſcun part de lendenture eſt de auxy grande force & effect, ſicome touts les parts enſemble.

AND for that ſuch Conditions are moſt commonly put and ſpecified in Deeds indented, ſomewhat ſhall here be ſaid (to thee my ſonne) of an Indenture, and of a Deed Poll concerning Conditions. And it is to be underſtood, that if the Indenture be bipartite, or tripartite, or quadripartite, all the parts of the Indenture are but one Deed in Law, and every part of the Indenture is of as great force and effect as all the parts together be.

¶ *En faits endentes,* Vide Sect. 217. Thoſe are called by ſeveral names, as Scriptum indentatum, charta indentata, Scriptura indeutata, ihdentura, Literæ indentatæ. An Indenture is a writing containing a Conveyance, Bargaine, Contract, Covenants or Agreements between two or more, and is indented in the top or ſide, anſwerable to another that likewiſe comprehendeth the ſelf-ſame matter, and is called an Indenture, for that it is ſo indented, and is called in Greek Συγγραφον.

If a Deed beginneth, Hæc Indentura, &c. and in troth the Parchment or Paper is not Indented; this is no indenture, becauſe words cannot make it indented. But if the deed be actually indented, and there be no words of Indenture in the Deed, yet it is an Indenture in law, for it may be an Indenture without words; but not by words without indenting. Lib. 5. fo. 20. Stiles caſe.

¶ *En faits indent* And here it is to be underſtood, that it ought to be in Parchment or in Paper. For if a writing be made upon a piece of wood, or upon a piece of Linen, or in the bark of a tree, or on a ſtone, or the like, &c. and the ſame be ſealed or delivered, yet is it no Deed; for a Deed muſt be written either in Parchment or Paper, as before is ſaid, for the writing upon theſe is leaſt ſubject to alteration or corruption. 14. E. 3. Lev. 79. 4. E. 2. Fines 116. 4. E. 2. Lev. 68. 2. R. 2. Det. 4. 27. H. 6. 2. F. N. B. 122. I.

¶ *Si lendenture ſoit bipartite, ou tripartite, ou quadripartite,* &c. Bipartite is when there be two parts and two parties to the Deed; Tripartite, when there are three parts and three parties; and ſo of Quadripartite, Quinquepartite, &c.

¶ *Et de fait poll.* A Deed poll is that which is plain without any indenting, ſo called, becauſe it is cut even or polled: every deed that is pleaded ſhall be intended to be a deed poll, unleſs it be alledged to be indented.

¶ *Touts les parts del endenture ne ſont que un en ley.* If a man by Deed indented make a gift in tail, and the Donee dyeth without iſſue, that part of the Indenture which belonged to the Donee, doth now belong to the Donor, for both parts do make but one Deed in law. 38. H. 6. 24, 25. 9. H. 6. 35. 35. H. 6. 3. 9. E. 3. 18. 9 E. 4. 18. Pl. Com. 134.

¶ *Et cheſcun part del Indenture eſt de auxy grand force,* &c. This is manifeſt of it ſelf, and is proved by the Books aforeſaid.

It is to be obſerved, that if the Feoffor, Donor, or Leſſor ſeal the part of the Indenture belonging to the Feoffee, &c. the Indenture is good, albeit the Feoffee never ſealeth the Counterpart belonging to the Feoffor, &c.

## Sect. 371.

ET feasance de Indenture eſt en deux maners. Un eſt de faire eux en le tierce perſon. Un auter eſt de faire eux en le primer perſon. Le feasance en le tierce perſon eſt come en tiel forme.

Hæc Indentura facta inter R. de P. ex una parte, & V. de D. ex altera parte, Teſtatur, quod prædictus R. de P. dedit & conceſſit, & hac præſenti carta indentata confirmavit præfato V. de D. talem terram. &c. Habendum & tenendum, &c. ſub conditione, &c. In cujus rei teſtimonium partes prædictæ ſigilla ſua præſentibus alternatim appoſuerunt. *Vel ſic*; in cujus rei teſtimonium uni parti hujus Indenturæ penes præfatum V. de D. remanenti, prædict' R. de P. ſigillum ſuum appoſuit, alteri verò parti ejuſdem Indenturæ penes R. de P. remanenti idem V. de D. ſigillum ſuum appoſuit. Dat. &c.

Tiel Endenture eſt appel endenture fait en le tierce perſon, pur ceo que les Verbes, &c. ſont en la tierce perſon. Et tiel forme dendentures eſt de pluis ſure feasance, pur ceo que eſt pluis communement uſe, &c.

AND the making of an Indenture is in two manners. One is to make them in the third perſon. Another is to make them in the firſt perſon. The making in the third perſon is as in this form.

*This Indenture made between R. of P. of the one part, and V. of D. of the other part, Witneſſeth, That the ſaid R. of P. hath granted, and by this preſent Charter indented, confirmed to the aforeſaid V. of D. ſuch Land, &c. To have and to hold, &c. upon Condition, &c. In witneſs whereof the parties aforeſaid to theſe preſents, interchangeably have put their Seals.* Or thus: *In witneſs whereof, to the one part of this Indenture, remaining with the ſaid V. of D. the ſaid R. of P. hath put his Seal; and to the other part of the ſame Indenture remaining with the ſaid R. of P. the ſaid V. of D. hath put his Seal, Dated, &c.*

Such an Indenture is called an Indenture made in the third perſon, becauſe the Verbs, *&c.* are in the third perſon. And this form of Indentures is the moſt ſure making, becauſe it is moſt commonly uſed, *&c.*

9.E.18. Vide the Books afore rehearſed.

¶ *ET le feasance del Indenture eſt en deux maners*, &c. Here is another of our Authors perfect diviſions. In this and the next Section following Littleton doth illuſtrate his meaning, by ſetting down forms and examples, which do effectually teach.

Vide 40.E.3.2.7.H.7.17 Dyer 28.H.19.Lib.2. fol.4.& 5.Godards caſe

In theſe two forms there are to be obſerved (amongſt other) three general parts of the ſame, viz. the premiſes, the Habendum, and the In cujus rei teſtimonium. But hereof hath been ſpoken at large, Sect. 1. 4. & 40. for Littleton ſpeaketh not here of the delivery, but only of the Context or words of the Deed.

17.Eliz.Dier 342.1.R.3 14.H.6.28. Bab.12.H.4. 12.30. Aſſ.31.

¶ *Pur ceo que eſt le pluis communement uſe.* Here it appeareth that that which is moſt commonly uſed in Conveyances is the ſureſt way. A communi obſervantia non eſt recedendum, & minime mutanda ſunt quæ certam habuerunt interpretationem. Magiſter rerum Uſus. It is provided by the Statute of 38. E. 3. cap. 4. that all penal Bonds in the third perſon

Perſon be void and holden for none, wherein ſome of our Books (d) ſeem to differ, but they being rightly underſtood, there is no difference at all. For the Statute is to be intended of Bonds taken in other Courts out of the Realm, and ſo it appeareth by the preamble of that Act. And it was principally intended of the Courts of Rome, and ſo it appeareth by Juſtice Hankford, in 2.H.4. in which Courts Bonds were taken in the third perſon. So as ſuch Bonds made out of the Realm are void; but other Bonds in the third perſon are reſolved to be good, as well as Indentures in the third perſon, by the opinion of the whole Court, in 8.E.4.

(d) 40.B.3.1.2.H.4.10. 8. E. 4,5.

## *Sect.* 372.

LE feaſance de Indenture en le primer perſon eſt come in tiel forme. Omnibus Chriſti fidelibus ad quos præſentes literæ indentatæ pervenerint. A. de B. ſalutem in Domino ſempiternam. Sciatis me dediſſe, conceſſiſſe, & hac preſenti carta mea indentata confirmaſſe C. de D. talem terram, *&c. Vel ſic*: Sciant præſentes & futuri, quòd ego A. de B. dedi, conceſſi, & hac præſenti charta mea indentata confirmavi C. de D. talem terram, *&c.* Habendam & tenendam, *&c.* ſub conditione ſequenti, *&c.* In cujus rei teſtimonium tam ego præd' A. de B. quam prædict' C. de D. his Indenturis ſigilla noſtra alternatim appoſuim'. *Vel ſic*: In cujus rei teſtimonium ego præfatus A. uni parti hujus Indenturæ ſigillum meum appoſui, alteri verò parti ejuſdem Indenturæ prædict' C. de D. ſigillum ſuum appoſuit, *&c.*

THE making of an Indenture in the firſt perſon, is as in this form. *To all Chriſtian people to whome theſe preſents indented ſhall come, A. of B. ſends greeting in our Lord God everlaſting. Know ye me to have given, granted, and by this my preſent Deed indented, confirmed to C. of D. ſuch land, &c.* Or thus: *Know all men preſent and to come, that I A. of B. have given, granted, and by this my preſent Deed indented, confirmed to C. of D. ſuch land,* &c. *To have and to hold,* &c. *upon Condition following,* &c. *In witneſs whereof, as well I the ſaid A. of B. as the aforeſaid C. of D. to theſe Indentures have interchangeably put our Seals.* Or thus: *In witneſs whereof I the aforeſaid A. to the one part of this Indenture have put my Seal, and to the other part of the ſame Indenture, the ſaid C. of D. hath put his Seal,* &c.

¶ HEre Littleton ſets down three forms of Deeds indented in the firſt perſon. Brevis via per exempla, longa per præcepta. It is requiſite for every Student to get Preſidents and approved forms, not only of deeds according to the example of Littleton, but of Fines, and other Conveyances and aſſurances, and eſpecially of good and perfect pleading, and of the right entries, and forms of Judgments, which will ſtand him in great ſtead, both while he ſtudies, and after when he ſhall give counſel. It is a ſafe thing to follow approved preſidents for; Nihil ſimul inventum eſt, & perfectum. Vide Sect.371.

## *Sect.* 373.

ET ſemble que tiel endenture que eſt fait en le primer perſon eſt auxy bone en la ley,

AND it ſeemeth that ſuch Indenture which is made in the firſt perſon is as good in law as the

ley, ſicome lendenture fait en le tierce perſon, quant ambideux parties ont a ceo miſe lour ſeals: car ſi en lendenture fait en l' tierce perſon, ou en le primer perſon, mention ſoit fait que le grantor avoit miſe ſolement ſon ſeal, & nemy le grantée, donques eſt lendenture tantſolement le fait l' grantor. Mes lou mention eſt fait que le grantée ad mis ſon ſeale a lendenture, &c. donques eſt lendenture auxy bien le fait le grantée come le fait le grantor. Iſſint il eſt le fait dambideux, & auxy chelcun part de lendenture eſt le fait dambideux parties en tiel caſe.

Indenture made in the third perſon, when both parties have put to this their ſeals; for if in the Indenture made in the third perſon, or in the firſt perſon, mention be made that the grantor only hath put his ſeal, and not the grantee, then is the Indenture only the deed of the grantor. But where mention is made that the grantee hath put to his ſeal to the Indenture, *&c.* then is the Indenture as well the deed of the grantee as the deed of the grantor. So it is the deed of them both; and alſo each part of the Indenture is the deed of both parties in this caſe.

HEre is to be obſerved, that albeit the words in this Indenture be only the words of the Feoffor, yet if the Feoffee put his Seal to the one part of the indenture, it is the deed of them both. And in this ſpecial caſe to make it the Deed of the Feoffee, it appeareth by Littleton, that mention muſt be made in the Deed, that he hath put to his Seal, for that he is no way made party to make it, being made in the firſt perſon, but only by the clauſe of putting his Seal thereunto. Otherwiſe it is of a deed indented in the third perſon, as before it appeareth, for there he is made party to the Deed in the beginning. And Littletons rule is true, that every part of an Indenture is the Deed of both parties; for as it hath been ſaid, both parts make but one deed in Law in that caſe.

## *Sect.* 374.

*SUr certain condition*, &c. Here by this (&c) is implyed that the condition in this caſe doth extend both to the eſtate for life, and to the remainder; but by ſpecial limitation it may extend to any one of them, and not to the other. And albeit he in the remainder be no party to the Indenture (the parties thereunto only being the Leſſor and the Tenant for life) yet when he in the remainder entreth and agreeth to have the lands by force of the Indenture, he is bound to performe the conditions contained in the In-

ITem ſi eſtate ſoit fait p Indenture a un home pur terme de ſa vie, le remainder a un auter en fee ſur certain condition, &c. & ſi le tenant a terme d vie avoit mis ſon ſeale al part de lendenture, & puis mozull, & il que eſt en le remainder ent en la terre per force de ſon remainder, &c. en ceſt cas il eſt tenus de performer touts les conditiõs compriſe en

ALſo if an eſtate be made by Indenture to one for term of his life, the remainder to another in fee upon a certain condition, *&c.* and if the Tenant for life have put his ſeal to the part of the Indenture, and after dieth, and he in the remainder entreth into the land by force of his remainder, *&c.* In this caſe he is tyed to perform all the conditions compriſed

len-

lendenture, ſicome le tenant a terme de vie, devoit fair en ſa vie, & uncore celluy en le remainder ne unqs enſeal' aſcun part del endenture. Mes la cauſe eſt, que entant que il enter & agrea daver les terres per force del endenture, il eſt tenus de performer les conditions deins meſme lendenture ſil voile aver la terre, &c.

in the Indenture, as the tenant for life ought to have done in his life time, and yet he in the remainder never ſealed any part of the Indenture. But the cauſe is, for that inaſmuch as he entred and agreed to have the lands by force of the Indenture, he is bound to performe the conditions within the ſame Indenture, if he will have the land, &c.

denture. And here is alſo a diverſity to be underſtood, that any eſtranger to the Indenture may take by way of remainder, but he cannot in this caſe take any preſent eſtate in poſſeſſion, becauſe he is an eſtranger to the Deed.

If A. by Deed indented between him and B. letteth lands to B. for life, the remainder to C. in fee, reſerving a rent, tenant for life dieth, he in the remainder entreth into the lands, he ſhall be bound to pay the rent, for the cauſe and reaſon before yielded by Littleton. 50.E.3.22.3. *H.*6.26.b

In Indenture of Leaſe is ingroſſed between A. of the one part, and D. and R. of the other part, which purporteth a demiſe for yeers by A. to D. and R. A. ſealeth and delivereth the Indenture to D. and D. ſealeth the Counterpane to A. But R. did not ſeal and deliver it. And by the ſame indenture it is mentioned, that D. and R. did grant to be bound to the Plaintiff in 20. pound in caſe that certain conditions comprized in the indenture were not performed. And for this 20 pound A. brought an action againſt D. onely, and ſhewed forth the Indenture. The defendant pleaded that it is proved by the Indenture that the demiſe by Indenture was made to D. and R. which R. is in full life, and not named in the writ, Judgement of the writ. The plaintiff replied, that R. did never ſeal and deliver the indenture, and ſo his writ was good againſt D. ſole. And there the counſel of the Plaintiff took a diverſity between a rent reſerved which is parcel of the leaſe, and the land charged therewith, and a ſum in groſs, as here the twenty pound is: for as to the rent they agreed that by the agreement of R. to the leaſe, he was bound to pay it: but for the 20 pound, that is a ſumme in groſſe, and collateral to the Leaſe, and not annexed to the land, and groweth due onely by the deed, and therefore R. ſaid he was not chargeable therewith, for that he had not ſealed and delivered the deed. But in aſmuch as he had agreed to the leaſe which was made by indenture, he was chargeable by the indenture for the ſame ſum in groſſe: and for that R. was not named in the writ, it was adjudged that the writ did abate. 38.E.3.8.2.3.*H.*6.26.b. Vide 45.E.3.11,12.

¶ *Aver la terre, &c.* Here is implied an ancient maxime of the Law, viz. Qui ſentit commodum ſentire debet & onus, Et tranſit terra cum onere.

## *Sect.* 375.

¶ ITem ſi feoffment ſoit fait p̄ fait Poll ſur condition, & p̄ceo q̄ l' condition neſt pas performe, le feoffor entra & happa la poſſeſſion de la fait Poll, ſi le feoffee port un action de cel entry envers le feoffor, il ad eſte queſtion ſi le feoffor poit pleder le condition per le dit fait Poll encounter le feoffee. Et aſcuns ont dit que non, entant que il

ALſo if a feoffment be made by deed Poll upon condition, and for that the condition is not performed, the feoffor entreth and getteth the poſſeſſion of the deed Poll, if the feoffee brings an action for this entrie againſt the feoffor, it hath been a queſtion, if the feoffor may plead the condition by the ſaid deed Poll againſt the feoffee. And ſome have ſaid

ſemble a eux que un fait Poll, & le propertie de meſme le fait appertinent a celuy a que le fait eſt fait, & nemy a celuy que fiſt le fait. Et entant que tiel fait ne attient al feoffor, il ſemble a eux que il ne poit pas ceo pleder. Et auters ont dit le contrarie, & ont monſtre divers cauſes. Un eſt, ſi le caſe fuit tiel, que en action perenter eux, ſi le feoffee pleder meſme le fait & monſtre eſt al Court, en ceſt cas entant que le fait eſt en Court, le feoffor poit monſtrer al Court coment en le fait ſont divers conditions deſire perfoymes de le part le feoffee, &c. & pur ceo que ils ne fueront perfoymes, il entrer, &c. & a ceo il ſerra reſceive. Per in le reaſon quant le feoffor ad le fait en poigne, & ceo monſtra a le court, il ſerra bien reſceive de ceo pleder, &c. & noſment quant le feoffor eſt prive al fait, car covient eſtre prive al fait quant il fiſt le fait, &c.

he cannot, inaſmuch as it ſeems unto them that a deed Poll and the property of the ſame deed belongeth to him to whom the deed is made, and not to him which maketh the deed. And inaſmuch as ſuch a deed doth not appertain to the feoffer, it ſeems unto them that he cannot plead it. And others have ſaid the contrary, and have ſhewed divers reaſons: one is, if the caſe were ſuch that in an action between them, if the feoffee plead the ſame deed, and ſhew it to the Court, in this caſe, inſomuch as the deed is in Court, the feoffor may ſhew to the Court how in the deed there are divers conditions to be performed of the part of the feoffee, &c. and becauſe they were not performed, he entred, &c. and to this he ſhall be received. By the ſame reaſon when the feoffor hath the deed in hand, and ſhews this to the court, he ſhall well be received to plead it, &c. and namely, when the feoffor is privie to the fait; for he muſt be privie to the deed when he makes the deed, *&c.*

(a) Vide Sect. 170. 302. 340.

¶ HEre the latter opinion is clear Law at this day, and is Littletons own opinion (a) as before hath been obſerved.

¶ *Ont monſtre divers cauſes.*

Fœlix qui potuit rerum cognoſcere cauſas.
Et ratio melior ſemper prævalet.

24. E. 3. 73. 45. E. 3. Monſtrans des faits 55. (b) 40. Aſſ. 34. lib. 5. 75. b. Wymarks caſe. (c) 12. H. 4. 8. 42 E. 3. 27. Wymarks caſe, ubi ſupra. 38. H. 6. 2. 41. Aſſ. 29. 12. H. 4. 8. 7. H. 4. 39. 11. H. 4. 73. 45. E. 3. 11. F. N. B. 243.

¶ *Entant que le fait eſt en Court, &c.* And herewith doe agree (b) many Authorities in Law. (c) And if the Deed remain in one Court, it may be pleaded in another Court without ſhewing forth; Quia lex non cogit ad impoſſibilia.

¶ *Le part le feoffee, &c.* Here alſo is implied, if the condition be to be performed on the part of the Feoffor, or by a ſtranger; and it is to be underſtood, that when a Deed is ſhewed forth to the Court, the Deed ſhall remain in Court all that Tearm in the cuſtody of the Cuſtos brevium: but at the end of the Tearm (if the Deed be not denied) then the Law adjudgeth the Deed in the cuſtody of the party to whom it belongeth: for a mans evidences are as it were the ſinewes of his land. But if the Deed be denied, then the deed in judgement of Law remaineth in Court until the plea be determined. The reſidue of this Section needeth no explication.

*Sect.*

## *Sect.* 376.

¶ AUry ſi deux homes ſont un treſpas a un auter, le quel releale a un d̄ eux per ſō fait, touts actions perſonals, e nient obſtant il ſuiſt action d̄ treſpas envers lauter, le defendant bien poit monſtrer que le treſpaſſe fuit fait per luy e per un auter ſon companion, e que le Plaintife per ſon fait q̄ il monſtre avant releſſa a ſon companion touts actions perſonals, judgement ſi action, &c. Et uncore tiel fait appertient a ſon companion, e nemy a luy, mes pur ceo que il poit aver advantage p̄ le fait ſi doit monſtrer le fait al Court, il poit ceo bi̇ē pleder, &c. Per meſme le reaſon poit le feoffor en lauter cas quant il doit aver advantage per le condition compris deins le fait Poll.

ALſo if two men do a treſpaſſe to another, who releaſes to one of them by his Deed all actions perſonals, and notwithſtanding ſueth an action of treſpaſſe againſt the other, the defendant may well ſhew that the treſpaſſe was done by him, and by another his fellow, and that the Plaintiff by his deed (which he ſheweth forth) releaſed to his fellow all Actions perſonals, and demand the judgment, *&c.* and yet ſuch deed belongeth to his fellow, and not to him; but becauſe he may have advantage by the deed if he will ſhew the Deed to the Court, he may well plead this, *&c.* by the ſame reaſon may the feoffor in the other caſe when he ought to have advantage by the condition compriſed within the Deed Poll.

¶ *Si deux homes ſont un treſpaſſe a un auter, &c.* Here by this Section it is to be underſtood that when divers do a treſpaſſe, the ſame is Joynt or ſeveral at the will of him to whom the wrong is done; yet if he releaſe to one of them, all are diſcharged, becauſe his own Deed ſhall be taken moſt ſtrongly againſt himſelf; but otherwiſe it is in caſe of appeal of death, &c. as if two men be jointly and ſeverally bounden in an Obligation, if the Obligee releaſe to one of them, both are diſcharged: and ſeeing the Treſpaſſers are parties and privies in wrong, the one ſhall not plead a Releaſe to the other without ſhewing of it forth, albeit the Deed appertaine to the other. 27.E.3.83.13. E.4.2. 15.E.4.26.21.E.4.72. 22.E.4.7.8.H.6.15. 20. .6.41.21.H.6. Arbitrement 41. 21R.3.9.2.14. .8.10. 34.H.8. tit.Eſtrangeall fait 21.3.H.6.18.26.

If an action of debt upon an Obligation be brought againſt an heir, he may plead in barre a releaſe made by the Obligee to the Executors. And albeit the Deed belong to another, yet muſt he ſhew it forth: for both of them are privie to the Teſtator. 13.E.2.tit.Monſtrans des faits 42.

¶ *Per meſme le reaſon.* Ubi eadem Ratio, ibi idem Jus.

## *Sect.* 377.

¶ AUry ſi le feoffee donaſt ou grātaſt le fait Poll al feoffor, tiel grant ſerra bone, e donques le fait e le propertie del

ALſo if the feoffee granteth the deed to the feoffor, ſuch grant ſhall be good, and then the deed and the property thereof belongeth

¶ *Le property del fait appertient al feoffor.* Hereby it appeareth that a man may give or grant his deed to another: and ſuch a grant by Paroll is good.

And

And it is alſo implied, That if a man hath an Obligation, though he cannot grant the thing in Action, yet he may give or grant the Deed, viz. the Parchment and Waxe to another, who may cancel and uſe the ſame at his pleaſure.

¶ *Serra pluis toſt entend' que il vient al fait per loyall meane, que per tortious meane.* Omnia præſumuntur legitimè facta, donec probetur in contrarium. Injuria non præſumitur.

¶ Quære de dubiis. There be three kinds of unhappy men.

1 Qui ſcit & non docet, He that hath knowledge and teacheth not.

2 Qui docet & non vivit, He that teacheth and liveth not thereafter.

3 Qui neſcit & non interrogat, He that knoweth not, and doth not inquire to underſtand. Therefore Littleton ſaith, Quære de dubiis.

fait appertient al Feoffor, &c. Et quit le Feoffor ad le Fait en poigne, & eſt plead al court, il ſerra plus toſt entendue que il vient al Fait per loyal meane, que per tortious meane. Et iſſint a eux ſemble que le Feoffor poit bien pleader tiel fait polle que comprent condition, &c. ſi ad le fait en poigne. Ideo ſemper quære de dubiis, quia per rationes pervenitur ad legitimam rationem, *&c.*

to the feoffor, *&c.* and when the feoffor hath the deed in hand, and is pleaded to the Court, it ſhall be rather intended that he cometh to the Deed by lawful meanes, than by a wrongful mean: and ſo it ſeemeth unto them, That the feoffor may well plead ſuch Deed pol which compriſeth the condition, &c. if he hath the ſame in hand. *Ideo ſemper quære de dubiis, quia per rationes pervenitur ad legitimam rationem,* &c.

Infœlix cujus nulli ſapientia prodeſt
Infœlix qui recta docet, cum vivit inique.
Infœlix qui pauca ſapit ſpernitque doceri.

¶ Quia per rationes pervenitur ad legitimam rationem. For Ratio eſt Radius divini Luminis. And by reaſoning and debating of grave learned men the darkneſſe of ignorance is expelled, and by the light of legal Reaſon the Right is diſcerned, and thereupon Judgment given according to law, which is the perfection of Reaſon. This is of Littleton here called Legitima ratio, whereunto no man can attain but by long ſtudie, often conference, long experience, and continual obſervation.

Certain it is, that in matters of difficulty the more ſeriouſly they are debated and argued, the more truely they are reſolved, and thereby new inventions juſtly avoided.

Inter cuncta leges, & percunctabere Doctos.

## Sect. 378.

¶ *Condition en ley &c.* Littleton having ſpoken of conditions in Deed, now according to his own diviſion cometh to ſpeak of conditions in law.

¶ *Que ne ſoit ſpecifie en Eſcript.* A condition in Law is, that which the Law intendeth or implieth without expreſſe words in the Deed.

¶ Eſtates que homes ont ſur condition en ley, ſont tiels eſtates que ont un condition per la ley a eux anner, comt que ne ſoit ſpecifie en eſcript. Sicome hõe grant per ſon fait a un auter lofice de

EStates which men have upon condition in Law, are ſuch Eſtates which have a Condition by the law to them annexed, albeit that it be not ſpecified in writing. As if a man grant by his Deed to another the

Par-

Parkerſhip de un park a aũ & occupier meſme loffice pur terme de ſon vie, leſtate que il ad en loffice eſt ſur condition en ley, ceſtaſcavoir, que le parker bien & loyalment gardera le park, & ferra ceo q̃ a tiel office appertiẽt a faire, ou autrement bien lirroit al grauntor & a ſes heires de luy ouſter, & de grant ſo a un auter ſil voit, &c. Et tiel condition que eſt entendus per la ley eſtre annexe a aſcun thoſe, eſt auxy fort ſi come la condition fuiſſoit mis en eſcript.

the office of Parkerſhip of a Park, to have and occupie the ſame office for terme of his life, the eſtate which he hath in the office is upon Condition in Law, to wit, that the Parker ſhall well and lawfully keep the Parke, and ſhall doe that which to ſuch office belongeth to doe, or otherwiſe it ſhall be lawful to the grantor, and his heires, to ouſt him, and to grant it to another if he will, *&c.* And ſuch condition as is intended by the Law to be annexed to any thing, is as ſtrong as if the condition were put in writing.

¶ *Que le Parker bien & loyalment gardera le Parke, &c.* Parke, this ſhould be written, Parque which is a French word, and ſignifieth that which we vulgarly call a Park, of the French verbe Parquer to impark, to encloſe. It is called in Domeſday, Parcus. In law it ſignifieth a great quantity of ground incloſed, priviledged for wild beaſts of chaſe by preſcription, or by the Kings grant.

The beaſts of Parque, or chaſe, properly extend to the Buck, the Doe, the Foxe, the Marton, the Roe, but in a common and legal ſenſe, to all the beaſts of the Foreſt. There be both Beaſts and Fowles of the Warren, Beaſts, as Hares, Conies, and Roes, called in Records (d) Capreoli. Fowles of two ſorts, viz. Terreſtres and Aquatiles; Terreſtres of two ſorts, Silveſtres and Campeſtres: Campeſtres, as Partridge, Quaile, Raile, &c. Silveſtres, as Pheſant, Wood-Cock, &c. Aquatiles, as Mallard, Herne, &c. whereof I have ſeen this Record. (*) R x conceſſit Johan i de Beverly Armigero ſuo quod ipſe cum quibuſcunque canibus ſuis ad quaſcunque beſtias feras Regis in quibuſcunque foreſtis, parcis ſuis, quotieſcunque voluerit, venari poſſit; & quoſcunque Falcones poſſit permittere volare ad quaſcunque aves de Warrena in quibuſcunque ripariis, &c.

(d) *Hill.* 13. *E.* 3. coram Rege in Theſaur.

(*) 38. *E.* 2. rot. patent pars 1. m. 10.

It is reſolved (e) by the Juſtices and the Kings Councel, that Capreoli, id eſt, Roes, non ſunt beſtiæ de Foreſta, eo quod fugiunt aliis feras. Beaſts of Foreſts be properly Hart, Hind, Buck, Hare, Boare and Wolfe, but legally all wild beaſts of Venery.

(e) *Hill.* 13. *E.* 3. coram Rege in Theſaur.

A Foreſt and Chaſe are not but a Parke muſt be incloſed. The Foreſt and Chaſe do differ in Offices and Lawes: every Foreſt is a chaſe, but every chaſe is not a Foreſt. A ſubject may have a Foreſt by ſpecial grant of the King, as the Duke of Lancaſter, and Abbot of Whitbie had.

Vide Sect. 7.

Ockam cap. quid Regis Foreſta, ſaith, Foreſta eſt tuta ferarum manſio, non quarumlibet, ſed ſilveſtrium, non quibuſlibet in locis, ſed certis, & ad hoc idoneis, unde Foreſta E. mutata in O Qgaſi ferefta, hoc eſt, Ferarum ſtatio.

Vide *Bract.* fo. 231. & 316. *Britton.* fo. 34. *Fleta lib.* 2. cap. 34, 35.

Pudzeld or Woodgeld is to be free from payment of money for taking of wood in any Foreſt. But let us now return to our Littleton.

In this Section Littleton putteth an example of a condition in Law annexed to the office of the Keeper of a Park; but this example muſt be underſtood with a diſtinction; for if the Parker doth not attend on the Parke one or two &c. dayes, this is no forfeiture of the office of Parkerſhip; but if in his default any Deer be killed and ſo a damage to the Lord, that is a forfeiture: for (that it may be ſaid once for all) non-uſer of it ſelfe without ſome ſpecial damage is no forfeiture of private offices; but non-uſer of publike offices which concern the adminiſtration of juſtice, or the common wealth, is of it ſelf a cauſe of forfeiture.

*E.* 4. 15. b. *L.* 5. *E.* 4. 26. *Pl. Com.* 379, 380.

2. *H.* 7. 11. 30. *H.* 6. 32. &c.

¶ *Luy ouſter ſil voit.* &c. Littleton here ſpeaketh of an Ouſter by force of a Condition in Law; therefore it is to be ſeen in what other caſes the Grantor may lawfully ouſt his Officer.

There is a diverſity between officers that have no other profit but a collateral certain Fee; for there the Grantor may diſcharge him of his ſervice, as to be a Bayly, receiver, ſurveyor

18.E.4.8.31.H.8.grants Br.134.34.H.8 ibid. 93.21.Eliz. Dyer 285.

beyor, Auditor, or the like, the exerciſe whereof is but labour and charge to him, but he muſt have his fee: for the maine rule of Law is, that no man can fruſtrate or derogate from his own grant to the prejudice of the Grantee. And where albeit the grantee hath no other profit but his fee, yet that fee is to be received and taken out of the profits appertaining to the Lord within his office; for there the grantor cannot diſcharge him of his ſervice or attendance, for that may turn to the prejudice of the Grantee, if the Grantor will not grant the Office at all. But in all caſes where the Officer relinquiſheth his office, and refuſeth to attend, he loſeth his office, Fee, Profit and all.

There is another diverſity, where the Grantee, beſides his certain fee, hath profits and availes by reaſon of his office, there the grantor cannot diſcharge him of his ſervice or attendance, for that ſhould be to the prejudice of the granter. As if a man doth grant to another the office of the Stewardſhip of his Courts of his Mannors with a certain fee, the Grantor cannot diſcharge him of his ſervice and attendance, becauſe he hath other profits and fees belonging to his office, which he ſhould loſe if he were diſcharged of his office. And as in the caſe which Littleton here putteth of the office of the Keeper of a Park, for that he hath not only his fee certain, but profits and availes alſo, in reſpect of his office, as Deer Skinnes, Shoulders, &c. But now let us proceed and ſee what other particular forfeitures in Law be of this office here ſpoken of by Littleton, and ſomewhat of Conditions in Law in general.

22.H.6.10.3.E.6.6. Dyer 71.

15.E.4.3 l.5.E.4.26. 23.H.8. Bendloes inter Eveſque des Londres & Hieron. lib.9. fo.50.95. 96.99.

And it is to be underſtood, that if any Keeper kill any Deer without warrant, or fell or cut any Trees, Woods, or Underwoods, and convert them to his own uſe, it is a forfeiture of his office, for the deſtruction of vert is, by a mean, deſtruction of Veniſon. So it is if he put down the lodge, or any houſe within the Park for putting of Hay into it for feeding of the Deer, or ſuch like, it is a forfeiture; & the reaſon wherefore the office in theſe and in like caſes ſhall be forfeited, (f) is, quia in quo quis delinquit, in eo de jure eſt punicadus.

(f) Mich.33.E.1.coram Rege in Theſaut.Leveſque de Durhams caſe. Pl.com.373.a Sir Henry Nevils caſe,21.E.4.2c. 93. Lib.8.fo.44. Wittinghams caſe.

As to conditions in law, you ſhall underſtand they be of two natures, that is to ſay, by the Common law, and by Statute. And thoſe by the Common law are of two natures, that is to ſay, the one is founded upon skill and confidence, the other without Skill or Confidence: Upon skill and confidence, as here the office of Parkerſhip, and other offices in the next Section mentioned, and the like.

Touching conditions in Law without skill, &c. ſome be by the common Law, and ſome by the ſtatute. By the common law as to every eſtate of Tenant by the Courteſſe, tenant in taile after poſſibility of iſſue extinct, tenant in dower, tenant for life, tenant for life, tenant for yeers, tenant by ſtatute merchant, or Staple, tenant by Elegit, Gardian, &c. there is a condition in law ſecretly annexed to their eſtates, that if they alien in fee, &c. that he in the reverſion or remainder may enter, & ſic de ſimilibus; or if they claime a greater eſtate in Court of Record, and the like.

Concerning conditions in law founded upon ſtatutes, for ſome of them an entry is given, and for ſome other a recovery by action: where an entry is given, as upon an alienation in Mortmaine, &c. and the like. Where an action is given, as for waſte againſt tenant for life and yeers, and the like.

¶ *Et ſiel condition que eſt entendus per la ley eſtre annex a aſcun choſe eſt auxy fort, &c.* Here it is worthy the obſervation to take a view of the diviſions aforeſaid in ſome particular caſe. As for example. Admit that an Office of Parkerſhip be granted or deſcend to an Infant or Feme Covert, if the conditions in Law annexed to this office which require skill and confidence be not obſerved and fulfilled, the office is loſt for ever, becauſe, as Littleton ſaith here, it is as ſtrong as an expreſſe condition. But if a Leaſe for life be made to a Feme covert, or an Infant, and they by charter of feoffment alien in fee, the breach of this condition in Law, that is without skill, &c. is no abſolute forfeiture of their eſtate. So of a condition in law given by Statute, which giveth an entry only. As if an Infant or Feme covert with her husband aliens by Charter of feoffment in Mortmaine, this is no bar to the Infant, or Feme Covert. But if a recovery be had againſt an Infant or Feme Covert in an action of waſte, there they are bound and barred for ever.

Lib.8.fol.44. Wittinghams caſe.

And it is to be obſerved, that a condition in law by force of a ſtatute which giveth a recovery is in ſome caſe more ſtrong than a condition in law without a recovery. For if Leſſee for life make a leaſe for yeers, and after enter into the land, and make waſte, and the Leſſor recover in an Action of waſte, he ſhall avoid the leaſe made before the waſte done. But if the Leſſee for life make a leaſe for yeers, and after enter upon him, and make a feoffment in fee, this forfeiture ſhall not avoyd the leaſe for yeers. Nor in any of the ſaid caſes a precedent Rent granted out of the land ſhall be avoyded. For if Leſſee for life grant

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a rent charge, and after doth waste, and the Lessor recovereth in an action of waste, he shall hold the land charged during the life of the tenant for life; but if the rent were granted after the waste done, the Lessor shall avoid it.

And the reason wherefore the case for peers in the case aforesaid shall be avoyded, is, because of necessity the action of waste must be brought against the Lessee for life, which in that case must demand Land for years, or else by the Act of the Lessee for life the Lessor should be barred to recover Locum vastatum, which the Statute giveth.

If a man hath an office for life which requireth skill and confidence, to which Office he hath a house belonging, and chargeth the house with a rent during his life, and after commit a forfeiture of his Office, the rent charge shall not be avoyded during his life; for regularly a man that taketh advantage of a condition in law, shall take the land with such charge as he finds it. And therefore Littleton is here to be understood, that a Condition in law is as strong as a condition in deed, as to avoid the estate or interest it selfe, but not to avoid precedent charges, but in some particular cases, as by that which hath been said appeareth.

There be at this day more conditions in law annexed to offices than were when Littleton wrote; for example, for offices in any wise touching the administration or execution of Justice, or Clerkship in any Court of Record, or concerning the Kings Treasure, Revenue, Account, Customes, Uniage, Pourtorship, Kings Surveyor, or keeping of any of his Majesties Castles, Forts, &c. For if any of these officers bargain or sell any of the said offices or any deputation of the same, or take any money or profit, or any promise, covenant, bond or assurance, to have any money or reward for the same, the person so bargaining or selling, or that shall take any such promise, covenant, bond or assurance, shall not onely forfeit his estate, but also every person so buying, giving or assuring be adjudged a disabled person to have or enjoy the same office or offices, deputation or deputations, &c. And that all such bargains, sales, promises, covenants and assurances, as be before specified, shall be void, except as in the same act is excepted. 3. H. 7. ca. 12. Auditor, Receiver, Bailiff, Keeper of a Castle, Master of the game, Keeper or Parker of any Forrest, Parke, Chase, &c. 7. E. 6. ca. 1. Treasurer, Receiver, Collector, Bailiff, &c. 5. E. 6. ca. 16.

Sir Robert Vernon Knight being Coferer of the Kings house, of the Kings gift, and having the receit of a great sum of money yeerly of the Kings Revenue, did for a certain sum of money bargain and sell the same to Sir A. I. and agreed to surrender the said office to the King, to the intent a grant might be made to Sir A. I. who surrendered it accordingly: and thereupon Sir A. was by the Kings appointment admitted and sworn Cuferer. And it was resolved by Sir Thomas Egerton Lord Chancellour, the chief Justice, and others to whom the King referred the same, that the said office was void by the said Statute, and that Sir A. was disabled to have or to take the said office, and that no non obstante could dispense with this act to enable the said Sir A. for the reason and cause before mentioned. Sect. 180. And hereupon Sir A. was removed, and Sir Marmaduke Darrel sworn (by the Kings commandment) in his place. And note, that all promises, bonds and assurances, as well on the part of the bargainor, as of the bargainee, are void by the same Act. (*) Nulla alia re magis Romana respublica interiit, quam quod magistratus officia venalia erant. Mich. 13. Jacobi Regis. Li. 3. fo. 83. Colshils case * Ærod. fo. 353.

(g) Jugurtha going from Rome, said to the City, Vade venalis civitas, mox peritura si emptorem invenias. (g) Salust.

Therefore by the Law of England it is further provided, that no Officer or minister of the king shall be ordained or made for any gift or brocage, favour or affection, nor that any which pursueth by him or any other privily or openly to be in any manner of office, shall be put in the same office or in any other, but that all such officers shall be made of the best and most lawful men and sufficient. A law worthy to be written in letters of Gold, but more worthy to be put in due execution. For certainly never shall Justice be duely administred, but when the officers and ministers of Justice be of such quality, and come to their places in such manner as by this law is required. 12. R. 2. cap. 2.

¶ *Tiel condition que est entendus per la ley estre annex a aſcun choſe, est auxi fort sicome la condition fuit miſe en eſcript.* And this accords with that ancient rule: Utique fortior & potentior est dispositio legis quam hominis. Vid. Sect. 4. 19. 429. 430.

Sect.

## Sect. 379.

1.E.4.20.Pl. Com.379.

¶ *Seneſchal.* Of this I have ſpoken before.

8.E.4.6.

¶ *Conſtabularie.* Of this likewiſe ſomething hath been ſpoken before. But a conſtable is often taken in the law for a Warden or Keeper, as Conſtabularius caſtri de Dover & 5. portuum; for the Warden of the Caſtle of Dover, and the Cinque-ports, &c. So as in this ſence Conſtabularius is taken for Caſtellanus; and this is proved by the Statute (*) of W. 1. ca. 7. Des priſes des Conſtables ou Caſtellains faitz des auters, &c. And Magna Charta c. 19. Nullus conſtabularius vel ejus ballivus capiat blada vel alia catalla alicujus qui non ſit de villa, ubi caſtrum ſuum ſitum eſt, &c. Stanford fol. 152. Conſtabularius Turris London, for Cuſtos Turris, 32.H.8 cap.28. Conſtable of the Foreſt, for the Keeper of the Foreſt.

(*)W.1.ca.7.

(b)Magna charta cap. 19.

Stanf.fo.152. 32.H.8.cap.28.

¶ *Bedelarie.* Bedel is derived of the Freuch word Beadeau, which ſignifieth a meſſenger of the Court, or under-Bayliff, in Latine Bedellus.

And the oath of a Bedel of a Manor is, that he ſhall duely and truely execute all ſuch Attachments and other Proces as ſhall be directed to him from the Lord or Steward of his Court, and that he ſhall preſent all pound Breaches which ſhall happen within his office, and all chattels waived, and eſtrayes.

¶ *Bayliwicke.* Of this ſufficient hath been ſaid before.

¶ En mñ le manner eſt de graunts doffices de ſeneſchal, Conſtabulañ, Bedelary, bayliwick, ou ouſs offices, &c. Mes ſi tiel office ſoit grant a unhoñ, a aver & occupier pur luy ou ſon deputy, donqz ſi loffice ſoit occupy p luy, ou per ſon deputy, ſicom̃ il deboit per le ley eſtre occupy, ceo ſuffiſt pur luy, ou auterment le granter & ſes heirs poient ouſte le grantee come eſt avantdit.

IN this manner it is of grants of the Offices of Steward, Conſtable, Bedelarie, Bayliwick, or other Offices, &c. But if ſuch Office be granted to a man to have and to occupie by himſelfe or his deputy, then if the office be occupied by him or his deputy, as it ought by the Law to be occupied, this ſufficeth for him, or otherwiſe the grantor and his heires may ouſte the Grantee, as is aforeſaid.

## Sect. 380.

¶ Here Littleton termeth words of limitation to be Conditions in law: for his firſt example is.

¶ *Durant le coverture enter eux.* Durante coopertura inter eos. This word (Durante) is properly a word of limitation, as Durante viduitate, or Durante virginitate, or Durante vita, &c. And properly a Condition in law is, as hath been ſaid, where the

¶ Item eſtates de fres ou tenemẽts purront eſtre ſur condition en ley, coment que ſur leſtate fait ne fuit aſcun mention ou reherſal fait de le cõdition. Si come mittomus q̃ un leas ſoit fait a le baron, & a ſa feme, a aver & tener a eux durãt l'coverture enter.

ALſo eſtates of lands or tenements may be made upon condition in law, albeit upon the eſtate made there was not any mention or rehearſal made of this condition. As put the caſe that a leaſe be made to the husband and wife, to have and to hold to them during enter.

enter eux, en ceſt cas ils ont eſtate pur term̃ de lour deux vies ſur condition en ley, ſ. ſi un de eux devie, ou que divorce ſoit fait enter eux, donq̃ bien lirroit a le Leſſor & a ſes heires dentrer, &c.

the coverture between them; In this caſe they have an eſtate for term of their two lives upon condition in law, ſ if one of them die, or that there be a divorce between them, then it ſhall be lawfull for the leſſor and his heirs to enter. *&c.*

Law createth the ſame without any expreſs words.

Dum alſo maketh a limitation, as if a leaſe be made, Dum ſola fuerit, or Dum ſola & caſti vixerit. Dummodo is alſo a word of limitation, as, Dummodo ſolverit talem reditum. Quamdiu alſo is a word of limitation; for if a man grant a rent out of the Manor of D. 37.H.6.27.3.E.3.15. 3.Aſſ.Pl. 14.E.2.Grant.94.

Quamdiu the Gyentor ſhall be dwelling upon the Manor, this is good; ut Quamdiu ſe bene geſſerit. 37.H.6.27.

And ſo be theſe words, Donec, Quouſque, Uſque ad, Tam diu, Ubicunque.

10.Aſſ.4.5.E.3.8.9.31. 3.E.3.18.Annuity 40. 19.H.6.54. Temps E.1. Annuity 150.11.Aſſ.p.g 21.Aſſ.p.18.26.E.3.69. 7.4.16.9.E.4.25,26. 9.H.6.39.14.H.8.13. * 47.E.3.27. 39.E.3.32. 33. 11.H.4.14.76. Bracton fo.228. 18.E.4.28.24.H.8. baſtards. Br.44.39.E.1.baſtard 21 22.E.4.tit.Conſult.9. 6.E.3.249.25.E.3.39.

¶ *Si lun de eux devie*, &c. For if one of them dye, the coverture is diſſolved, and conſequently the ſtate determined by the limitation.

¶ *Ou que divorce ſoit fait enter eux*, &c. Here is a diſtinction to be underſtood: for there be two kind of divorces, viz. one, à vinculo matrimonii, * and the other, A menſa & thoro. Divortium dicitur a divertendo, or divertendo, quia vir divertitur ab uxore. Divorces A vinculo matrimonii are theſe: Cauſa Precontractus, Cauſa Metus, Cauſa Impotentiæ ſeu Frigiditatis, Cauſa Affinitatis, Cauſa Conſanguinitatis, &c. And I read in an ancient Record, Coram Rege, Termino Paſch. 30. E. 1. William de Chadworths caſe, that he was divorced from his wife, for that he did carnally know her Daughter before he married the mother; all which are cauſes of divorce preceding the marriage.

A Menſa & Thoro, as Cauſa Adulterii, which diſſolveth not the marriage A vinculo Matrimonii, for it is ſubſequent to the marriage. And the Divorce that Littleton here ſpeaketh of is intended of ſuch divorces as diſſolve the marriage A vinculo Matrimonii, and maketh the iſſue baſtard, becauſe they were not Juſtæ nuptiæ. And therefore in Littletons caſe, though the husband and wife be divorced Cauſa adulterii, yet the freehold continueth, becauſe the Coverture continueth. (*) Vid. Sect. 399.

## *Sect.* 381.

¶ ET que ils ont eſtate pur terme de lour deux vies, Probatur ſic, chelcun home que ad eſtate de franktenement en alcun terres ou tenements, ou il ad eſtate en fee, ou en fee taile, ou pur terme de la vie demeſne, ou pur terme dauter vie, & per tiel leaſe ils ont franktenement, mes ils nont per ceſt grãt fee, ne fee taile, ne pur terme dauter vie, Ergo ils ont eſtate pur terme de lour vies, mes ceo eſt ſur condition en ley, en le forme avantdit, & en ceſt cas ils ſeront waſt, le feoffor avera enders eux briefe de waſt

AND that they have an eſtate for term of their two lives, is proved thus; every man that hath an eſtate of freehold in any lands or tenements, either he hath an eſtate in fee, or in fee tail, or for term of his own life, or for term of another mans life, and by ſuch a leaſe they have a freehold: but they have not by this grant fee, nor fee taile, nor for term of anothers life, *Ergo*, they have an eſtate for term of their own lives; but this is upon condition in Law in form aforeſaid; and in this caſe, if they ſhall do waſt, the feoffor ſhall

ſuppoſant per ſon briefe, Quod tenet ad terminum vitæ, &c. mes en ſon count il declare coment & en quel maner le leas fuit fait.

have a writ of waſte againſt them; ſuppoſing by his writ, *Quod tenet ad terminum vitæ, &c.* but in his count he ſhall declare how, and in what manner the leaſe was made.

Pl. Com. 561. b. Vid. Sect. 345. ſimile.

¶ *Robatur ſic.* By this argument logically drawn à diviſione, it appeareth, how neceſſary it is that our Student ſhould (as Littleton did) come from one of the Univerſities to the ſtudy of the Common law, where he may learn the liberal Arts, and eſpecially Logick: for that teacheth a man not only by juſt argument to conclude the matter in queſtion, but to diſcern between truth and falſhood, and to uſe a good method in his ſtudy, and probably to ſpeak to any legal queſtion, and is defined thus, Dialectica eſt ſcientia probabiliter de quovis thematæ diſſerendi; whereby it appeareth how neceſſary it is for our Student.

37. H. 6. 27.

¶ *Suppoſant per ſon briefe*, Quod tenet ad terminum vitæ, *&c.* This and the reſt of this Section is evident and plain.

## *Sect.* 382.

Vid. Bract. lib. 5. 414.

*Si un Abbe.* So it is of a Biſhop, Arch-Deacon, and other Eccleſiaſtical or temporal body, politique or Corporate, or of any Officer or Graduate, or the like.

¶ *Reſigne, ou ſoit depoſe.*

And ſo it is of a Tranſlation and Ceſſion.

¶ EN meſme la maner eſt, ſi un Abbe fait un Leaſe a un hõe, a aver & tener a luy durant le temps que le leſſor eſt Abbe, en ceſt caſe le Leſſee ad eſtate pur terme de ſa vie demeſn̄, mes ceo eſt ſur condition en ley, ſ̄. que ſi labbe reſigna, ou ſoit depoſe, que bien lirroit a ſ̄ ſucceſſor denter, &c.

IN the ſame manner it is, if an Abbot make a leaſe to a man for years, to have and to hold to him during the time that the Leſſor is Abbot; in this caſe the leſſee hath an Eſtate for term of his own life; but this is upon condition in Law, s. That if the Abbot reſigne or bee depoſed, that then it ſhall be lawful for his ſucceſſor to enter, *&c.*

## *Sect.* 383.

¶ *LIVRE Daſſiſes* is a Book of the Reports of Caſes in the reigne of King Edward the third, and it is called the book of Aſſiſes, becauſe the greateſt part of the caſes therein are upon Writs of Aſſiſe, brought as hath been ſaid, and which hath been cited before.

¶ *Deviſa les Tenements a vendre per ſon Executor.* This muſt

¶ ITem hõe poit deier en le Liu̇ Daſſiſe, viz. anno 38. E. 3. p. 3. un pl' Daſſ. en ceſt ſayme que enſuiſt. ſ̄. Un Aſſiſe de Novel Diſſeiſin auter ſoits ſuit port vers A. que pleda al Aſſiſe, & trove fuit per verdict, Que

ALſo a man may ſee in the Book of Aſſiſes, *An.* 38. *E.* 3. *p.* 3. a plea of Aſſiſe in this form following, s. An Aſſiſe of *Novel Diſſeiſin* was ſometime brought againſt A. who pleaded to the Aſſiſe; and it was found by verdict, that

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launcestor le plaintif devisa les tenements a vendre per le Defendant, que fuit son Executor, & de faire distribution des deniers pur son alm̃: Et fuit trove que maintenant apres la mort le Testator, un home luy tendist certain summe de deniers pur les Tenements, mes non pas al value, & que le Executor puis avoit tenus les Tenements en sa main demesne per deux ans, al entent de les vender pluis chier a ascun auter, & trove fuit q̃ il avoit tout temps prist les profits de les Tenements a s̃ use demesne sans rẽfaire pur lalme le mort, &c. Moubray Justice disoit, Lexecutor en tiel case est tenus p la ley a faire le vender a pluis tost que il purroit apres la mort son Testator, & trove est que il refuse de faire vendr̃, & issint ō avoit un default en luy, & issint per force del devise il fuist tenus dañ mis touts le profits avenants de les Tenements al use l' mort, & trove est que il ad

the Ancestour of the Plaintiff devised his Lands, to be sold by the Defendant who was his Executor, and to make distribution of the mony for his Soul. And it was found, That presently after the death of the Testator, one tendred to him a certain sum of mony for the lands, but not to the value, and that the Executor afterwards held the lands in his own hands two years, to the intent to sell the same dearer to some other; and it was found that he had all the time taken the profits of the lands to his own use, without doing any thing for the Soul of the deceased, *&c. Moubray* Justice said, The Executor in this case is bound by the Law to make the sale as soon as he may after the death of his Testator, and it is found that he refused to make sale, and so there was a default in him, and so by force of the Devise he was bound to put all the profits coming of the lands to the use of the dead, & it is found that he took them to his

be intended to be of Lands devisable by Custome; for lands by the Common law were not devisable, (as hath been said;) for in this Section is implyed a diversity, viz. when a man deviseth that his Executor shall sell the Land, there the lands descend in the mean time to the heir, and until the sale be made, the heir may enter and take the profits. But when the Land is devised to his Executor to be sold, there the devise taketh away the discent, and vesteth the state of the land in the Executor, and he may enter and take the profits, and make sale according to the devise. And here it appeareth by our Author, That when a man deviseth his tenements to be sold by his Executors, it is all one as if he had devised his tenements to his executors to be sold: and the reason is, because he deviseth the tenements, whereby he breaks the Discent.

¶ *Moubray.* John Mowbray was a reverend Judge of the court of Common pleas, and descended of a noble family.

¶ *Lexecutor en tiel case est tenus per la ley a faire le vender a pluis tost que il purroit apres la mort son testator,* &c.

And the reason hereof is, for that the mean profits taken before the sale, shall not be Assets, so as he may be compellable to pay debts with the same; and therefore the law will inforce him to sell the lands as soon as he can, for otherwise he shall take advantage of his own laches: But if a man devise that his Executor shall sell his land, there he may sell it at any time, for that he hath but a bare power, and no profit. And by this case it appeareth what construction the Law maketh for the speedy payment of debts. And here is to be observed, That many

words in a Will do make a Condition in Law, that make no condition in a deed: as here to deviſe lands to an Executor ad vendendum, ſo if lands be deviſed to one ad ſolvendum 20. l. to I. S. or paying twenty pounds to I. N. this amounts to a Condition. And Crickmers caſe was this: A man ſeiſed of certain lands holden in Socage had iſſue two Daughters, A. and B and deviſed all his lands to A. and her heirs, to pay unto B. a certain ſum of mony at a certain day and place; the mony was not paid, and it was adjudged, That theſe words, To pay, &c. did amount in a Will to a Condition, and the reaſon was, for that the land was deviſed to A. for that purpoſe, otherwiſe B. to whom the mony was appointed to be paid, ſhould be remedileſs. Et intereſt reipublicæ ſuprema hominum teſtamenta rata haberi: and the Leſſe of B. upon an actual Ejectment recovered the moity of the land againſt A.

Mich. 31. & 32. El. in the Kings Bench. Crickmers caſe adjudged, D. & E. 2. fol. 74. 7. E. 6. 70.

pzile a ſ̃ uſe ď meſne, & iſſint auter default en luy: Per que fuit adjudge que le plaintife recovera. Et iſſint appiert per le dit judgement, que per force del dit deviſe, lexecutor navoit Eſtate ne poyer en les Tenements, forſque ſur condition in ley.

own uſe, and ſo another default in him. Wherefore it was adjudged, That the Plaintiff ſhould recover. And ſo it appeareth by the ſaid Judgement, That by force of the ſaid Deviſe the Executor had no eſtate nor power in the lands, but upon condition in law.

¶ *Et iſſint appiert per le judgement*, &c. This concluſion upon a Judgement is of great authority in law, Judicium is quaſi juris dictum. Quia judicium pro veritate accipitur, and, as it hath been ſaid,

## *Sect.* 384.

9. E. 4. 36.

HEreby it appeareth that Limitations (which, as hath been ſaid, Littleton termeth Conditions in law) may be pleaded without Deed, and the reaſon of our Author is obſervable, becauſe the law in it ſelf purporteth the Condition, whereof ſomewhat hath been ſaid before; and therefore look back to the Conditions in law, or words of limitation, and withal, that a ſtranger may take advantage of a limitation, as hath been ſaid.

¶ Et mults auters choſes & caſes y ſont deſſates ſur condition ẽ la ley, & en tiels caſes il ne beſoigne daver monſtre alcun fait, rehearſant la condition pur ceo que la ley en luy meſm̃ purpoꝛt le condition, &c.

AND many other things there are of Eſtates upon Condition in Law, and in ſuch caſes he needed not to have ſhewed any Deed, rehearſing the condition, for that the Law it ſelf purporteth the condition, &c.

Vid. Sect. 220.

Littleton having ſpoken at large of conditions in Deed and in Law, ſomewhat ſeemeth neceſſary to be ſaid of defeaſances whereby the ſtate or right of Freehold or inheritance may be defeated and avoided.

Ex paucis dictis intendere plurima poſſis.

¶ Plus ſerra dit de Conditions en le prochein Chapter, en le Chapter de Releaſes, & en le Chapter de Diſcontinuance.

*Ex paucis dictis intendere plurima poſſis.*

More ſhall be ſaid of Conditions in the next Chapter, in the Chapter of Releaſes, and in the Chapter of Diſcontinuance.

¶ *Defeaſance*, Defeaſantia is fetched from the French word Defaire, i.e. to defeat or undo, infectum reddere quod factum eſt. There is a diverſity between Inheritances executed, and Inheritances executory; or lands executed by livery, &c. cannot by Indenture of Defeaſance be defeated afterwards. And ſo if a Diſſeiſee releaſe to Diſſeiſor, it cannot be defeated by Indentures of Defeaſance made afterwards; but at the time of the releaſe or feoffment, &c. the ſame may be defeated by Indentures of Defeaſance; for it is a Maxime in Law, Quæ incontinenti fiunt in eſſe videntur.

Bract. li. 2. fo. 16, 17. Aſſ. p. 2. 5. E. 3. 42. E. 2. 1. 43. E. 3. 17. 43. Aſſ. 12. 7. H. 6. 43. 8. H. 6. 23. 32. E. 3. Annu. 30. 5. E. 3. Annuity 44. 30. Aſſ. p. 1. 30. Aſſ. p. 11. 3 m Aſſ. 32.

And

But Rents, Annuities, conditions, warranties and such like that be Inheritances executory may be defeated by Defeasances made, either at that time, or at any time after: And so the Law is of Statutes, Recognizances, Obligations, and other things Executory. 20. Ass. pl. 7. y. E. 4. 29. Browning and Bestons case, Pl. Com. 131. 28. H. 8. Dyer 6. 27. H. 8. 15. 19. R. 2. done 10. Albanies case. lib. 1. 107

¶ *Ex paucis dictis intendere plurima possis.*

Verses at the first were invented for the help of memory; and it standeth well with the gravity of our Lawyer to cite them. By this verse of our Author, Inferences and Conclusions in like cases are warrantable.

Lastly, somewhat were necessary to be spoken concerning clauses of provisoes, containing Power of Revocation, which since Littleton wrote, are crept into voluntary Conveyances, which pass by raising of uses, being executed by the (*) Statute of 27. H. 8. and are become very frequent; and the Inheritance of many depend thereupon. As if a man seised of Lands in Fee, and having issue divers Sons, by Deed indented, covenanteth in consideration of Fatherly love, and for the advancement of his Blood, or upon any other good consideration, to stand seised of three Acres of Land to the use of himself for life, and after to the use of Thomas his eldest Son in taile; and for default of such issue, to the use of his second Son in taile, with divers like remainders over; With a Proviso, that it shall be lawful for the covenantor at any time during his life to revoke any of the said uses, &c. This Proviso being coupled with an use, is allowed to be good, and not repugnant to the former Statutes. But in case of a Feoffment, or other Conveyance, whereby the Feoffee or Grantee, &c. is in by the common Law, such a Proviso were meerly repugnant and void. (*) 23. H. 8. cap. 10.

And first in the case aforesaid; if the Covenantor, who had an estate for life do revoke the uses according to his power, he is seised again in Fee simple without entry or claim.

Secondly, he may revoke part at one time, and part at another.

Thirdly, if he make a feoffment in Fee, or levy a fine, &c. of any part, this doth extinguish his power but for that part, whereas in that case the whole Condition is extinct. But if it be made of the whole, all the power is extinguished: So as to some purposes, it is of the nature of a condition, and to other purposes in nature of a Limitation. Lib. 1. fol. 173, 174. Digges case. Lib. 1. fol. 107. Albanies case. Lib. 10. fo. 143. Scropes case. Lib. 7. fo 12, 13. Sir Francis Englefields case.

Fourthly, if he that hath such power of revocation hath no present interest in the Land, nor by the Ceasor of the state shall have nothing, then his feoffment or fine, &c. of the Land is no extinguishment of his power, because it is meer collateral to the Land.

Fifthly, by the same conveyance that the old uses be revoked, may new be created or limited, where the former cease ipso facto by the revocation, without either entry or claim.

Sixthly, that these revocations are favourably interpreted, because many mens inheritances depend on the same. And here I may apply the aboveſaid verse:

Ex paucis dictis intendere plurima possis,

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## Chap. 6. Discents que tollent Entries. *Sect.* 385.

¶ Discents q̃ tollet entries sont ẽ deux mañes cestascaboir; ou discent est en fee, ou ẽ fee taile: Discẽts ẽ fee q̃ tollẽt entries sont, sicõe home seisie de certaine terres ou tenements est

Discents which toll entries are in two manners, to wit, where the discent is in fee, or in feetail. Discents in fee which toll entries, are as if a man seised of certain lands or tenements is by another disseised, and the disseisor hath issue, and

¶ *Discents.* This word commeth of the Latine word descendere, id est, ex loco superiore in inferiorem movere; and in Legall understanding it is taken when Land, &c. after the death of the Ancestor is cast by Course of Law upon the heir, which the law calleth a Discent. And this is the noblest and worthiest meanes whereby Lands are derived from one to another, because it is wrought and tested by the Act of Law, and Right of Blood, unto the worthiest Mirror. cap. 2. Sect. 5. Bract. l. 5. fol. 370. & 434 Britton, fol. 115. 215. Vide Sect. 5.

thiſt and next of the Blood and Kindred of the Anceſtor; and therefore it hath not in the Common law altogether the ſame ſignification that it hath in the Civill Law; for the Civilians call him Hæredem, qui ex teſtamento ſuccedit in univerſum jus teſtatoris. But by the Common law he is onely Heire which ſucceedeth by right of Blood. And this agreeth well with the Etymologie of the word (Heire) to whom the lands deſcend, for Hæres diſcitur ab hærendo, quia qui Hæres eſt hæret, hoc eſt, proximus eſt ſanguine illi cujus eſt Hæres. So as he that is Hæres, ſanguinis eſt Hæres, & herus hæreditatis.

¶ *Diſcents que tollent entries ſont en deux Manners.* Here is an exact and perfect diviſion made by our Author, and yet withal plain and perſpicuous.

Now as a Diſcent is the worthieſt means to come to lands, &c. ſo hath the Heir more privileges than any that by other order or means come to the Lands, &c. as ſhall appear hereafter.

pun auter diſſeiſie, & le diſſeiſor ad iſſue & morust de tiel eſtate ſeiſie, ore les tenements diſcend ont al' iſſue del diſſeiſor per courſe de la ley come heire a luy: Et pur ceo que la ley mitte les terres ou tenements ſur iſſue per force del diſcent, iſſint que l'iſſue vient a les tenements per courſe de ley, & nemy per ſon fait demeſne, lentrie le diſſeiſee eſt tolle, & il eſt mis de ſuer un briefe Dentre ſur diſſeiſin envers le heire le Diſſeiſor, de recoverer la terre.

dieth of ſuch eſtate ſeiſed, now the Lands diſcend to the iſſue of the diſſeiſor by courſe of Law, as heire unto him. And becauſe the law caſt the lands or Tenements upon the iſſue by force of the diſcent; ſo as the iſſue cometh to the Lands by courſe of Law, and not by his own Act, the entry of the Diſſeiſee is taken away, and he is put to ſue a Writ of *Entrie ſur diſſeiſin* againſt the heir of the Diſſeiſor, to recover the Land.

(*) Bract.lib.4.fol.162. & 209. gritton fol.115. Flora lib.4.cap.2.

Nota, In ancient time (*) if the Diſſeiſor had been in long poſſeſſion, the Diſſeiſee could not have entred upon him. (a) Likewiſe the Diſſeiſee could not have entred upon the Feoffee of the Diſſeiſor, if he had continued a year and a day in quiet poſſeſſion. But the law is changed in both theſe Caſes; only the dying ſeiſed being an Act in law, doth hold at this day; and this ſeemeth to be very ancient, for this was the law before the Conqueſt. (b) Porro autem quam maritus ſine lite controverſia ſedem incoluerit, eam conjux & proles ſine controverſia poſſidento, ſi qua in illum lis fuerit illata viventem, eam hæredes ad ſe (perinde atque is vivus) accipiunto.

(a) 50.E.3.21.1.Aſſ.13. 20.3.Aſſ.432. 2.Aſſ.15.29.Aſſ.5.14. 26.Aſſ.12.21.Aſſ.28. 43.Aſſ.17.

(b) Lamb.explicar.fol. 120.70.

And one of the reaſons of this ancient Law may be, that the heir cannot ſuddenly by entendment of law, know the true ſtate of his Title. And for that many advantages follow the poſſeſſion and Tenant, the law taketh away the entry of him that would not enter upon the Anceſtor, who is preſumed to know his Title, and driveth him to his Action againſt the Heir that may be ignorant thereof.

11.H.7.12.40.E.3.24. ¶ *Et morust de tiel eſtate ſeiſie.* To a Diſcent that taketh away an entry, a dying ſeiſed is neceſſary, as here it appeareth; but a man to other purpoſes may have lands, by diſcent, though his Anceſtor dyed not ſeiſed, as hath been ſaid before.

33.E.3.gard. 162. 6.H.4.4.39.E.3.36. 15.E.4.14. F.N.B.143.q. 7.H.4.12.5.2.Aſſiſ.9. 21.E.3.2. ¶ *Des terres ou tenements.* That is, of ſuch tenements as be corporal, and do lie in livery, and not of Inheritances, which lie in grant, as Advowſons, Rents, Commons in groſs, and ſuch like, which be Inheritances incorporeal, and yet are included within this word (tenements.) For Diſcents of them do not put him that right hath to an Action; and the reaſon of this diverſity is, for that houſes ſerve for the habitation of men; and lands, to be manured for their ſuſtenance; and therefore the Heir after a Diſcent ſhall not be moleſted or diſturbed in them by entry.

¶ *Eſt per un auter diſſeiſie.* The like law is of an abatement or intruſion, and of their Feoffees or Donees, &c.

Upon the words of Littleton a diverſity may be collected, that if a recovery be had by A. againſt

againſt B. and before execution B. die ſeiſed, this Diſcent ſhall not take away the entry of the Recoverer. But if after execution B. had diſſeiſed the Recoverer, and died ſeiſed, this diſcent ſhall take away the entry of the Recoverer within the expreſſe words of Littleton: and ſo it is in caſe of a Fine. 33.E.3.tit.Entrie con. 51.45.E.3. quare Imp. 139. 27.E.3.88.9.H.6.49. 21.H.6.17.3.E.4.6. 12.E.4.19.3.H.7.3. 6.E.4.11 7.H.7.15. 5.H.7.31.10.H.7.5.b.

(n) A recovery is had againſt Tenant for life, where the remainder is over in fee. Tenant for life dieth, he in remainder entreth before execution, and dieth ſeiſed, the Entry of the Recoverer is lawful, becauſe he is privie in eſtate, otherwiſe it is if the Diſcent had been after execution. (n)5.H.7.2.

A. Recovereth an advowſon againſt B. in a Writ of Right, and hath judgement: then the Incumbent dieth, C. by uſurpation preſents to the Church, and his Clerk is admitted and inſtituted, B. dieth, A. is put out of poſſeſſion, and the heire of B. is not ſo bound by the judgement either in blood or eſtate, but that he ſhall preſent. (o)B. leaſes a fine to A. of an advowſon to him and his heires, after the Church becomes void, B. preſents by uſurpation, and his Clerke is admitted and inſtituted, this ſhall put A. the Conuſee out of poſſeſſion. And the reaſon of theſe two caſes is, for that at the Common Law every preſentation to a Church did put the rightful Patron out of poſſeſſion, and did put him to his Writ of Right, whether the preſentation were by Title or without; and therefore albeit the uſurpation were in both the ſaid caſes before execution, yet it put the righeful Patron out of poſſeſſion. So note a diverſity between a recovery of Land, and of an Advowſon. 45.E.3.quare imp. 139. (o) 8.E.2.quare imp. 166.

¶ *Lentrie ſe diſſeiſee eſt tolle.* Here is one of the priviledges which the Law giveth to the heire by diſcent of Houſes and Lands.

(p)At the Common Law if the Diſſeiſor, Abator, or Intruder, had died ſeiſed ſome after the wrong done, the Diſſeiſee and his heires had been barred of his and their entry without any time limited by Law; but now by the Statute(q) made ſince Littleton wrote, it is enacted, that except ſuch diſſeiſor hath been in the peaceable poſſeſſion of ſuch Mannors, Lands, &c. whereſore he ſhall die ſeiſed by the ſpace of five years next after ſuch diſſeiſin &c. without entry or continual claime, &c. that there ſuch dying ſeiſed, &c. ſhall not take away the entry of ſuch perſon or perſons, &c. But after the five years the Diſſeiſee muſt take ſuch continue allclaime, &c. as our Author hath taught us, the learning whereof is neceſſary to be known. And it is ſaid that Abators and intruders are out of this Statute, becauſe the Statute is penal, and extends onely to a Diſſeiſor, and that was the moſt common miſchiefe. Et ad ea quæ frequentius accidunt jura adaptantur. (p)Leſtat de 32.H.8. cap. 33. Vid. ſect. 422-426. (q)37.H.6.2. Pl.Com.47. in Wimbeſhes caſe.

The Feoffee of a Diſſeiſor is out of the ſaid Statute, and remains as at the Common Law. But to a Diſſeiſor the Statute is taken favourably for advancement of the ancient right: for whether the diſſeiſin be without force, or with force, it is within the Statute. And albeit the Statute ſpeak of him that at the time of ſuch Diſcent had title of entrie, &c. or his heires, yet the ſucceſſors of bodies politique or Corporate, ſo you hold your ſelfe to a Diſſeiſin, are within the remedy of this Statute; for the Statute extendeth clearly to the Predeceſſor being diſſeiſed; and conſequently without naming of his Succeſſor extendeth to him; for he is the perſon that at the time of ſuch Diſcent had title of entry. Mich.4 & 5.Eliz. Dyer 219.acc.

But if a man make a leaſe for life, and the leſſee for life is diſſeiſed, and the Diſſeiſor die ſeiſed within five yeers, the leſſee for life may enter; but if he die before he doth enter, it is ſaid that the entry of him in the Reverſion is not lawful, becauſe his entry was not lawful upon the Diſſeiſor at the time of the Diſcent, as the Statute ſpeaketh. But if leſſee for life had died firſt, and then the Diſſeiſor had died ſeiſed, he in the reverſion had been within the remedy of the Statute; becauſe he had title of entry at the time of the diſcent, as the Statute ſpeaketh, and ſo within the expreſſe letter of the Statute; albeit the diſſeiſin was not immediate to him; and the like is to be ſaid of a remainder, &c. Vid.Pl.Com.47. ubi ſupra.

¶ *Brieſe dentrie ſur diſſeiſin.* Breve de ingreſſu ſuper diſſeiſinam. Of this Writ ſomewhat ſhall be ſaid in the next Section.

## *Sect.* 386.

¶ Diſſeiſes tail ꝙ tollent entries ſont, ſicome home eſt diſſeiſie, ꝙ Diſcents in Taile which take away entries are, as if a man be diſſeiſed, and the

¶ *Moruſt de tiel eſtate ſeiſie,* If a Diſſeiſor make a gift in taile, and the Donee diſcontinueth in fee, ꝙ diſſeiſee the

the Diſcontinuee, and dyeth ſeiſed, this diſcent ſhall not take away the entry of the Diſſeiſee; for the diſcent of the Fee ſimple is baniſhed and gone by the Remitter; and albeit the iſſue be in by force of the eſtate taile, yet the Donee died not ſeiſed of that eſtate, and of neceſſity there muſt be a dying ſeiſed, as hath been ſaid, which is a point worthy of obſervation, and implieth many things.

le diſſeiſor dona, m̃ la terre a un auter en l' taile, & l' tenant en le tail' ad iſſue, & moruſt de tiel eſtate ſeiſie, & iſſue enter, en teſt caſe lentre l' diſſeiſee eſt tolle, & il eſt mis de ſuer envers iſſue de l' tenant ẽ taile un briefe Dentre ſur diſſeiſin.

diſſeiſor giveth the ſame land to another in taile, and the tenant in taile hath iſſue and dieth of ſuch Eſtate ſeiſed, and the iſſue enter; in this caſe the entrie of the diſſeiſee is taken away, and he is put to ſue againſt the iſſue of the tenant in taile a writ of *Entrie ſur diſſeiſin.*

¶ *En ceſt caſe lentrie le diſſeiſee eſt tolle.*

9.H.7.24. If a diſſeiſor make a gift in taile, and the donee hath iſſue and dieth ſeiſed, now is the entry of the Diſſeiſee taken away; but if the iſſue die without iſſue, ſo as the eſtate taile which deſcended is ſpent; the entrie of the Diſſeiſee is revived, and he may enter upon him in the reverſion or remainder.

13.H.4.8.9. 33.H.6.5.b. per Moyle. 34.H.6.11.a. per Curiam. Vid. Sect.395. So if there be Grandfather, Father and Son, and the ſon diſſeiſeth one, and infeoffeth the Grandfather who dieth ſeiſed, and the land diſcendeth to the Father, now is the entry of the diſſeiſee taken away, but if the Father dieth ſeiſed, and the land diſcendeth to the Son, now is the entry of the Diſſeiſee revived, and he may enter upon the Son, who ſhall take no advantage of the diſcent, becauſe he did the wrong unto the Diſſeiſee. But in the caſe abovеſaid, ſome have ſaid, that where after ſuch diſcent to the Father, he made a Leaſe to the Son, for terme of another mans life upon whom the Diſſeiſee entred, that the Sonne brought an Aſſiſe and recovered, and the reaſon that hath been yeelded is, for that the Sonne had not the Fee ſimple which he gained by diſſeiſin, but is a purchaſer of the Freehold onely from the Father, and the diſcent remains not purged. Contrary it were, as it is there ſaid, if the Son were heir to the diſcent. But the bookes cited there in Fitzherb. tit. Title Placit. 6. doth not warrant that caſe; and I hold the Law to the Contrary, viz. that the Diſſeiſee in that caſe ſhall enter upon the Diſſeiſor, as well as if the Father had conveyed the whole Fee ſimple to the Son; for in that caſe alſo the diſcent to the Father is not purged. If a diſſeiſor make a leaſe to an Infant for life, and he is diſſeiſed, and a diſcent caſt, the Infant enters, the entry of the Diſſeiſee is lawful upon him. More ſhall be ſaid of the like matter, in this Chapter, hereafter, in his proper place, Sect. 393.395.

13.E.3. Br.tit.Entrie Cong.127.

¶ *Briefe dentrie ſur diſſeiſin.* Breve de ingreſſu ſuper diſſeiſinam.

19.H.6.56.9 H.5.9. This writ lieth onely upon a diſſeiſin made to the Demandant or to ſome of his anceſtors, and of this Writ there be four kinds: The firſt is a Writ that lieth for the Diſſeiſee againſt the Diſſeiſor upon a diſſeiſin done by himſelf, and this is called a Writ of entry in the nature of an Aſſiſe. The ſecond is a writ of Entrie ſur diſſeiſin en le Per, whereof Littleton here ſpeaketh, for the heir by diſcent is in the Per by his Anceſtor: ſo it is if the diſſeiſor maketh a feoffment in fee, a gift in taile, or a leaſe for life, for they are in the Per by the Diſſeiſor. (*) The third is a Writ of Entry Sur diſſeiſin en le Per & Cui, as where A. being the Feoffee of D. the Diſſeiſor maketh a feoffment over to B. there the diſſeiſee ſhall have a Writ of entry Sur diſſeiſin of Lands &c. in which B. had no entry but by A. to whom D. demiſed the ſame, who unjuſtly and without judgment diſſeiſed the Demandant. Theſe are called Gradus, Degrees, which are to be obſerved, or elſe the Writ is abatable, for Sicut natura non facit ſaltum, ita nec lex.

Bracton lib.5. fo.219.b. & 318. Brit. fol.264,265 Fleta lib.5.cap 35. 5.E 3.216. (*)22.E.3.b.7. E.3.25. F.N.B.192.

The fourth is a Writ of Entrie ſur diſſeiſin in le poſt, which lieth when after a diſſeiſin, the land is removed from hand to hand beyond the degrees; and it is called in le poſt, becauſe the words of the Writ be Poſt diſſeiſinam, quam D. injuſte, &c. fecit, &c. the formes of theſe Writs you ſhall read in the Regiſter and F.N.B. and therefore it were needleſſe to recite them here. So then a degree is of two ſorts, either by act in law, whereof Littleton here putteth an example of a diſcent, or by an act of the party by lawful conveyance, as is aforeſaid. But it is to be underſtood, that at the Common law, if the lands were conveyed out of the degrees, the Demandant was driven to his writ of right, in reſpect of ſuch long poſſeſſion in ſo many mens hands, which the law doth ever reſpect and favour. And therefore by the Statute (a) of Marlebridg, the Writ of Entrie in le poſt given, Proviſum eſt etiam, quod

14.H.4.40.

(a) Marlebr.cap.29.24. E.3.70.

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ſi alienationes illæ de quibus breve de ingreſſu dari conſuevit, per tot gradus fiant, per quot breve illud in forma prius uſitata fieri non poſſit, habeant conquerentes breve ad recuperandam ſeiſinam ſuam ſine mentione graduum, ad cujuſcunque manus per hujuſmodi alienationes res illa devenerit, per breve originale, & per commune conſilium domini regis inde providendum, &c.

Now it is neceſſary to be known, what doth make a degree. Firſt, no eſtate gained by wrong doth make a degree, and therefore neither Abatement, Intruſion, or Diſſeiſin upon Diſſeiſin, doth make a degree. Neither doth every change by lawful title work a degree, as if a Biſhop or an Abbot, or the like, diſſeiſe one and die, where his ſucceſſor is in by lawful title; for though the perſon be altered, yet the right remaineth where it was, viz. in the Church, and both of them ſeiſed in the ſame right, viz. in the right of the Church, and therefore in that very caſe Bracton demands the queſtion. An faciunt gradum in Abbatem, ſicut de hærede in hæredem? Et videtur quod non magis quam in computatione diſcenſus, quia tales alternatur perſona, non propter hoc alternatur dignitas, ſed ſemper manet. And herewith agreeth (c) Fleta.

Bracton ubi ſupra. Britton ubi ſupra. Fleta ubi ſupra. 4.*E.*2.bre.790. 21.*H.*6.8.

(b) Bract.lib.4.fol. 321. 5.*E.*3.38. 5.*E.*2.entrie 66. 11.*H.*4.83.

(c) Fleta lib.5. cap.34.

Alſo an eſtate made to the King doth make no degree; and therefore if a Diſſeiſor of Lands inrolled confeſſe the land to the King, and the King by his Charter granteth it over, the Diſſeiſee cannot have a Writ of Entrie in le Per & Cui, but in le Poſt, for the Kings Charter is ſo high a matter of record, as it maketh no degree.

3.*E.*3.entrie 11. 22.*E.*3.7. F.N.*B.*191.k.

Alſo an eſtate of a Tenant by the courteſie, or of the Lord by Eſcheat, or of an execution of an uſe, by the Statute of 27.*H.*8. or by judgment, or recovery, or of any others that come in the Poſt, work no degree. (d) But a tenancie in dower by Aſſignement of the heir, doth work a degree, becauſe he is in by her husband, but Aſſignement of Dower by a Diſſeiſor worketh no degree, but is in the Poſt, as hereafter ſhall be ſaid in his proper place.

5.*E.*2.entrie 66. 7.*E.*3.360. (d)36.*H.*6.dower. 30.

When the degrees are paſt, ſo as a Writ of Entry in the Poſt doth lie, yet by event it may be brought within the degrees again; as if the Diſſeiſor infeoffe A. who infeoffes B. who infeoffes C. or if the Diſſeiſor die ſeiſed, and the land diſcend to A. and from him to C. now are the degrees paſt, & yet if C. infeoffe A. or B. now it is brought within the degrees again.

44.*E.*3.4.5.39. *E.*3.25. 5.*H.*7.6.3.*H.*6.38.

If the Diſſeiſor make a leaſe for life, the remainder in fee; Tenant for life dieth, he in the remainder is in the Per, becauſe he now claimeth immediately from the Diſſeiſee, and both theſe eſtates make but one degree.

50.*E.*3.27.

Note there be divers other Writs of Entry, beſides this Writ of Entry, Sur diſſeiſin, whereof Littleton here ſpeaks, as a Writ of Entry. Ad terminum qui præteriit, in caſu proviſo. in conſimili caſu, ad communem legem, ſine aſſenſu capituli, dum fuit infra ætatem, dum non fuit compos mentis, cui in vita, Sur cui in vita, Intruſion, Ceſſavit, and the like; and that which hath been ſaid of one, may be applied to all.

## *Sect.* 387.

ET nota que en tiels diſcents, que tollent entries, il covient que home moyſt ſeiſie en ſon demeſne come de fee, ou en ſon demeſne come de fee taile: Car un moyent ſeiſie pur terme de vie, ne pur terme dauter vie, ne unques tollent entre.

AND note that in ſuch Diſcents which take away entries, it behoveth that a man die ſeiſed in his demeſne as of fee, or in his demeſne as of fee taile; for a dying ſeiſed for term of life, or for term of another mans life, doth never take away an entry.

IF a diſſeiſor make a leaſe to a man and to his heires during the life of I.S. and the leſſee dieth, living I.S. this ſhall not take away the entry of the Diſſeiſee, becauſe he that died ſeiſed had but a freehold onely; and heires in that caſe were added to prevent the occupant, for the heire in that caſe ſhall not have his age as it was adjudged in (d) Lords caſe.

Dyer 8.El.2.255. 7.*H.*4.46.8.*H* 4.15. 17.*E.*3.48.12. *H.*4.42.

(d) Paſch.16.Eliz. in Communi Banco. 3.*E.*3.tit.Entr. *Cong.* 58.F.N.*B.*145.m.

But if he in the reverſion diſſeiſe his Tenant for life, and dieth ſeiſed, this diſcent ſhall take away the entry of the Tenant for life.

9.*H.*7.25.a.

So it is, if there be tenant for life, the remainder in taile, the remainder in fee, and Tenant in taile diſſeiſeth the Tenant for life and dieth ſeiſed, this ſhall take away the entry of the Tenant for life.

9.*H.*7.25.

But if the Kings Tenant for life be diſſeiſed, & the Diſſeiſor die ſeiſed, this diſcent ſhall not take away the entry of the leſſee for life, becauſe the Diſſeiſor had but a bare eſtate of Freehold during the life of the leſſee, and Littleton ſaith, that a diſcent of an eſtate for term of another mans life ſhall not take away an entry.

¶ *En ſon demeſne come de fee.* If an Infant be diſſeiſed, and the Diſſeiſor die ſeiſed,

Temps E.1.Reliefe.12. Dyer 14.Eliz.308. 40.E.3.39.b. (*)24.k.3.47.

ſeiſed, and after the infant cometh to a full age, and the Heire of the Diſſeiſor die before he entreth, albeit he died not ſeiſed of an actual ſeiſin, but of a ſeiſin in law, yet that dying ſeiſed ſhall take away the entry of the Diſſeiſee. * And yet in pleading the ſecond heire ſhall (as hath been ſaid) make himſelfe Heire to the Diſſeiſor, and that land ſhall not be recobered in value for the warranty made of other lands by the firſt heir; But though the firſt heir had but a ſeiſin in Law, yet he is within the words of Littleton, For he was ſeiſed and died ſeiſed in his demeſne as of Fee.

## *Sect.* 388.

¶ AND therefore if a Diſſeiſor make a Leaſe for yeers and die ſeiſed of the Reverſion, his diſcent ſhall take away the entry of the Diſſeiſee, becauſe he died ſeiſed of the Fee and Franktenement. Like law it is, if the land be extended upon a Statute, Judgement, or Recogniſance; and ſo it is in caſe of a Remainder.

But if he had made a leaſe for life, and die ſeiſed of the reverſion, this diſcent ſhall not take away the entry of the Diſſeiſee, for that though he had the Fee, yet he had not the Franktenement.

Vid.Sect.302.393. So it is of a Tenant in Taile, mutatis mutandis; and note, the Law doth ever give great reſpect to the Eſtate of Freehold, though it be but for terme of life.

¶ ITem un diſcent de reverſion, ou de Remainder, ne unques tollent entry: iſſint que en tiels taſes que tollent entries, perforce de diſcents, il covient que celuy que mozuſt ſeiſie ad Fee & Franktenement al temps d'ſon mozant, ou Fee taile & Franktenement al temps de ſon morant, ou autrement tiel diſcent ne tolle entre.

ALſo a Diſcent of a Reverſion, or of a remainder, doth not take away an entrie. So as in thoſe caſes which take away entries by force of Diſcents, it behoveth that he dyeth ſeiſed of Fee and Freehold at the time of his deceaſe, or of Fee taile and Freehold at the time of his death; or otherwiſe ſuch Diſcent doth not take away an Entrie.

If a Diſſeiſor make a leaſe for term of his own life, and dieth, this diſcent ſhall not take away the entry of the Diſſeiſee; for though the Fee and Franktenement diſcend to the heire of the Diſſeiſor, yet the Diſſeiſor died not ſeiſed of the Fee and Franktenement: and Littleton ſaith, That unleſſe he hath the Fee and Franktenement at the time of his deceaſe, ſuch diſcent ſhall not take away the entry.

## *Sect.* 398.

¶ BY this it appeareth that a Diſcent in the Collateral Line doth take away an entry, as well as in the lineal.

¶ *Moront ſeiſie* &c. Here (&c.) implyeth Fee ſimple, or Fee taile.

¶ ITem come eſt dit de Diſcents que diſcendont al iſſue de ceux que mozont ſeiſies, &c. Meſme la Ley eſt lou ils nont aſcun iſſue, mes les Tenements diſcendont al frere, ſoer, uncle, ou auter coſin de celuy que mozuſt ſeiſie.

ALſo as it is ſaid of Diſcents which diſcend to the iſſue of them which die ſeiſed, &c. the ſame Law is where they have no iſſue, but the Lands diſcend to the Brother, Siſter, Uncle, or other Couſin of him which dieth ſeiſed.

*Sect.*

## *Sect.* 390.

¶ Item ſi ſoit Seignior & tenant, & le Tenant ſoit diſſeiſie, & le diſſeiſor aliena a un auter en fee, & alienee debie ſans heire. & le Seignior enter come en ſon eſcheat: en ceſt caſe le Diſſeiſee poit enter ſur le Seignior, pur ceo que le Seignior ne vient a le Terre per diſcent, mes per voy deſcheat.

ALſo if there be Lord and Tenant, and the Tenant be diſſeiſed, and the Diſſeiſor alien to another in Fee, and the Alienee die without iſſue, and the Lord enter as in his Eſcheat: In this caſe the Diſſeiſee may enter upon the Lord, becauſe the Lord cometh not to the Land by Diſcent, but by way of Eſcheat.

¶ *Le Diſſeiſee poit enter ſur le Seignior*, &c. For albeit the alienee of the Diſſeiſor die ſeiſed, and the Lord by Eſcheat cometh to the Land by Act in Law, yet becauſe the Land diſcendeth not to him, the entrie of the Diſſeiſee in reſpect of the Eſcheat ſhall not be taken away. For a dying ſeiſed and a Diſcent, and not a dying ſeiſed and an Eſcheat, doth take away the entry: for (as hath been ſaid) the Diſcent is the worthier title. But in that caſe if the Lord by Eſcheat die ſeiſed, and the Land diſcend to his heire, that Diſcent ſhall take away the entry of the Diſſeiſee. So it is if the Diſſeiſor die ſeiſed, and the Heire of the Diſſeiſor dieth without heire, the 37.H.6.1.9.H.7.24.b.

Diſſeiſee cannot enter upon the Lord by Eſcheat. So as there is a diverſity as touching the Diſcent, when after a diſcent caſt, the Iſſue in taile dieth without Iſſue, and when after a Diſcent caſt, the Heire in Fee ſimple dieth without Heire, for he in the Reverſion, or Remainder upon a Eſtate taile claimeth in above the Eſtate taile, but the Lord by Eſcheat claimeth in under the Heire in Fee ſimple.

## *Sect.* 391.

¶ Item ſi home ſeiſie de certaine Terre en Fee, ou en Fee taile, ſur condition de render certaine rent, ou ſur auter condition, comẽt que tiel Tenant ſeiſie en fee, ou en fee taile, mozuſt ſeiſie, uncoze ſi le condition ſoit enfreint en lour dies, ou apres lour deceaſe, ceo ne tollera pas lentry del Feoffoz, ou del Donoz, ou de lour heires, pur ceo que le Tenancie

ALſo if a man be ſeiſed of certain Land in Fee, or in Fee taile, upon condition, to render certain rent, or upon other condition, albeit ſuch Tenant ſeiſed in Fee or in Fee Taile, dyeth ſeiſed, yet if the condition be broken in their lives, or after their deceaſe, this ſhall not take away the entry of the Feoffor or Donor, or of their heires, for that the Tenancie is char-

¶ Upon theſe two Sections is to be obſerved a diverſitie between a right, for the which the Law giveth a remedy by Action, and a title, for the which the Law giveth no remedy by Action, but by entry onely. For example. The Feoffor upon Condition in this caſe hath a right to the land, and therefore his entry may be taken away, becauſe he may recober his right by Action; but the Feoffor or Donor that hath but a Condition, his title of entry cannot be taken away by any Diſcent, becauſe he hath no remedy by Action to recober the land: and therefore if a Diſcent ſhould take away his entry, it ſhould barre him for ever. And the Law is all one, whether the Diſcent were before the condition broken, or after. 33.Aſſ.11.24.21.H.6. 17. 33.Aſſ.11.24.

Alſo

Brook.tit.Mortmaine 6. 47.E.3.11.21.E.3.17.

40.Aſſ.13.

Alſo he that hath a title to enter upon a Mortmain, ſhall not be barred by a diſcent, becauſe then he ſhould be without all remedy. And ſo it is in caſe where a woman hath a title to enter, *Cauſa matrimonii prælocuti*, no diſcent ſhall take away her entry, becauſe ſhe hath but a title, and no remedy by Action.

If a man be ſeiſed of Lands in fee, and by his laſt will in writing deviſeth the ſame to another in fee, and dieth, after whoſe deceaſe the Freehold in Law is caſt upon the deviſee, and the heire before any entry made by the Deviſee, entreth, and dieth ſeiſed, this Diſcent ſhall not take away the entry of the Deviſee; for if the Diſcent which is an act in Law, ſhould take away his entry, the Law ſhould barre him of his right, and leave him utterly without remedy. And ſo it is of him that entreth for conſent to a raviſhment, and ſo it was reſolved in the caſe of Martin Trotte of London(n) Paſchæ 32. Eliz. in Com. Banco. And accordingly was the opinion of the Court of Common pleas, (o) Paſch. 1. Jac. Reg. To this may be added as a like caſe, the Kings Patentee before he enter, &c. Another reaſon wherefore a diſcent ſhall not take away the entry of him that hath a title to enter by force of a condition, &c. is, for that the condition remaines in the ſame eſſence that it was in at the time of the creation of it, and cannot be deveſted or put out of poſſeſſion as lands and tenements may.

(n) Paſch.32.Eliz.in Communi Banco. 7.R.2.Scir.Fac.3. 41. E.3.14. per Pinchden.

(o) Paſch. 1.Jac.Regis in Communi Banco.

## *Sect.* 392.

¶ Item ſi tiel Tenant ſur condit ſoit diſſeiſie & le diſſeiſor devie ent ſeiſie, & la terre deſcendiſt al heir le diſſeiſor, ore le entry le tenant ſur condition, que fuiſt diſſeiſie eſt toll: Mes uncore ſi le condition ſoit enfreint, donque poit le Feoffor ou le Donor que fierent eſtate ſur condition, ou lour heires enter, Cauſa qua ſupra.

Alſo if ſuch Tenant upon Condition be diſſeiſed, and the Diſſeiſor die thereof ſeiſed, and the land deſcend to the Heire of the Diſſeiſor, now the entry of the Tenant upon Condition, who was diſſeiſed, is taken away. Yet if the Condition be broken, the Feoffor or the Donor which made the eſtate upon Condition, or their heires, may enter, *Cauſa qua ſupra.*

## *Sect.* 393.

¶ *Devie ſeiſie*, &c. viz. in fee ſimple, or in fee taile.

¶ *Et ſon heire enter* &c. So as he hath an actual fee ſimple.

¶ *De la* 3. *part de les tenements*, &c. id eſt, in ſeverality.

By this Section it appeareth, that an entry being taken away by the Diſcent, is revived by the endowment, albeit the Tenant in Dower ſhall have it but for her life. And the cauſe is, for that although the heire entred, yet

¶ Item ſi un deſſeiſor devie ſeiſie, &c. & ſon heire enter, &c. le quel endowa la feme le diſſeiſor d la tierce part d les tenements, &c. En ceſt cas quant a ceſt tierce part que eſt aſſigne a la feme en dower maintenant apres ceo que la feme enter, ad le

Alſo if a Diſſeiſee die ſeiſed, &c. and his heire enter, &c. who endowes the wife of the Diſſeiſor of the third part of the Land, &c. In this caſe as to this part which is aſſigned to the wife in Dower, preſently after the wife entreth and hath the poſſeſſion of the ſame third

poſ-

poſſeſſion de meſme la tierce part, le diſſeiſee poit loyalment enter ſur la poſſeſſion la feme en meſme la tierce part. Et la cauſe eſt, pur ceo que quant la feme ad ſon dower, el ſerra adjudge eins immediate per ſon baron, & nemy per l' heire, & iſſint quant a le franktenement de meſme la tierce part, le Diſcent eſt defeate. Et iſſint poies veir, que devant le endowſmt le diſſeiſſe ne poit enter en alcun part, &c. & apres len dowment il poit enter ſur la fee, &c. mes uncore il ne poit enter ſur les auters deux parts que l' heire le Diſſeiſor ad p le Diſcent.

part, the diſſeiſee may lawfully enter upon the poſſeſſion of the Wife into the ſame third part. And the reaſon is, for that when the Wife hath her dower, ſhe ſhall be adjudged in immediately by her husband and not by the Heire. And ſo as to the Freehold of the ſame third part, the Diſcent is defeated. And ſo you may ſee that before the endowment the Diſſeiſee could not enter into any part, &c. and after the endowment he may enter upon the wife, &c. but yet he cannot enter upon the other two parts which the Heire of the Diſſeiſor hath by the Diſcent.

when the Wife is endowed ſhe ſhall not be in by the heir, (a) but immediately by her Husband being the diſſeiſor, who is in for her life by a Title Paramount the dying ſeiſed and Diſcent; and therefore in judgment of law, the diſcent as to the Freehold, and the poſſeſſion which the heire hath, is taken away by the endowment: for that the Law adjudgeth no mean leiſin between the Husband and the Wife. (a) 3. E. 2. Entry 75. 19. E. 2. Dower 171. 5. E. 2. Entr. 66. 24. E. 3. 32. 40. 38. Aſſ. Pl. 26. 43. E. 3. 32. 45. E. 3. 9. b. 11. 4. 11. 7. H. 5. 3. 10. E. 3. 27. 28. 36. H. 6. Dower 20.

If there be Lord, Meſne and Tenant, the Meſne doth grant to the Tenant to acquit him againſt the Lord and his Heirs; the Lord dies, his Wife hath the Seigniory aſſigned to her for her dower, and diſtreines the Tenant; albeit the grant was to acquit him againſt the Lord and his Heirs onely; yet becauſe ſhe continued the eſtate of her husband, and the reverſion remained in the heir, this Grant of acquittal did extend to the wife; which is a notable caſe. 31. E. 1. Meſne 55.

If after the dying ſeiſed of the Diſſeiſor, the Diſſeiſee abate, againſt whom the wife of the Diſſeiſor recover by confeſſion in a writ of dower, in that caſe, though the Diſcent be avoided, as Littleton here ſaith, yet the Diſſeiſee ſhall not enter upon the Tenant in dower, becauſe the recovery was againſt himſelfe; but if he had aſſigned Dower to her in pais, ſome ſay he ſhould enter upon her.

A man makes a gift in taile, reſerving twenty ſhillings rent, and dies, the Donee takes Wife and dieth without Iſſue; the Heir of the Donor entreth and endoweth the Wife; ſhe is ſo in of the eſtate of her Husband, that albeit the eſtate taile be ſpent, and the rent reſerved thereupon determined, yet after ſhe be endowed, ſhe ſhall be attendant to the heire in reſpect of the ſaid rent. And ſo it is of Lord and Tenant, the Wife that is endowed ſhall be attendant for the due Services, but if any Services be encroached, albeit that incroachment ſhall bind the heir, yet the wife ſhall be contributary, but for the ſervices of right due. 10. E. 3. 26.

¶ *Iſſint poies vierque devant len dowment le diſſeiſee ne poit enter, & apres lendowmen' il poit enter*, &c. The like hath been ſaid before in this Chapter. Sect. 386. where the entry of the Diſſeiſee may be taken away for a time, and by matter ex poſt facto revived again.

Note, albeit the Diſſeiſor after a Diſcent taketh to him but an eſtate for life, yet when the Diſſeiſee doth enter upon him, he ſhall thereby deveſt the reverſion, for the eſtate of Freehold, ſo that whereupon a Præcipe doth lie, and therefore the entry of the Diſſeiſee, is as availeable in Law, as if he had recovered it in a Præcipe. And ſo it is, if a Diſſeiſor make a leaſe for life, and grant the reverſion to the King, the entry of the Diſſeiſee upon his Tenant for life ſhall deveſt the Reverſion out of the King in the ſame manner, as if he Diſſeiſee had recovered the lands againſt the Tenant for life in a Præcipe. Vid. Sect. 302. 388. 25. E. 3. 48. Pl. Com. 553.

## *Sect.* 394.

¶ *EN ceſt caſe jeo poy enter ur le poſſeſſion liſſue, &c.*

Vid.9.H.7.24.& 37. H. 6.1.

For here was but a Diſcent of a Reverſion at the time of the dying ſeiſed; for the eſtate of the Tenant by the courteſie had commencement by the having of iſſue, and is conſummate by the death of the wife, ſo as the fee & franktenement did not after the deceaſe of the Wife deſcend to the Heire. and albeit the Tenant by the Courteſie dieth afterwards, and that the franktenement is caſt upon the Heir, ſo as now he hath the Fee and franktenement by Diſcent, yet becauſe the Heire came not to the Fee and franktenement at once, immediately after the deceaſe of the wife, ſuch a mediate Diſcent ſhall not take away the entry of the Diſſeiſee. On the other ſide, an immediate diſcent may take away an entry for a time, and mediately may be avoided by matter ex poſt facto, as hath been ſaid. But if a dying ſeiſed taketh not away the entry of him that right hath at the time of the Diſcent, it ſhall not by any matter ex poſt facto take away his entry.

See before the Chapter of Homage.

¶ Item, ſi un feme ſoit ſeiſie de terre en Fee, dont jeo aye droit & title dentre, ſi la feme prent baron, & ont iſſue enter eux, & puis la feme debie ſeiſie, & apres le baron debie, & iſſue enter, &c. en ceſt caſe jeo poy enter ſur le poſſ. iſſue, pur ceo que iſſue ne vient a les tenements immediate per Diſcent apres la mort la mere &c. eins per le mort del pier.

¶ Contrarium tenetur P.9.Hen.7. per tout le Court, & M. 37.H.6. ¶.

ALſo if a woman be ſeiſed of land in fee, whereof I have right and title to enter, if the woman take husband and have iſſue between them, and after the wife die ſeiſed, and after the husband die, and the iſſue enter, &c. In this caſe I may enter upon the poſſeſſion of the iſſue, for that the iſſue comes not to the Lands immediately by Diſcent after the death of the mother &c. but by the death of the father.

¶ *Contrarium tenetur P.9.H.7.per tout le court, & M.37.H.6.* ¶

If a Diſſeiſor die without heire, his Wife privement enſeint with an iſſue, and after the iſſue is borne who entreth into the Land, he hath the Land by Diſcent, and yet thereby the entry of the Diſſeiſee ſhall not be taken away, becauſe as Littleton here ſaith, the iſſue commeth not to the Lands immediately by Diſcent after the deceaſe of the Father.

And ſo it is if a Diſſeiſor make a gift in taile, the remainder in fee, and the Donee dieth without iſſue leaving his wife privement enſeint with a Sonne, and he in the remainder enters, and after the Son is borne, who entreth into the Land, this Diſcent ſhall not take away the entry of the Diſſeiſee, Cauſa qua ſupra.

¶ *Contrarium tenetur*, &c. This is an addition, and therefore to be paſſed over. And at this day this caſe of Littleton is holden for clear Law.

## *Sect.* 395.

¶ Item, ſi un diſſeiſor enfeoffa ſon pier en fee, & l'pier morust de tiel eſtate ſeiſie, p q les tents diſcendont al' diſſeiſor come fits & heire, &c. en ceſt caſe l' diſſeiſee bien poit enter ſur le diſſeiſor, nient obſtant le Diſcent.

ALſo if a Diſſeiſor infeoffe his father in fee, and the father die ſeiſed of ſuch eſtate, by which the land diſcend to the Diſſeiſor, as ſonne and heire, &c. In this caſe the Diſſeiſee may well enter upon the Diſſeiſor, notwithſtanding the pur

pur ceo que quant al disseisin, le disseisor serra adjudge eins forsque come disseisor, nient obstant le discent, Quia particeps criminis.

Discent for that as to the Disseisin, the Disseisor shall be adjudged in but as a Disseisor, notwithstanding the Discent, *Quia particeps criminis.*

¶ Of this sufficient hath been said before in this Chapter, it is true, that albeit a Discent be cast, and the entry of the Disseisee taken away, yet if the Disseisor cometh to the land again, either by discent, or purchase of any estate or freehold, which is implyed in the (&c.) the Disseisee may enter upon him, or have his assise against him, as if no discent or mean conveyance had been, Quia particeps criminis. Sect. 386. And regularly 15.E.4.23.2.11.E.4.2. 18.E.4 25.2.33.H.6.5.B 34.H.6 11.12 H.8.9. 24.H.8.3.9.18.H.8.5. 5 H.7.19.Ass.54. 39 E.3.25,26.

## *Sect.* 396, 397.

¶ Item si home seisie de certaine terr̃ en fee ad issue deux fits, & mourust seisie, & le puisne fits entra p abatement en la terre, quel ad issue, & de ceo mourust seisie, & les tenemẽts discendont al issue, & l'issue entra en la terre, en ceo case le fits eigne, ou son heire, poit enter p la ley sur lissue del fits puisne, nient contrestiant le discent, pur ceo que quant le fits puisne abatit ẽ la terr̃ apres l'mort son pier devant alcun entrie per le fits eign fait, la ley intendra que il entra enclaymant come heire a son pier, & pur ceo q̃ leigne fits clayma per mesme le title, cestascavoir, come heire a son pier, il & ses heires poient enter sur lissue de puisne fits, nient obstant le discent, &c. pur ceo que ils clayment per mesme le title.

Also if a man seised of certain land in fee have issue two sons, and die seised, and the younger son enter by abatement into the land, and hath issue, and dyeth seised thereof, and the Land discend to his issue, and the issue enters into the Lands; in this case the eldest sonne or his Heir may enter by the Law upon the issue of the younger son notwithstanding the Discent, because that when the younger son abated into the land after the death of his father, before any entry made by the eldest sonne, the law intend that hee entred claiming as heir to his father. And for that the eldest sonne claimes by the same title, that is to say, as Heir to his Father, he and his Heirs may enter upon the issue of the younger son, notwithstanding the dis-

¶ *En ceste case le fits eigne*, &c. *poit entrer sur lissue del fitz puisne*, &c.

And the reason hereof is, for that the law intendeth the youngest son entred claiming; the Land as Heir to his Father; and because the eldest Sonne claimeth also by the same title, viz. as Heir to his Father, therefore he and his heirs may enter upon the second Sonne and his Heirs, in respect of the privity of the blood betwen them, and of the same claim by one title, albeit the youngest Son gained a fee simple by his entry; for Littleton here calleth it an abatement, which proveth the gaining of a fee simple.

And it is to be observed, that, Assisa mortis antecessoris non tenet inter conjunctas personas sicut fratres & sorores, &c. For these are privy in blood; but it lieth against strangers, & then damages are to be recovered against a stranger, but not against his brother. Bract.lib.4.fo.261. 282,283. Britton.fol. 180,181. Fleta lib.5.cap.1,2,&c. 20.E.3.Darr.present.13 12.H.3.Mord.pl.ultim. 13.E.1.Mord 47. 29.Ass.11.F.N.B.196.B

Lands were given to the Husband and Wife, and to the Heirs of their two bodies; they had issue a Daughter, the wife died, the Husband had issue by another Wife four Sons and died, the eldest Son abated Pasch.3.E.3.Coram Rege Kanc. in Thesau.

abated and dyed ſeiſed, this Diſcent did take away the Entrie of the Daughters, becauſe they claimed not by one title. And in ancient Books an eldeſt ſonne is called Hæres propinquus, and the younger ſonne Hæres remotus. And albeit the eldeſt Sonne hath iſſue and dieth, and that after his deceaſe the youngeſt ſonne or his heir entreth, and many diſcents be caſt in his line, yet may the heirs of the eldeſt Sonne enter in reſpect of the priority of the blood, and of the ſame claim by one title; but if the youngeſt Son make a Feoffment in fee, and the Feoffee die ſeiſed, that Diſcent ſhall take away the entry of the eldeſt, in reſpect that the priority of the blood faileth. And admit that the youngeſt ſon be of the half blood to his brother, yet he is of the whole blood to his father; and therefore if he entreth by abatement, and dieth ſeiſed, it ſhall not bar his elder brother of his entry. But if the eldeſt ſon entreth, and gaineth an actual poſſeſſion and ſeiſin, then the entry of the youngeſt is a diſſeiſin. And then a dying ſeiſed ſhall take away the entry of the eldeſt, for Poſſeſſio terræ muſt be Vacua when the youngeſt Son enters by abatement, as Bracton ſaith, becauſe he hath more colour in that caſe to claim, as heir to his father, who laſt was actually ſeiſed: Therefore if after the deceaſe of the father, an eſtranger doth firſt enter and abate, upon whom the youngeſt Son entreth and diſſeiſe him and die ſeiſed; this Diſcent ſhall bind the eldeſt, for he entred by diſſeiſin, and not by abatement.

8.E.2.Aſſ.380.
40.E.3.24.b.29. Aſſ.24.

Vid. Brook. tit. Entry 29.

If a man be ſeiſed of Lands of the nature of

mont per un meſme title. Et en meſme le manner il ſerra, ſi ſueront pluſors diſcents de un iſſue a un auter iſſue del puiſne fits.

ſcent, *&c.* becauſe they claim by the ſame title. And in the ſame manner it ſhall be, if there were more diſcents from one iſſue to another iſſue of the younger ſon.

## *Sect.* 397.

MEs en tiel caſe, ſi le pier fuit ſeiſie de certaine terres en fee, & ad iſſue deux fits & devie, & leigne fits enter, & eſt ſeiſie, *&c.* & puis le puiſne frere luy diſſeiſit, p̄ ql diſſeiſin il eſt ſeiſie en fee, & ad iſſue, & de tiel eſtat̄ mozuit ſeiſie donques leigne frere ne poit entrer, mes eſt mis a ſon briefe Dentre ſur diſſeiſin, *&c.* de recoverer la terre. Et la cauſe eſt, q̄ ceo que le puiſne frere vient a les tenements p̄ tozt̄ious diſſeiſin fait a ſon eigne frere, & per eel tozt la Ley ne poit entender que il claim come heire a ſon pier, nient pluis que un eſtrange perſon que uſt diſſeiſie leigne frere q̄ navoit aſcun title, *&c.* Et iſſint poyes veier la diverſity, lou le puiſne frere enter apres le mozt le pier devant aſcun entrie fait per leigne frere en tiel cas, & ou leigne

BUt in this caſe if the Father were ſeiſed of certain lands in Fee, and hath iſſue two ſons and die, and the eldeſt ſon enter and is ſeiſed, &c. & after the younger brother diſſeiſeth him, by which diſſeiſin he is ſeiſed in fee, and hath iſſue, and of this eſtate dieth ſeiſed, then the elder brother cannot enter, but is put to his Writ of *Entrie ſur diſſeiſin*, &c. to recover the land. And the cauſe is, for that the youngeſt brother commeth to the lands by wrongfull diſſeiſin done to his elder brother; and for this wrong the Law cannot intend that he claimeth as Heir to his father, no more than if a ſtranger had diſſeiſed the elder brother which had no title, *&c.* And ſo you may ſee the diverſity where the younger brother entreth after the death of the father, before any entry made by the elder brother in this

frere

frere enter apres la moꝛt ſon pier, & puis eſt diſſeiſe & le puiſne frere, lou le puiſne frere puis moꝛust ſeiſie.

case, and where the elder brother enters after the death of his father, and after is diſſeiſed by the younger brother, where the younger after dieth ſeiſed.

Burgh English, and hath iſſue two ſons, and die, and the eldeſt ſon before any entry made by the youngeſt, entereth into the Land by abatement, and dyeth ſeiſed; this ſhall not take away the Entry of the youngeſt Brother, *Et ſic de ſimilibus.* And theſe and the like caſes are all within the reaſon and

rule of our Author. And where our Author ſpeaketh only of an abatement, ſo it is not an intruſion; For if the Father make a leaſe for life, and hath iſſue two ſons and dyeth, and the Tenant for life dieth, and the youngeſt ſon intrude, and die ſeiſed, this Diſcent ſhall not take away the entry of the eldeſt. But if the Father had made a leaſe for years, it had been otherwiſe, for that the poſſeſſion of the leſſee for years maketh an actual Freehold in the eldeſt ſon. And it is to be obſerved, that the reaſon of Littleton in this caſe (for that both the brethren hold by one title) holdeth alſo in many other caſes.

If two Coparceners make partition to preſent by turn, and one of them uſurp in the turn of the other, this uſurpation ſhall not put the other out of poſſeſſion, becauſe they claim by one title. 22.E.4.4.

If two Coparceners be, and they ſeveral preſent to the Ordinary, yet the Church is not litigious, becauſe they claim all by one title. Doct. & Stud. cap. 30. fol. 117.

If upon a Writ of Diem clauſit extremum, the youngeſt ſon be found heir, the eldeſt ſon had no remedy by the Common law, becauſe they claimed by one title; but otherwiſe it is if they claim by ſeveral titles, as it appeareth in our books. But this is now holpen by a (*) Statute made ſince Littleton wrote. 12.E.4.18. * 2.E.6.cap.8.

If two Parſons be in debate for tithes, which amount to above the fourth part and one man is Patron of both Churches, no Judicavit doth lie: for that both Incumbents claim by one and the ſame Patron, *Et ſic de ſimilibus.* 2.H.7.12.2. See the Section next following.

And where Littleton ſaith, ſeiſed of lands in Fee, the ſame Law it is if a man be ſeiſed of lands in tail, and hath iſſue two ſons, *Mutatis mutandis.*

¶ *Et eſt ſeiſie*, &c. That is to ſay, actually ſeiſed, either by entry, as Littleton here putteth it, or by poſſeſſion of the Leſſee for years, or the like.

¶ *Navoit aſcun title*, &c. That is to ſay, any pretence or ſemblance of title, as the younger brother here hath, and in many other caſes, there is a great diverſity holden in our books (o) where one hath a colour or pretence of right, and when he hath none at all, whereof you may read plentifully in our books. (o) 1.E.2.baſtardie 29. 21.E.3.34.22.Aſſ.85. 39.E.3.26.17.E.3.59. 11.E.3.Aſſ.88. 21.H.6.14. 11.E.3.p.3. Vid.Sect.400. & cap. Corran.

## *Sect.* 398.

¶ Et meſme le maner eſt, ſi home ſeiſie de certain tre en fee ad iſſue deux files & debie, leigne file entra en la terre clayment tout la terre a luy, & ent ſolement prift les profits & ad iſſue & moꝛus ſeiſie, per que ſon iſſue enter, quel iſſue ad iſſue & debie ſeiſie, & ſecond iſſue enter, & ſic ultra, uncore le puiſne file ou ſon iſſue, quanta le moitie poit enter ſur quecunque iſſue de leigne file, nient obſtant tiel

IN the ſame manner it is, if a man ſeiſed of certain Land in fee, hath iſſue two daughters and dyeth, the eldeſt daughter entreth into the Land, claiming all to her, and thereof only taketh the profits, and hath iſſue and dieth ſeiſed, by which her iſſue enter, which iſſue hath iſſue and dieth ſeiſed, and the ſecond iſſue enter, *& ſic ultra*; yet the younger daughter or her iſſue as to the moity may enter upon any iſſue whatſoever of the elder

diſcent, pur ceo que ils claimont per un meſne title, &c. mes en tiel caſe, ſi ambideux Soers avoyent enter apres la mort lour Pier, & ent fueront ſeiſies, & puis leigne Soer uſt diſſeiſie la puiſne Soer de ceo que a luy aſſert, & ent fuit ſeiſie en fee & ad iſſue, & de tiel eſtate mourſt ſeiſie, per que les Tenements diſcendont al Iſſue del eigne Soer, donque le puiſne Soer, ne ſes heires ne poient enter, &c. Cauſa qua ſupra, &c.

daughter notwithſtanding ſuch diſcent, for that they claim by one ſame title, &c. but in ſuch caſe where both ſiſters have entred after the death of their father, and were thereof ſeiſed, and after the eldeſt ſiſter had diſſeiſed the younger of her part, and was thereof ſeiſed in Fee, and hath Iſſue, and of ſuch Eſtate dieth ſeiſed, whereby the lands deſcend to the Iſſue of the elder ſiſter, then the younger ſiſter nor her heirs cannot enter, &c. *Cauſa qua ſupra*, &c.

¶ *Claimant tout la terre.* Here it appeareth, That when the one Coparcener doth ſpecially enter, claiming the whole land, and taking the whole profits, that ſhe gains the one moity, viz. of her ſiſter by abatement, and yet her dying ſeiſed ſhall not take away the entry of her ſiſter; whereas when one Coparcener enters generally and taketh the profits, this ſhall be accounted in Law the entry of them both, and no diveſting of the moity of her ſiſter.

21.Aſſ.19 21. E.3.7.27. 32.36.Aſſ.2.27.Aſſ.68. 36.Aſſ.p.1.43.E.3.19. 4.H.7.10.16.H.7.4.

See more of this in the chapter of Warranty, Sect. 710. 28.Aſſ.30. Vid.Sect.710.

If one Coparcener enter claiming the whole, and make a feoffment in Fee, and take back an eſtate to her and her heirs, and hath iſſue, and die ſeiſed; this Diſcent ſhall take away the entry of the other ſiſter, becauſe by the Feoffment the privity of the Coparcenary was deſtroyed.

¶ *Claimant per un meſme title*, &c. Of this ſufficient hath been ſaid in the next precedent Section.

¶ *Ne poient enter*, &c. Of this there hath been alſo ſpoken in the ſame Section.

## Sect. 399.

¶ *Eſtre en fee.* For this holds not in caſe of an eſtate taile.

Pl.Com.57.39.E.3. Le darreine caſe.

¶ *Mulier, ſeu filius mulieratus.* *Mulier* hath three ſignifications; Firſt, Sub nomine mulieris continetur quælibet Fœmina. Secondly, Proprie ſub nomine mulieris, continetur Virgo. Thirdly, Appellatione mulieris in Legibus Angliæ, continetur Uxor. Et ſic filius natus vel filia nata ex juſta uxore, appellatur in Legibus Angliæ filius mulieratus, ſeu filia mulierata, a Sonne mulier, or a Daughter mulier, Sicut Baſtardus dicitur à Græco verbo Baſtaris, i.e. Meretrix, ſeu Concubina, quia procreatur ex meretrice ſeu con-

Lib.8. fol. 101,102. Sir Rich. Lechfords caſe.

Glanvil.lib.7.cap.2. Bract.lib.5.cap.19. Brit.cap.70.

Vid.Sect.183.

¶ ITem ſi home eſt ſeiſie de certaine Terre en fee, & ad iſſue deux fits, & leigne fits eſt Baſtard, & l' puiſne fitz eſt mulier, & le Pier debie, & le Baſtard enter enclaimant eſte heire a ſon pier, & occupia la terre tout la vie ſans aſcun entre fait ſur luy per l' mulier, & le Baſtard ad iſſue & mourſt ſeiſie de tiel eſtate en fee,

ALſo if a man be ſeiſed of certain lands in fee, and hath Iſſue two ſons, and the elder is a Baſtard, and the younger *Mulier*, & the father die, and the Baſtard entereth claiming as heir to his Father, and occupieth the Land all his life, without any entry made upon him by the *Mulier*, & the Baſtard hath Iſſue and dieth ſeiſed

& la

& la Terre diſcendiſt a ſon Iſſue, & ſon Iſſue enter, &c. En cest case le mulier eſt iams remedy, car il ne poit enter, ne aver alcun Action pur recoverer la Terre, pur ceo que eſt un ancient Ley en tiel caſe uſe, &c.

of ſuch eſtate in Fee, and the Land deſcend to his Iſſue, & his Iſſue entreth, *&c.* In this caſe the *Mulier* is without remedy, for he may not enter, nor have any Action to recover the land, becauſe there is an ancient law in this caſe uſed, *&c.*

concubina. In Engliſh, he is called baſe borne, and the ſingle ſome ſay, That a Baſtard is as much to ſay, as one that is a Baſe Natural, for Aerd ſignifieth Nature. I read in Fleta. (p) That there be three kinds of Baſtards, viz. Manſer, Nothus, & Spurius, which are deſcribed in two old Verſes;

(p) Fleta lib. 1. cap. 5. Vide Sect. 380.

Manſeribus Icetum; Nothis Mœchus dedit ortum.
Ut ſeges è ſpica, ſic Spurius eſt ab amica.

But we term them all by the name of Baſtards that be born out of a lawful marriage. By the common Law, (r) if the Husband be within the four Seas, that is, within the Juriſdiction of the King of England, if the Wife hath Iſſue, no proof is to be admitted to prove the Child a Baſtard, (for in that caſe, Filiatio non poteſt probari) unleſs the Husband hath an apparent impoſſibility of procreation; as if the husband be but eight years old, or under the age of procreation, ſuch Iſſue is Baſtard, albeit he be born within marriage. (l) But if the Iſſue be born within a moneth or a day after marriage, between parties of full lawful age, the childe is legitimate.

(r) Bract. lib. 4. fo. 278, 279. 7. H. 4. 9. 43. E. 3. 19. 41. E. 3. 7. 44. E. 3. 10. 29. Aſſ. 54. 98. Aſſ. 14. 1. H. 6. 7. 19. H. 6. 17. 39. E. 3. 13.

(l) 18. E. 4. 28.

¶ *Diſcendiſt a ſon iſſue.* For if the Baſtard dieth ſeiſed without Iſſue, and the Lord by Eſcheat entreth, this dying ſeiſed ſhall not bar the Mulier, becauſe there is no Diſcent. If the Baſtard enter, and the Mulier dieth, his Wife privement enſeint with a Son, the Baſtard hath Iſſue and dieth ſeiſed, the Son is born, his right is bound for ever. But if the Baſtard dieth ſeiſed, his Wife enſeint with a Son, the Mulier enter, the Son is born, the Iſſue of the Baſtard is barred: for Littleton putteth this caſe, that there ſhall not only be a dying ſeiſed, but alſo a Diſcent to his Iſſue.

¶ *Et ſon iſſue enter*, &c. And ſo it is to be underſtood, albeit the Mulier after the deceaſe of the Baſtard, doth enter before the Heir of the Baſtard, for the Diſcent divert, and not the entry of the Heir.

¶ *Le mulier eſt ſans remedie.* Hereby it appeareth that this Diſcent differeth from other Diſcents, for this Diſcent barreth the right of the Mulier, whereas other Diſcents do take away the entry onely of him that right hath, and leaveth him to his Action; but here by the dying ſeiſed of the Baſtard, his Iſſue is become lawful Heire (a) Ac is bounden, that if the Mulier be within age at the time of the dying ſeiſed, that nevertheleſſe he ſhall be barred, becauſe the Iſſue of the Baſtard is in judgement of Law become lawful Heir; and the Law doth prefer Legitimation before the privilege of Infancie.

Lib. 8. 101. 102. Sir Rich. Lechfords caſe.

(a) 5. E. 2. Diſcent Br. 49. 31. Aſſ. 18. 22. 33. E. 3. Verdict. 48. 36. Aſſ. 2. Pl. Com. Stowels caſe. 10. E. 3. 2.

And the reaſon of this caſe is, for that Juſtum non eſt aliquem poſt mortem facere baſtardum, qui toto tempore vitæ ſuæ pro legitimo habebatur. And ſo it ſeemeth to be. That if a man hath Iſſue a Son being Baſtard eigne, and a Daughter, and the Daughter is married, the Father dieth, the Son entreth and dieth ſeiſed, this ſhall bar the Feme Covert. And the Diſcent in this caſe of Services, Rents, Reverſions, expectant upon Eſtates Tail, or for life, whereupon Rents are reſerved, &c. ſhall bind the right of the Mulier, but a diſcent of theſe ſhall not bar them that right have to an Avoſon.

13. E. 1. tit. Baſtardy 28.

14. E. 2. Baſtardie 26.

So if the Baſtard dieth ſeiſed, and his Iſſue entereth, the Wife of the Baſtard, or it is not the entry of the Mulier lawful upon the Tenant in Dower, for his right was barred by the Diſcent.

Sir Rich. Lechford caſe ubi ſupra.

If the Baſtard eigne entreth into the Land, and dieth, Mulier, and entreth into Religion, this Diſcent ſhall bar the right of the Mulier.

20. E. 3. Baſtardy 29.

¶ *Ad iſſue deux fits.* If a man hath Iſſue ſuch a Baſtard as is aforeſaid, and dieth, and the Baſtard entreth and dieth ſeiſed, and the land deſcendeth to his Iſſue, the Collateral Heir of the Father is bound, as well as where there be two Sons.

Hil. 18. E. 2. cor. Reg. Rot. 144. Ebor. 17. E. 3. 59. F. tit. Baſtard 32. Sir Rich. Lechfords caſe ubi ſupra.

And where our author ſpeaketh of Sons, ſo it is if a man hath Iſſue two Daughters, the eldeſt being a Baſtard, & they enter and occupy peaceably as Heires, now the Law in favour of Legitimation, ſhall not adjudge the whole poſſeſſion in the Mulier, (who then had the only right) but in both, ſo as if the Baſtard hath Iſſue & dieth, her Iſſue ſhall inherit.

See afterwards in the Chapter of Warranties.

(b) And

(b) And in the same case, if both daughters enter and make partition, this partition shall bind the Mulier for ever.

(c) And an Assise of Mortdancester lieth not between the Bastard and the Mulier in respect of the proximity of bloud.

And the Bastard being impleaded or vouched shall have his age.

(b) 2.E.tit.Bastardy 15. 21.E.3.34.b.30.Ass.p.7 Sir Rich. Lechfords case, ubi supra.

(c) Brit.cap.73. 20.E.3.Vouch.129. 11.E.3.Age 3.5.H.7.2. Sir Rich. Lechfords case, ubi supra.

¶ *Et le Bastard enter come heire a son pier.* If a man had Issue Bastard eigne and Mulier Puisne, and the Bastard in the life of the Father hath Issue and dieth, and then the Father dieth seised, and the Sonne of the Bastard entreth, as heir to his Grand-father and dieth seised, this Discent shall bind the Mulier.

¶ *Pur ceo que est ancient Ley en tiel case use, &c.* As hereafter in our Commentary upon the two next Sections shall appear, by our ancient Books, and the ancient Statutes of the Realm. And here is implied how necessary it is after the example of our Author, to look into the Antiquities, than which nothing is more venerable, profitable and pleasant.

## Sect. 400.

¶ MEs il ad estre opinion dascuns, que ceo serra intendue lou l' pier ad un fits bastard per un feme, & puis espousa mesm la feme, & apres lespousels il ad issue per mesme la feme un fits, ou un file mulier, & puis le pier mozust, &c. si tiel Bastard enter, &c. & ad Issue & debie seisie, &c. donque avera lissue de tiel Bastard le Terre cleerement a luy, come avant est dit, &c. & nemy alcun auter bastard la mere, que ne fuit unque espouse a son pier, & ceo semble bone & reasonable opinion. Car tiel Bastard nee debant espousels celebrea perenter son pier & la mere, per la Ley de Saint Eglise est Mulier, coment que per la Ley del Terre il est Bastard, & issint il ad un colour dentrer come heire a son pier, pur ceo que il est per un Ley mulier, &c. s. p la Ley de Saint Eglise. Mes autermt est de bastard que nad alcun maner colour dentre come heire, entant que il ne poit per nul Ley estre dit mulier, car tiel Bastard est dit en la Ley, Quasi nullius filius, &c.

But it hath been the opinion of some, That this shall be intended where the Father hath a Son Bastard by a woman, and after marrieth the same woman, and after the espousals he hath issue by the same woman a son or a daughter, and after the Father dieth, *&c.* if such Bastard entreth, *&c.* and hath issue and die seised, *&c.* then shall the issue of such Bastard have the land cleerly to him, as it is said before, *&c.* and not any other Bastard of the Mother which was never married to his Father, and this seemeth to be a good and reasonable opinion: for such a Bastard born before marriage celebrated between his Father and his Mother, by the Law of holy Church is *Mulier*, albeit by the Law of the Land he is a Bastard, and so he hath a colour to enter as heire to his Father, for that he is by one Law *Mulier*, s. by law of Holy Church. But otherwise it is of a Bastard which hath no manner of colour to enter as Heir, in so much as he can by no Law be said to be *Mulier*, for such a Bastard is said in the Law to be *Quasi nullius filius, &c.*

Mes

¶ *Mes ad eſte lopinion daſcuns, &c.* And our Author here ſaith, that this opinion is good and reaſonable, for that ſuch a Baſtard, by the Law of holy Church, (*) is a Mulier.

Matrimonium ſubſequens legitimos facit quod ſacerdotium non quoad ſucceſſionem, propter conſuetudinem regni quod ſe habet in contrarium. Yet the Canon Law holdeth them Legitimate quoad ſucceſſionem. By a Parliament holden (q) Anno 20.H.3. for that to certifie upon the Kings Writ, that the ſon born before marriage is a Baſtard, was Comm Communem formam Eccleſiæ, rogaverunt omnes Epiſcopi Magnates ut conſentirent, quod nati ante matrimonium eſſent legitimi, ſicut illi qui nati ſunt poſt matrimonium quantum ad ſucceſſionem hæreditariam, quia Eccleſia tales habet pro legitimis: Et omnes Comites & Barones uno voce reſpondérunt, Quod nolunt Leges Angliæ mutare, quæ hoc uſque uſitatæ ſunt & approbatæ.

(*) Vid. Britton fol. 128.b.166.203. and the Statute of Mert. 20. H. 3. cap. 19. confirmeth this opinion. Hil. 18. E. 3. coram Rege in Theſaur. Ebor. Bract. lib. 2. fol. 63.

(q) Statut. de Merton. 20. H. 3. cap. 9 Vid. Bract. 5. 416. 417. 10. Aſſ. Pl. 20.

¶ *Iſſint que il ad un colour dentre, &c.* Here it is to be obſerved, That the Law more reſpecteth him that hath a colourable title, though it be not perfect in law, than him that hath no title at all, as hath been ſaid (r) before.

(r) Vid. Sect. 397. & cap. garr. Sect.

## *Sect.* 401.

¶ MEs en le caſe avãdit, lou le Baſtard enter apres la mort le pier, & l' mulier luy ouſta, & puis le Baſtard diſſeiſit la mulier, & ad iſſue, & debie ſeiſie, & iſſue enter, dõq la mulier poit aver hyeke Dentre ſur diſ. envers iſſue del Baſtard & recovera la terre, &c. Et iſſint poies dier le diverſitie lou tiel Baſtard continue la poſſ. tout ſa vie ſans interruption, & lou la mulier enter & interrupt le poſſeſſion de tiel Baſtard, &c.

But in the caſe aforeſaid, where the Baſtard enter after the death of the Father, and the mulier ouſt him, and after the Baſtard diſſeiſe the mulier, and hath iſſue and dieth ſeiſed, and the iſſue enter, then the mulier may have a Writ of *Entrie ſur diſſeiſin* againſt the iſſue of the Baſtard & ſhall recover the Land, *&c.* And ſo you may ſee a diverſity where ſuch Baſtard continues the poſſeſſion all his life without Interruption, and where the mulier entreth and interrupts the poſſeſſion of ſuch Baſtard, *&c.*

¶ *Et la mulier luy ouſta.* An eſtranger in the name the Mulier without his Commandement cannot enter upon the Baſtard, for that the Baſtard may gaine the eſtate and bar the Mulier. And therefore regularly none ſhall enter but the Mulier, or ſome other by his Commandement. And therefore Littleton ſaith (and the Mulier put him out) no more than in the caſe (a) of the Lord Awdley: for there an eſtranger of his own head could not enter in the name of him that right had to Enter within the five years to avoid the Fine. But in both theſe caſes, firſt, if the Mulier agree thereunto before the Diſcent of the Baſtard; or ſecondly, if he that right hath before the five years be paſt do aſſent thereunto, the claime is good, and ſhall avoid the eſtate both of the Baſtard and of the Conuſee, as it was holden in the Lord Awdleys Caſe. Quia omnis ratihabitio retrotrahitur, & mandato æquiparatur, and it ſtandeth well

(a) Mich. 38. and 39. Eli. in the Kings bench upon evidence by the whole Court. Vid. 31. H. 8. entr. Conge. Br. 125.

4. H. 7. cap.

with the words of the Statute, ſo that they purſue their title, &c. by Way of Action or entery, and ſo is the book in (b) 31. H. 8. to be intended.

(b) Vid. Sect. 334. 31. H. 8. entr. conge. Br. 123.

But in the caſe of the Baſtard eigne, which is Littletons caſe, Gardein in Socage, or Gardein in Chivalrie may enter, for they are no ſtrangers, as in another place is plainly ſhewed. If an Infant make a feoffment in fee, an eſtranger of his own head cannot enter (c) to the uſe of the Infant, for the eſtate is voidable. But where an Infant or a man of full age is diſſeiſed, an entry by a ſtranger of his own head is good and veſteth meſnelty the eſtate in the Infant, or other diſſeiſee. So it is if Tenant for life make a feoffment in fee, an eſtranger may enter for a forfeiture in the name of him in the Reverſion, and thereby the eſtate ſhall be veſted in him. Et ſic de ſimilibus.

(c) Paſch. 39. El. in Communi, Ban. per Curiam. to. H. 7. 16. 7. E. 3. 69. 26. E. 3. 62. per Thorp. 43. E. 3. releaſe 28. 11. Aſſ. 11.

¶ *Lou*

¶ *Lou tiel Baſtard continue tiel poſſeſſion ſans interruption.* If the Mulier entreth upon the Baſtard, & the Baſtard recovereth the Land in an Aſſiſe againſt the Mulier, now is the Interruption avoided, and if the Baſtard dieth ſeiſed, this ſhall barre the Mulier.

2.Aſſ.9. If the Baſtard eigne after the deceaſe of the father entreth, and the King ſeiſeth the land for ſome contempt ſuppoſed to be committed by the Baſtard, for which no Freehold or Inheritance is loſt but only the profits of the Land by way of ſeiſure, and the Baſtard die, and his Iſſue is upon his petition reſtored to the poſſeſſion, for that the ſeiſure was without cauſe, the Mulier is barred for ever; for the poſſeſſion of the King, when he hath no cauſe of ſeiſure, ſhall be adjudged the poſſeſſion of him for whoſe cauſe he ſeiſed. But if after the death of the father the mulier be found heir and within age, and the King ſeiſeth, in that caſe the poſſeſſion of the King is in right of the mulier, & veſteth the actual poſſeſſion in the Mulier, and conſequently the Baſtard eigne is fore-cloſed of any right for ever.

And ſo it is, when the King ſeiſeth for a contempt, or other offence of the Father, or of any other Anceſtor, in that caſe, if the iſſue of the Baſtard eigne upon a Petition be reſtored, for that the ſeiſure was without cauſe, the mulier is not barred, for the Baſtard could never enter, and conſequently could gaine no eſtate in the Land, but the poſſeſſion of the King in that caſe ſhall be adjudged in the right of the mulier. And it is to be obſerved, that the Baſtard muſt enter in vacuam poſſeſſionem, and continue during his life, without interruption made by the mulier.

¶ *Interrupt le poſſeſſion del Baſtard*, &c. If the Baſtard invite the mulier to ſee his houſe, and to ſee Pictures, &c. or to dine with him, or to hawk, hunt, or ſport with him, or ſuch like upon the Land deſcended, and the mulier cometh upon the Land accordingly, this is no interruption, becauſe he came in by the conſent of the Baſtard; and therefore the coming upon the land can be no treſpaſs; but if the mulier cometh upon the ground of his own head, & cutteth down a tree, or diggeth the ſoil, or take any profit, theſe ſhall be interruptions, for rather then the Baſtard ſhall puniſh him in an action of treſpaſs, the act ſhall amount in law to an Entry, becauſe he hath a right of Entry. So it is, if the mulier put any of his beaſts into the ground, or command a ſtranger to put in his beaſts, theſe do amount to an Entry; for albeit in theſe caſes the mulier doth not uſe any expreſſe words of entry, yet theſe, and ſuch like Acts, do without any words amount in Law to an Entry, for acts without words may make an Entry, but words without an Act (viz. Entry into the lands, &c.) cannot make an Entry, all which interruptions are implied in the ſaid, &c.) More ſhall be ſaid hereafter of Interruptions in the chapter of Continual Claime.

Pl.Com. Parſon de Hc nylanes caſe 91. 35.H.6.24.21 H.6.9. 1.E.4.3.21. E.4.5-5. E. 4. 60.

## Sect. 402.

Brook tit.diſcent 40. ¶ *Si un enfant deins age ad cauſe dentrer.* If a man ſeiſed of lands in Fee die, his wife privement enſeint with a ſon, and a ſtranger abate and die ſeiſed, and after the ſonne is born, he ſhall be bound by the Diſcent, becauſe he at the time of the diſcent had no right to enter; and this is to be gathered upon theſe words of Littleton, ad cauſe dentrer, which at the time of the Diſcent he had not.

20.H.6.28.b.2.E.4. 25.26. 15.E.4.diſcent.30. ¶ *Eſt eins per Diſcent, &c.* Here is implied any other heire, collateral or lineal.

(d) Vid.Sect.259.405. And infant is accounted in law (as hath been often ſaid;) (d) until he paſſeth the

¶ Item, ſi un enfant deins age ad tiel cauſe de entry en aſcuns terres ou tenements ſur un auter, que eſt ſeiſie en fee, ou en fee taile, de meſme les terres ou tenements, ſi tiel home que eſt tiel-ment ſeiſie, morust de tiel eſtate ſeiſie, & les terres diſcendont a ſon iſſue durant le temps que lenfant eſt deins age, tiel diſcent, ſi tollera

ALſo if an Infant within age hath ſuch cauſe to enter into any Lands or Tenements upon another, which is ſeiſed in fee, or in Fee taile, of the ſame Lands or Tenements, if ſuch man who is ſo ſeiſed, dieth of ſuch eſtate ſeiſed, and the Lands deſcend to his Iſſue, during the time that the Infant is within age, ſuch Diſcent ſhall not take away the entry of the lentrie

lentry lenfant meſq̃ il poit enter ſur le iſſue que eſt eins per diſcent, &c. pur ceo que nul laches ſerra adjudge en un enfãt deins age en tiel caſe.

Infant, but that he may enter upon the iſſue which is in by diſcent, for that no laches ſhall be adjudged in an Infant within age in ſuch a caſe.

age of 21 years, and certain privileges he hath in reſpect of his infancy.

¶ *Nul Laches ſerra adjudge en le infant deins age en tiel caſe.*

And Littleton well adds (en tiel caſe) that is, in caſe of Diſcent; for in ſome other Caſes, laches ſhall prejudice 33.E.3.quar.imp.46.

an Infant: As laches ſhall be adjudged in an Infant, if he preſume not to a Church within ſix moneths; for the Law reſpecteth more the privilege of the Church (that the cure be ſerved) than the privilege of Infancy. And ſo the publike Repoſe of the Realm concerning mens Freehold and inheritance, ſhall be preferred before the privilege of Infancy, in caſe of a fine, where the time begins in the time of the Anceſtor. So non-claim of a Villeine of an Infant by a year and a day, who had fled into ancient Demeſne, ſhall take away the ſeiſure of the Infant. And if an Infant dying not an Infant of the death of his Anceſtor within a year and a day, he is barred of his appeal for ever; for the Law reſpects more liberty and Life, than the Privilege of Infancy. And here is to be obſerved, that Littleton putteth his caſe, that an Infant ſhall enter upon a Diſcent, when a ſtranger dieth ſeiſed; but he put it not ſo before, in the caſe of the Baſtard eigne. B. Tenant in taile infeoffeth A. in fee. A. hath iſſue within age, and dieth. B. abateth and dieth ſeiſed, the iſſue of A. being ſtill within age, this Diſcent ſhall bind (e) the Infant, for the iſſue in taile is remitted: and the Law doth more reſpect an ancient right in this caſe, than the privilege of an infant that had but a defeaſible eſtate. As it is ſaid (f) if the King die ſeiſed of Lands, and the land deſcend to his ſucceſſor, that this ſhall bind an Infant, for that the privilege of an Infant in this caſe holds not againſt the King. Pl.Com.372. (e) 11.E.4.1.2. F.N.B 35.m. (f) 35.H.6.60.

## *Sect.* 403.

¶ ITem, ſi le baron & ſa Feme come en droit la feme ont title & droit denter en tenements que un auter ad en Fee, ou en fee taile, et tiel Tenant moruſt ſeiſie, &c. en tiel caſe lentre le Baron eſt tolle ſur l', heire que eſt eins per Diſcent. Mes ſi le Baron devie, donque la Feme bien poit enter ſur liſſue que eſt eins per diſcent, pur ceo que Laches le Baron ne turnera la Feme ne les heires en prejudice ne en dammage

ALſo if Husband and Wife, as in right of the wife, have title and right to enter into lands which another hath in fee, or in fee taile, and ſuch tenant dieth ſeiſed, &c. In ſuch caſe the entry of the Husband is taken away upon the heire which is in by Diſcent: but if the Husband die, then the wife may well enter upon the Iſſue which is in by Diſcent, for that no Laches of the Husband ſhall turn the Wife or her heires to any prejudice, nor loſs

¶ *Si baron & Feme come en droit ſa feme ont title & droit denter, &c. & tiel Tenant moruſt ſeiſie, &c.*

Theſe words are general, but are particularly to be underſtood, viz. when the wrong was done to the Wife during the coverture; for if a Feme ſole be ſeiſed of lands in Fee, and is Diſſeiſed, and then taketh husband, In this caſe the husband and wife, as in the right of the wife, have right to enter; and yet the dying ſeiſed of the diſſeiſor in that caſe ſhall take away the entry of the Wife after the death of her husband; and the reaſon is as well for that the her ſelfe, when ſhe was ſole, might have entred and recontinued the poſſeſſion, as alſo it ſhall be accounted her folly that ſhe would take ſuch a Husband which would not enter before the Diſcent. 9.H.7.24.2.2.E.4.25. 7.E.3.47.b.20. H.6.28. 15.E.4.diſcent.30. b.12.E.3.12.

But

9.H.7.24. But there if the woman were within age at the time of her taking of husband then the dying ſeiſed ſhall not after the deceaſe of her husband take away her Entry; becauſe no folly can be accounted in her, for that ſhe was within age when ſhe took husband; and after Coverture ſhe cannot enter without her husband; all which is implied in the ſaid (&c.)

en tiel cas, mes que la feme & ſes heirs bien poient enter, lou tiel diſcent eſt eſchue durant le coverture.

in ſuch caſe, but that the wife and her heirs may well enter where ſuch Diſcent is eſchued during the Coverture.

Vid.Sect.402. ¶ *Laches le Baron ne turnera la feme*, &c. *al prejudice*, &c. Laches ſignifieth in the Common law, retchleſneſs, or negligence, Et negligentia ſemper habet infortunium comitem. Here is a diverſity to be obſerved, that albeit regularly no laches ſhall be accounted in Infants, or Feme Coverts, as is aforeſaid, for not entry or Claime to avoid Diſcents, yet laches ſhall be accounted in them for no performance of a Condition annexed to the ſtate of the land. For if a Feme be infeoffed either before or after marriage, reſerving a Rent, and for default of payment a re-entry, in that caſe, the laches of the Baron ſhall diſherit the wife for ever. And ſo it is (n) of an infant, his laches, for not performing of a Condition annexed to a ſtate, either made to his Anceſtor or to himſelf, ſhall barre him of the right of the land for ever.

20.H.6.28.b. (n)31.Aſſ.p.17. 42.E.3.1.Pl. Com.55. 10.H. 7.13.H.7. 35. .6.41.Pl.Com.136. b. Pleta lib.2. cap.50. If a man make a feoffment in fee to another reſerving a Rent, and if he pay not the Rent within a moneth, that he ſhall double the Rent, and the Feoffee dieth, his heir within age, the Infant payeth not the Rent, he ſhall not by this laches forfeit any thing. But otherwiſe it is of a Feme Covert; and the reaſon and cauſe of this diverſity is, for that the Infant is provided for, by the Statute, (o) Non current uſuræ contra aliquem infra ætatem exiſtent, &c. But that Statute doth not extend to a Feme Covert, neither doth that Statute extend to a condition of a re-entry, which an Infant ought to performe; for the forfeiture thereof cannot be called Uſura.

(o)Leſtat de Mert.ca.5.

## Sect. 404.

¶ MEs la Court tient, lou tiel title eſt done al feme ſole, que puis prent Baron, que nentra pas, eins ſuffer un Diſcent, &c. la auter eſt, car ſerra dit la folly le feme de prender tiel baron que nentre en temps, &c.

But the Court holdeth, where ſuch title is given to a feme ſole, who after taketh husband which doth not enter but ſuffer a Diſcent, *&c.* there otherwiſe it is; for it ſhall be ſaid the folly of the wife to take ſuch a husband which entered not in time, *&c.*

9.H.7.24. ¶ This is added, and therefore as formerly I have done, I meddle not withal, howbeit the opinion is holden for law, as it appeareth in the Section next precedent.

## Sect. 405.

¶ HEre Littleton explaineth a man of no Sound memory, to be Non compos mentis. Many times (as here it appeareth) the latine word explaineth the true ſenſe, and calleth him not Amens, demens, furioſus, lunaticus, fatuus, fulrus, or the like, for Non compos mentis is moſt ſure and legal.

Fol. .fol.368.b. per. Sanders lib.4. fol.127. 182.Berveleyes caſe. Mir.cap.1.Sect.9.cap.5. Sect.1.Bracton.fol.165. & 420. Brit.fol.167. b.217.66. Fleta li.6.c.39.Fitz.N. B.222.b. Stanf.Prer. 33.34.

Non compes mentis is

¶ ITem, ſi homme que eſt de non ſain memorie, que eſt a dire en Latin, Qui non eſt compos mentis, ad cauſe de entre en aſcuns tiels tenements, ſi tiel Diſcent, ut ſupra, ſoit ewe en ſa vie, durant le temps que il fuit de

ALſo if a man which is of non ſane memory, that is to ſay in Latine, *Qui non eſt compos mentis*, hath cauſe to enter into any ſuch tenements, if ſuch diſcent, *ut ſupra*, he had in his life during the time that he was not of ſound

non

non ſane memorie, & puis devia, ſon heire bien poit enter ſur luy que eſt eins p diſcent. Et en ceſt caſe poyes bien un cas, q̃l' heire poiet enter, & uncore ſon anceſter que avoit meſme le title ne puiſſoit enter. Car celuy que fuit hors de ſa memorie al temps de tiel diſcent, q̃l voille enter apres tiel diſcent, q̃ action ſur ceo ſoit ſue enders luy, il nad reins pur luy a pleader, ou de luy ayder, mes adire que il fuit de non ſane memorie al temps de tiel diſcent, &c. & a ceo ne ſerra il reſceive adire, pur ceo que nul home d̃ pleine age ſerra reſceive en aſcun plee per la ley a diſabler le perſon demeſn̄; mes l' heire bien poit diſabler le perſon ſon auncetter pur ſon advantage demeſne en tiel cas, pur ceo q̃ nul laches poit eſtre adjudge pur la ley en celuy que ad nul diſcretion en tiel caſe.

memory, and after dieth, his Heir may well enter upon him which is in by Diſcent. And in this caſe you may ſee a caſe where the Heire may enter, and yet his anceſtor which had the ſame title could not enter. For he which was out of his memory at the time of ſuch diſcent, if he will enter after ſuch a diſcent, if an action upon this be ſued againſt him, he hath nothing to plead for himſelf or to help him; but to ſay, that he was not of ſane memory at the time of ſuch Diſcent, *&c.* And he ſhall not be received to ſay this, for that no man of full age ſhall be received in any plea by the Law to diſable his own perſon; but the Heir may well diſable the perſon of his Anceſtor for his own advantage in ſuch caſe; for that no Laches may be adjudged by the Law in him which hath no diſcretion in ſuch caſe.

of four ſorts. 1. Idiota which from his nativity by a perpetual infirmity, is Non compos mentis. 2. He that by ſickneſs, grief, or other accident, wholly loſeth his memory and underſtanding. 3. A Lunatick that hath ſometime his underſtanding, and ſometime not, Aliquando gaudet lucidis intervallis, and therefore he is called Non compos mentis, ſo long as he hath not underſtanding. Laſtly, he that by his own vicious act for a time deprived himſelf of his memory and underſtanding, as he that is drunken. But that kind of Non compos mentis ſhall give no privilege or benefit to him or to his Heires. And a Diſcent ſhall not take away the entry of an Idiot, albeit the want of underſtanding was perpetual; for Littleton ſpeaketh generally of a man of non ſane memory. So likwiſe if a man that becomes Non compos mentis by accident as is aforeſaid, be diſſeiſed and ſuffer a diſcent, albeit he recover his memory and underſtanding again, yet he ſhall never avoid the diſcent; and ſo it is à fortiori, of one that hath Lucida intervalla: As for a Drunkard, who is Voluntarius Dæmon, he hath (as hath been ſaid) no privilege thereby; but what hurt or ill ſoever he doth, his drunkenneſs doth aggravate it. Omne crimen ebrietas & incendit, & detegit.

Lib. 4. 124, 125. Beverleys caſe.

If an Idiot make a feoffment in fee, he ſhall in pleading never avoid it, by ſaying that he was an Idiot at the time of his feoffment, and ſo had been from his nativity. But upon an office found for the King, the King ſhall avoid the feoffment, for the benefit of the Idiot, whoſe cuſtody the Law giveth to the King.

39. H. 6. 42. b. Abb. Aſſ. 89. b. F. N. B. 202. 5. E. 3. 70. Britton, cap. 28. fol 66. 25. Aſſ. p. 4. 35. Aſſ. pl. 10

So it is of a Non compos mentis by accident, and of him Qui gaudet lucidis intervallis. If an eſtate be made during his Lunacy; for albeit the parties themſelves cannot be received to diſable themſelves, yet twelve men upon their oaths may find the truth of the matter. But if any of them alien by fine or recovery, this ſhall not only bind himſelf, but his Heirs alſo. As amongſt other things requiſite to be known; theſe Caſes you ſhall find at large in my Commentaries, whereunto for brevity I refer the Reader: Upon all which books there have been four ſeveral opinions concerning the alienation, or other act of a

32. E. 3. tit. Scire fol. 160. Stanf. Pr. 34 F. N. B. 202. a. Beverleys caſe, lib. 4. 126, 127, 128.

9.H.7.24. But there if the woman were within age at the time of her taking of husband then the dying seised shall not after the decease of her husband take away her Entry; because no folly can be accounted in her, for that she was within age when she took husband: and after Coverture she cannot enter without her husband; all which is implied in the said (&c.)

en tiel cas, mes que la feme & ses heirs bien poient enter, lou tiel discent est eschue durant le coverture.

in such case, but that the wife and her heirs may well enter where such Discent is eschued during the Coverture.

Vid.Sect.402. ¶ *Laches le Baron ne turnera la feme, &c. al prejudice, &c.* Laches signifieth in the Common law, retchielnels, or negligence, Et negligentia semper habet infortunium comitem. Here is a diversity to be observed, that albeit regularly no laches shall be accounted in Infants, or Feme Coverts, as is aforesaid, for not entry or Claime to avoid Discents, yet laches shall be accounted in them for no performance of a Condition annexed to the state of the land. For if a Feme be infeoffed either before or after marriage, reserving a Rent, and for default of payment a re-entry, in that case, the laches of the Baron shall disherit the wife for ever. And so it is (n) of an infant, his laches, for not performing of a Condition annexed to a state, either made to his Ancestor or to himself, shall barre him of the right of the land for ever.

20.H.6.28.b. (n) 31.Ass.p.17. 42.E.3.1.Pl. Com.55. 10.H.7.13.H.7. 35..6.41.Pl.Com.136.

If a man make a feoffment in fee to another reserving a Rent, and if he pay not the Rent within a moneth, that he shall double the Rent, and the Feoffee dieth, his heir within age, the Infant payeth not the Rent, he shall not by this laches forfeit any thing. But otherwise it is of a Feme Covert; and the reason and cause of this diversity is, for that the Infant is provided for, by the Statute, (o) Non current usuræ contra aliquem infra ætatem existent. &c. But that Statute doth not extend to a Feme Covert, neither doth that Statute extend to a condition of a re-entry, which an Infant ought to performe; for the forfeiture thereof cannot be called Usura.

b. Pleta lib.2. cap.50.

(o) Lestat de Mert.ca.5.

## Sect. 404.

¶ MEs la Court tient, lou tiel title est done al feme sole, que puis prent Baron, que nentra pas, eins suffer un Discent, &c. la auter est, car lerra dit la folly le feme de prender tiel baron que nentre en temps, &c.

But the Court holdeth, where such title is given to a feme sole, who after taketh husband which doth not enter but suffer a Discent, *&c.* there otherwise it is; for it shall be said the folly of the wife to take such a husband which entered not in time, *&c.*

9.H.7.24. ¶ This is added, and therefore as formerly I have done, I meddle not withal, howbeit the opinion is holden for law, as it appeareth in the Section next precedent.

## Sect. 405.

¶ HEre Littleton explaineth a man of no sound memory, to be Non compos mentis. Many times (as here it appeareth) the latine word explaineth the true sense, and calleth him not Amens, demens, furiosus, lunaticus, fatuus, fatuus, stultus, or the like; for Non compos mentis is most sure and legal.

Pl.C. fol.368.b. per. Sanders lib.4. fol.127. 182.Berveleyes case. Mir.cap.1.Sect.9.cap.5. Sect.1.Bracton.fol.165. & 420. Brit.fol.167. b.217.66. Fleta li.6.c.39.Fitz.N. B.222.b. Stanf.Prer. 33.34.

¶ ITem, si hom que est de non sain memorie, que est adire en Latin, Qui non est compos mentis, ad cause dentre e astuns tiels tenements, si tiel Discent, ut supra, soit ewe en sa vie, durant le temps que il fuit de

ALso if a man which is of non sane memory, that is to say in Latine, *Qui non est compos mentis*, hath cause to enter into any such tenements, if such discent, *ut supra*, he had in his life during the time that he was not of sound

non

non ſane memorie, & puis debia, ſon heire bien poit enter ſur luy que eſt eins p diſcent. Et en ceſt caſe poyes beyer un cas, q̃l' heire poiet enter, & uncore ſon anceſter que avoit meſme le title ne puiſſoit enter. Car celuy que fuit hors de ſa memorie al temps de tiel diſcent, ſil voile enter apres tiel diſcent, ſi action ſur ceo ſoit ſue enders luy, il nad reins pur luy a pleader, ou de luy ayder, mes adire que il fuit de non ſane memorie al temps de tiel diſcent, &c. & a ceo ne ſerra il reſceive adire, pur ceo que nul home d̃ pleine age ſerra reſceive en aſcun plee per la ley a diſabler le perſon demeſn̄; mes l' heire bien poit diſabler le perſon ſon auncetter pur ſon advantage demeſne en tiel cas, pur ceo q̃ nul laches poit eſtre adjudge pur la ley en celuy que ad nul diſcretion en tiel caſe.

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Lib. 4. 124, 125. Beverleys caſe.

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39. H. 6. 42. b. Abb. Aſſ. 89. b. F. N. B. 202. 5. E. 3. 70. Britton, cap. 28. fol 66. 25. Aſſ. p. 4. 35. Aſſ. pl. 10 32. E. 3. tit. Scire fol. 160. Stanf. Pr. 34 F. N. B. 202. a. Beverleys caſe, lib. 4. 126, 127, 128.

man that is Non compos mentis, &c. For firſt, ſome are of opinion; That he may avoid his own act, by entry or plea. Secondly, Others are of opinion, That he may avoid it by writ, and not by plea. Thirdly, Others, That he may avoid it either by plea or by Writ; and of this opinion is Fitzherbert in his Natura Brevium, ubi ſupra. And Littleton here is of opinion, That neither by Plea, nor by Writ, nor otherwiſe, he himſelf ſhall avoid it, but his Heir (in reſpect his Anceſtor was Non compos mentis) ſhall avoid it by entry, Plea, or Writ. And, herewith the greateſt authority of our Books agree; and ſo was it reſolved with Littleton in Beverleys caſe (r) where it is ſaid, That it is a Maxime of the common Law, That the party ſhall not diſable himſelf: But this holdeth only in Civil cauſes; for in Criminal cauſes, as Felony, &c. the act and wrong of a mad man ſhall not be imputed to him, for that in thoſe cauſes, Actus non facit reum, niſi mens ſit rea; and he is Amens (id eſt) ſine mente, without his mind or diſcretion; and Furioſus ſolo furore punitur, a mad man is only puniſhed by his madneſs. And ſo it is of an Infant, until he be of the age of fourteen, which in Law is accounted the age of diſcretion.

Vide Br. tit. Dum fuit inf. a ætatem. 5.

(r) Lib. 4. fo. 126, 127.

26. Aſſ. 27. 21. H. 7. 31. Stanford 16. b. 8. E. 2. Goron. 412. 414. 351. 22. E. 3. ibid. 224. Beverleys caſe, ubi ſupra. F. N. B. 202. D. 3. H. 7. 2. Vide 3. E. 3. tit. Entrie Cong. Statham. 12. E. 4. 8. 39. H. 6. 4. Abbr. Aſſ. 89. 39. H. 6. 43.

¶ *Et en ceſt caſe poyes veir un caſe*, &c. And though Littleton ſaith, (One caſe) yet other caſes may be found to the ſame end: For if there be Grandfather, Father and Son, and the Father diſſeiſe the Grand-father, and make a Feoffment in Fee, without warranty, the Grand-father dyeth, albeit the right deſcend to the Father, he cannot by this right deſcended, enter againſt his own Feoffment; but if he die, the Son ſhall enter, and avoid the eſtate of the Feoffee.

15. E. 4. tit. Diſcent 30. So if the Grand-father be Tenant in Taile, and the Father Diſſeiſe him, ut ſupra, mutatis mutandis.

If Lands be given to two, and to the heirs of one of them, he that hath the fee ſimple ſhall not have an action of Waſte upon the Statute of Glouceſter, againſt the Joyntenant for life; but his Heir ſhall maintain an action of waſte againſt him, upon the Statute of Glocester; ſo the Heir ſhall maintain that action which the Anceſtor could not.

## *Sect.* 406.

¶ Et ſi tiel home d̄ non ſane memorie fait Feoffment, &c. il meſm̄ ne poit enter ne aver briefe appell' Dum non fuit compos mentis, *&c.* cauſa qua ſupra: Mes apres la mort ſon h̄e bien poit enter, ou aver le dit Briefe Dum non fuit compos mentis a ſon election. Meſme la Ley eſt lou enfant deins age fait Feoffement, & debie, ſon heire poit enter, ou aver un Briefe de Dum fuit infra ætatem, *&c.*

AND if ſuch a man of Non ſane memory make a Feoffment, *&c.* he himſelf cannot enter nor have a Writ called *Dum non fuit compos mentis*, &c. *cauſa qua ſupra*: but after his death his Heir may well enter, or have the ſaid Writ of *Dum non fuit compos mentis*, at his choice. The ſame law is where an Infant within age maketh a Feoffment and dieth, his heir may enter, or have a Writ of *Dum fuit infra ætatem*, &c.

¶ *Fait feoffment*, &c. Or any other like conveyance in paiis; but Fines and other aſſurances of Record are not implyed in this (ꝛc.)

¶ *Meſme la ley dun Enfant.* This is true, as to the bringing of a Dum fuit infra ætatem, &c. but without queſtion the Infant in that caſe might have entred, as it appeareth in the next Section.

¶ *Briefe* Dum non fuit compos mentis. This Writ (as it appeareth by our Author) lyeth for the Heir of him that was Non compos mentis, and not for himſelf; but a Dum fuit infra ætatem lieth as well for the anceſtor himſelf after his full age, as for his heir.

*Sect.*

## *Sect.* 407.

¶ Item, ũ jeo ſue diſſeiſie per un enfant deins age, le quel aliena a un auter ẽ fee, & lalienee devie ſeiſie, & les Tẽts diſcendõt a ſon heire, eſteant lenfant deins age, mon entry eſt tolle.

ALſo if I be diſſeiſed by an Infant within age, who alieneth to another in Fee, and the Alienee dieth ſeiſed, and the lands diſcend to his heir being an Infant within age, my entry is taken away, &c.

## *Sect.* 408.

¶ Mes ũ lenfant deins age ent ſur l' hẽ que eins p diſcent, come il bien poit ſur ceo q̃ meſme le diſcent fuit durant ſon nonage, donque jeo bein puiſſe enter ſur le diſſeiſor, pur ceo que p ſon entrie il ad defeat & anient le diſcent.

BUt if the infant within age enter upon the Heir which is in by diſcent, as he well may, for that the ſame Diſcent was during his Nonage, then I may well enter upon the Diſſeiſor, becauſe by his entry he hath defeated and taken away the Diſcent.

¶ HEre it appeareth, that the entry of the Infant is lawful, and giveth advantage to the Diſſeiſee to enter alſo, becauſe the Diſcent, which was the impediment, is avoided. And it is to be obſerved, That if the Diſcent be caſt, the Infant being within age, he may enter at any time, either within age, or after his full age. Vid. the next Sect. following. 43.E.3.tit. Entr.Cong. Vet.N.E.126.b. F.N.B.192. 45.E.3.21.

And ſo it is if an Infant make a Feoffment, &c. he may enter either within age, or at any time after his full age; and ſo in both caſes may his Heir.

## *Sect.* 409.

¶ Mẽ meſme le manner eſt lou jeo ſue diſſeiſie, & le diſſeiſor fait Feoffment en fee ſur condic, & le Feoffee mor de tiel eſtate ſeiſie, jeo ne purroy my enter ſur l' hẽ le feoffee: mes ũ le Condition ſoit enfreint, iſſint q̃ pur cel cauſe le Feoffor enter ſur l'heire, ore jeo bẽ puiſſe enter, pur ceo que quãt le Feoffor ou ſes heires entront pur le condition enfeeint, le diſcent eſt mutrim defeat, &c.

¶ IN the ſame manner it is where I am Diſſeiſed, and the diſſeiſor make a feoffment in fee upon condition, and the Feoffee die of ſuch eſtate ſeited, I may not enter upon the heire of the Feoffee: but if the condition be broken, ſo as for this cauſe the feoffor enter upon the Heir, now I may well enter; for that when the Feoffor or his Heirs enter for the condition broken, the Diſcent is utterly defeated, &c.

¶ The reaſon hereof is apparent; for Ceſſante Cauſa, ceſſat Cauſatum. Tenant in Capite maketh a feoffment in Fee to the uſe of the Feoffee and his Heirs, until the Feoffor pay an hundred pounds to him or his Heirs; the Feoffee dyeth, his heire within age; now hath the King the wardſhip of the body, and is intituled to the gard of the Land. But if the Feoffor pay the hundred pounds according to the limitation, the Wardſhip is diveſted, both for the body and the Land, and ſo it is in caſe of a Condition; for as Littleton here ſaith, the Diſcent which is the cauſe of Wardſhip, is utterly defeated; And by theſe two laſt caſes which Littleton hath here put, it appeareth, That there is no difference, where the Diſcent is diſaffirmed by a right Paramount, as where the ſtate was never law- Vid. the Sect. next precedent. Dyer 13.El.fol.298,299.

lawful,(as in the caſe of an Infant,)and where the diſcent is affirmed for a time,the eſtate being lawful,and being after defeated by matter ex poſt facto, by a title of Re-entry.

## Sect. 410.

Vid.Sect.200.

ENtre en Religion, &c. Here is implyed Profeſſion. This diſcent ſhall not bar the entry of the Diſſeiſee, for that the diſcent cometh by the Deed of the Father, becauſe he entred into Religion, wherein there is an excellent poynt worthy of obſervation: For albeit the entry into Religion make not the Diſcent, but the profeſſion, whereof you have read before, Sect. 200. Yet here you may learn by Littleton, That the Law reſpects the original Act, and that is, his entry into Religion, which is his own Act, whereupon the profeſſion followed, whereby the Diſcent hapned; for Cujuſque rei poteſtiſſima pars, principium eſt. And again, Origo rei inſpici debet, whereof you ſhall make great uſe in reading of our Books. * Here Littleton attributeth the cauſe of the diſcent to his Entry into Religion, which was his own Act, whereas a Diſcent doth not take away an entry unleſs it cometh by death, which, as Littleton ſaith, is the Act of God; and no glorious pretext of an Act, (no though it be of Religion) ſhall work a wrong to a ſtranger, that hath right, to bar him of his Entry: But it is ſaid, That in the caſe of the Baſtard eigne, and mulier puiſne, ſuch a Diſcent ſhall bind the Mulier, as before hath been ſaid; and ſuch an Heire that cometh in by ſuch a Diſcent, ſhall have his age.

* V.Pl.Com.Dame Hales caſe. 6.E.3.41.&c.

10.E.3.55.

ITem, ſi jeo ſoy Diſſeiſee, & ſe Diſſeiſor adiſſue & enter en Religion, per force de quel les Tenements diſcendōt a ſon iſſue, en teſt caſe jeo bien puiſſe enter ſz iſſue, & uncore la fuit un Diſcent. Mes pur ceo que tiel diſcēt diſent al iſſue per fait le pier, ſ. pur ceo que il enter en Religion, &c. & le Diſcent ne vient a luy per fait de Dieu, ſ. per mort, &c. mon entre eſt congeable. Car ſi jeo arraigne un Aſſiſe d Novel Diſſeiſin envers mon Diſſeiſor, coment que il puit enter en religion, ceo ne abata my mont brē mes mōſtr (& con obſtant) eſtroyera en la force, & mon recovere vers luy ſerr boñ. Et per meſme la reaſon le diſcent que aveigne a ſon Iſſue per ſon fait demeſne, ne tollera moy d mō entry, &c.

ALſo if I be diſſeiſed, and the Diſſeiſor hath Iſſue and entreth into Religion, by force whereof the lands deſcend to his iſſue; In this caſe I may well enter upon the iſſue, and yet there was a diſcent: but for that ſuch diſcent cometh to the iſſue by the Act of the father, ſ. for that he entred into Religion, &c. and the Diſcent came not unto him by the Act of God, (*ſcilicet*) by death, &c. my entry is congeable: for if I arraign an Aſſiſe of *Novel diſſeiſin* againſt my diſſeiſor, albeit he after enter into Religion; this ſhall not abate my writ, but my writ (notwithſtanding this) ſhall ſtand in his force, and my recovery againſt him ſhall bee good. And by the ſame reaſon the diſcent which cometh to his iſſue by his own Act, ſhall not take from me my entry, &c.

¶ *Car ſi jeo arraigne un Aſſiſe*, &c. Nota, if a man be tenant or Defendant in a real or perſonal Action, and hanging the ſuit, the tenant or Defendant entreth into Religion, by this the Writ is not abated, becauſe it is by his own Act. And ſo it is of a Reſignation, but otherwiſe it is of a Depoſition or a deprivation, becauſe he is expelled by judgment, and yet his offence, &c. was the cauſe thereof. ſed in præſumptione Legis, judicium redditur in invitum.

3.H.6.41.10.H.6. 10.b. 18.E.4.19. 5.b. 4.25.52. 7.E.4.19.18.E.3.24,25. E.3.39.46.E.3.25.30.b. 1.Brief 815.Bracton lib. 4.fo.189.&lib.5.fo.414. 22.R.2.Briefe 936.15. Aſſ.pl.8.

¶ *Moy de mon entry*, &c. Here is implyed, Or any of my heirs.

Sect.

## *Sect.* 411.

¶ Item ſi jeo leſſe a un home certain terres pur terme de 20. ans, & un auter may diſſeiſt, & ouſta le termor & debie ſeiſie, & les tenements diſcendont a ſon heire, jeo ne purroy enter, & uncore le leſſee pur terme dans bien poit enter pur ceo que il p ſon entry ne ouſta l'heir q̃ eſt eins p diſcẽt p l'franktenemẽt q̃ eſt a luy diſcẽdus meſ ſolement claime daver les teneñts pur terme dans, le quel neſt pas expulſement de le franktenement de l' heire que eſt eins per diſcent. Mes auterment eſt ou mon tenant a terme de vie eſt diſſeiſie, Cauſa patet, *&c.*

ALſo if I let unto a man certain lands for the term of twenty years, and another diſſeiſeth me, and ouſt the termor, and die ſeiſed, and the Lands deſcend to his Heir, I may not enter; and yet the Leſſee for years may well enter, becauſe that by his entry he doth not ouſte the heir who is in by Diſcent of the Freehold which is deſcended unto him, but only claimeth to have the Lands for terme of years, which is no expulſion from the Freehold of the heire who is in by Diſcent. But otherwiſe it is where my Tenant for terme of life is diſſeiſed, *Cauſa patet*, &c.

¶ *Pur terme de* 20. *ans.*

It is clear that a Diſcent ſhall not take away the entry of a Leſſee for years, as our Author here ſaith, nor of a Tenant by Elegit, or Tenant by Statute Merchant, or ſuch like, as have but a Chattle and no Freehold; and the reaſon is, for that by their entry upon the heir by diſcent, they take no Freehold (which as often hath been obſerved, is ſo much reſpected in Law) from him; but otherwiſe it is of an eſtate for life, or any higher eſtate. And as a Diſcent of a Freehold and inheritance, ſhall take away the Entry of him that right hath to a Freehold or Inheritance; ſo a Diſcent of a Freehold and Inheritance cannot take away the entry of him that hath but a Chattle; for that no Diſcent or dying ſeiſed can be of the ſame.

A man ſeiſed of an advowſon in fee grants three avoidances one after another, and after the Church becometh void, and the Grantor preſents, and his Clerk is admitted and inſtituted, and after the Church becomes void again, the Grantee may preſent to the ſecond avoidance, for that he was not put out of the poſſeſſion thereof; for as the Leſſor having the Freehold and Inheritance cannot diſſeiſe his Leſſee for years, having but a Chattle, that any diſcent may be caſt, to take away his entry (as Littleton here ſaith:) ſo in the ſaid caſe, the Grantor hath Franktenement and Fee of the Advowſon rightfully, ſo as he cannot make any uſurpation, to gain any eſtate, or to put the Grantee ſo out of poſſeſſion, as that he ſhould not preſent, no more then the Leſſee for years in this caſe, to enter. Alſo in reſpect of the privity that is between them, the uſurpation of the Grantor ſhall not put the Grantee out of poſſeſſion for the two latter avoidances. And this was reſolved (a) by all the Judges of the Court of Common Pleas, which I my ſelf heard and obſerved.

(a) Hil. 18. Eliz. in Communi Banco.

## *Sect.* 412.

¶ Item, il eſt dit que ſi home eſt ſeiſie de tenements en fee per occupation en temps de guerre, & ent mourt ſeiſie en

ALſo it is ſaid that if a man be ſeiſed of Lands in fee by occupation in time of Warre, and thereof dyeth ſeiſed in the

¶ *Per occupation en temps de guerre.*

Firſt, it is neceſſary to be known what ſhall be ſaid Time of peace, Tempus pacis; and what ſhall be ſaid, Tempus belli, ſive guerræ; time of war. Tempus pacis, eſt quando

Inter brevia de anno 1. E.3 parte 1. & Paſch. 28. E.3 inter adjudicata coram Rege lib.2.f.37. in theſaur. Paſch.39.E.3. inter adjudicata coram Rege in theſaur.l.2.f.93.

do Cancellaria & aliæ Curiæ Regie ſunt apertæ, quibus lex ſicbat cuicunque prout fieri conſuavit. And ſo it was adjudged in the caſe of Roger Mortimer, and of Thomas Earl of Lancaſter. Utrum terra ſit guerrina necne, naturaliter debet judicari per recorda Regis, & eorum qui curias Regis per legem terræ cuſtodiunt, & gubernant, ſed non alio modo.

temps de guerre, & les Tenements diſcendont a ſon heir, tiel diſcent ne ouſtera alcun home de ſon entry, & de ceo home poit vier en un plea ſur un briefe de Aiel, An.7.E.2.

time of warre, and the tenements diſcend to his heire, ſuch diſcent ſhall not ouſt any man of his entry; and of this a man may ſee in a Plea upon a Writ of Aiel, 7.E.2.

14.E.3.tit.ſcire facias 122. but more fully in the Record at large.

And therefore when the Courts of Juſtice be open, and the Judges and Miniſters of the ſame may by Law protect men from wrong and violence, and diſtribute Juſtice to all, it is ſaid to be time of peace. So, when by invaſion, Inſurrection, Rebellions, or ſuch like, the peaceable courſe of Juſtice is diſturbed and ſtopped, ſo as the Courts of Juſtice be as it were ſhut up, Et ſilent leges inter arma, then it is ſaid to be time of war. And the tryal hereof is by the records, and Judges of the Court of Juſtice; for by them it will appear, whether Juſtice had her equal courſe of proceeding at that time, or no; and this ſhall not be tryed by Jury.

If a man be diſſeiſed in time of peace, and the Diſcent is caſt in time of War, this ſhall not take away the entry of the Diſſeiſee.

Bracton lib.4.fol.240.

Item tempore pacis, quod dicitur ad differentiam eorum quæ fuerunt tempore belli, quod idem eſt, quod tempore guerrino, quod nihil differt, à tempore juris, & injuriæ; eſt enim tempus injuriæ; cum fuerunt oppreſſiones violentæ, quibus reſiſti non poteſt, & diſſeiſinæ injuſtæ.

So as hereby it alſo appeareth, that time of peace is the time of law and right, and time of War is the time of violent oppreſſion, which cannot be reſiſted by the equal courſe of Law. And therefore in all real actions, the expleas, or taking of the profits, are laid Tempore pacis; for if they were taken Tempore belli, they are not accounted of in Law.

In gham cap. de novel diſſeiſin.

¶ *Per Occupation.* Occupation is a word of Art, and ſignifieth a putting out of a mans Freehold in time of War; and it is all one with a diſſeiſin in time of peace, ſaving that it is not ſo dangerous, as it appeareth here by Littleton; and therefore the Law gave a Writ in that caſe of Occupavit, ſo called by reaſon of that word in the Writ, in ſtead of diſſeiſivit, in the Aſſiſe of Novel diſſeiſin, if the diſſeiſin had been done in time of peace; whereby it appeareth, hold aptly both in this, and in all other places, Littleton throws his whole Book ſpeaketh. But albeit Occupatio, whereof Littleton here ſpeaketh, is uſed only in the ſaid Writ, and in none other, (that I can find or remember) yet hath it been uſed commonly in Conveyances and Leaſes, to limit or make certain precedent words; as, ad tunc in tenura & occupatione. But occupatio is applyed to the poſſeſſion, be it lawful or unlawful; it hath alſo crept into ſome Acts of Parliament, as 4.7. cap.19.39 Eliz.cap.1. and others; and occupare, is ſometime taken to conquer.

Lib.fo.49. 50.Ognels caſe.

¶ *Et de ceo home poit vier en un plea ſur briefe de Aiel, Anno* 7. E. 2.

Hereby it appeareth, that ancient terms or years, after the example of Littleton, are to be cited and vouched, for confirmation of the Law, albeit they were never Printed, and that of thoſe years, thoſe eſpecially of E.1 H.3. &c. are worthy of the reading and obſervation, a great number of which I have ſeen and obſerved; which in mine opinion do give a great light, not only to the underſtanding and reaſon of the Common Law, (which Fitzherbert either ſaw not, or were by him omitted) but alſo to the true expoſition of the ancient Statutes, made in thoſe times; yet mine advice is, that they be read in their time: for after our Student is enabled and armed to ſet on our year Books, or reports of the Law, let him read firſt the latter reports, for two cauſes: *Firſt*, for that for the moſt part the latter Judgements and Reſolutions are the ſureſt; and therefore it is beſt to ſeaſon him with them in the beginning, both for the ſettling of his judgement, and for the retaining of them in memory. *Secondly*, for that the latter are more facile and eaſier to be underſtood then the more ancient; but after the reading of them, then to read theſe others before mentioned, and all the ancient Authors that have written of our Laws; for I would with our Student to be a compleat Lawyer. But now to return; As it is in caſe of diſcent, ſo it is in caſe of preſentation, for no uſurpation in time of War putteth the right Patron out of poſſeſſion, albeit the incumbent come in by inſtitution and induction: And time of War doth not only give privilege to them that be in War, but to all others within the Kingdom; and although the admiſſion and inſtitution be in time of peace, yet if the preſentment were in the time of War, it putteth not the right Patron out of poſſeſſion.

6.E.3.41.7.E.3.dart. pref.2. 18.E.2. quar. imp.175. F.N.B.31.

## *Sect.* 413.

¶ Item, que nul moꝛant ſeiſie (ou les tenements viendꝛont un auter per ſucceſſion) tollera lentꝛ dalcun perſon, &c. Come de Pꝛelates, Abbots, Pꝛiozs, Deans, ou Perſon deſgliſe, ou d̄ auters coꝛps politike, &c. coment q̄ ils ſueront pꝛ. moꝛants ſeiſie, & pꝛ. ſucceſſoꝛs, ceo ne tolle jammes alcun home de ſon entry.

¶ Plus ſerra dit de deſcents en le pꝛochein chapter.

ALſo that no dying ſeiſed (where the tenements come to another by ſucceſſion) ſhall take away the entry of any perſon, *&c.* As of Prelates, Abbots, Priors, Deanes, or of the Parſon of a Church, or of other bodies politike, *&c.* albeit there were xx. dyings ſeiſed, and xx ſucceſſors, this ſhall not put any man from his entry.

More ſhall be ſaid of Diſcents in the next chapter.

¶ *PER Succeſſion.* This in the Common law is applied onely to bodies politike oꝛ Coꝛpoꝛate, which have ſucceſſion perpetual, and not to natural men, as is a Biſhop and his ſucceſſoꝛs, oꝛ to an Abbot, Deane, Archdeacon, Pꝛebend, Parſon, &c. and their ſucceſſoꝛs, and not to I. S. oꝛ any other natural body and his ſucceſſoꝛs, but to him and his heirs. And the ſucceſſoꝛ of any of theſe is in the Poſt; and the heire of the natural man is in the Per; and Succedere, is deriued of Sub & cedere. Vid. Sect. 11. 7. E. 3. 25. 2. 5. E. 3. 13. & 31.

¶ *Corps politike, &c.* This is a Body to take in ſucceſſion, framed (as to that capacity) by policy, and thereupon it is called here by Littleton a body politike; and it is alſo called a Coꝛpoꝛation, oꝛ a body incoꝛpoꝛate, becauſe the perſons are made into a body, and are of capacity to take and grant, &c. And this politike, oꝛ incoꝛpoꝛate, may commence, and be eſtabliſhed thꝛee manner of waies, viz. by pꝛeſcription, by letters patents, oꝛ by act of Parliament. Every body politike oꝛ coꝛpoꝛate, is either Eccleſiaſtical oꝛ Lay: Eccleſiaſtical either regular, as Abbots, Pꝛiozs, &c. oꝛ Secular, as Biſhops, Deans, Archdeacons, Parſons, Vicars, &c. Lay, as May oꝛ and Commonalty, Bayliffs and Burgeſſes, &c. Alſo every body Politike oꝛ Coꝛpoꝛate, is either elective, pꝛeſentative collative, oꝛ donative. And again, it is either ſole, oꝛ aggregate of many, as you may read in the third part of my Commentaries. And this body Politike oꝛ Coꝛpoꝛate aggregate of many, is by the Civilians called Collegium oꝛ Univerſitas. Lib. 3. fol. 73. in the caſe of the Dean and Chapter of Norwich.

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## Chap. 7. Continual Claime. *Sect.* 414.

COntinual claim eſt la lou home ad dꝛoit a title dentrer en aſcuns terres ou tenemẽts dont auter eſt ſeiſie en fee, ou en fee taile, ſi teſty que ad title d̄trer faitc̄-

COntinual claim is where a man hath right and title to enter into any lands or Tenements whereof another is ſeiſed in fee, or in fee taile, if he which hath title to enter makes continual claim to the Lands or Tene-

¶ HEre our author firſt deſcribeth what a continual claime is. It is called Continuum Clameum, becauſe at the Common Law it muſt have been made within every yeer and day, as Littleton here teacheth. And yet if he that right hath, maketh claime, and the Ter-tenant dyeth within the yeer and the day, this claime though it be but once * made (as Mirror cap. 1. Sect. 15. & Sect. 18. Bract. lib 5. fo. 435, 436. Britton 107. b. 126. 4. Fleta lib. 6. cap. 52, 53. Vid. Sect. 424. Vid. Sect. 385. 32. H. 8. p. 33.

(*)Vid.Sect.424.

(as hath been ſaid) ſhall preſerve the entry of him that maketh the claime.

¶ *Ad droit & title denier.* And yet in ſome caſes, a continual Claime may be made by him that hath right and cannot enter.

If tenant for yeers, Tenant by Statute Staple, Marchant, or Elegit, be ouſted, and he in the reverſion diſſeiſed, the Leſſor, or he in reverſion, may enter to the intent to make his claim, and yet his entry as to take any profits, is not lawful during the terme. And in the ſame manner, the Leſſor or he in the reverſion in that caſe, may enter to avoid a collateral warranty, or the Leſſor in that caſe may recover in an Aſſiſe: And ſo (as ſome have holden) may the Leſſor entr in caſe of a leaſe for life, to this intent, to avoid a Diſcent, or a Warranty.

Dyer 19.Pl.Com. 374. 15.H.7.3.4. Jacobins caſe 28.H.6.28.

Vid.Sect.442.45. E.3. 21.

If the Diſſeiſee make continual claime, and the Diſſeiſor die ſeiſed within the yeer, his heire within age, and by office the King is intitled to the Wardſhip, albeit the entry of the diſſeiſee be not lawful, yet may he make continual claime to avoid a diſcent, and ſo in the like.

7.H.6.40. Contin. Claime 1. Downelers caſe 5. E. 4.4.

¶ *Uncore poit celuy que fait tiel claime ou ſon heire enter.* This is to be underſtood in this manner, that if the Father made claime, and the diſſeiſor dieth, and then the Father dieth, that his heire may enter, becauſe the diſcent was caſt in the Fathers time, and the right of entry which the Father gained by his claime, ſhall deſcend to his heire. But if the Father make continual claime, and dieth, and the Son make no continual claime, and within the yeer and day after the claime made by the Father, the Diſſeiſor dieth, this ſhall take away the entry of the Son, for that the diſcent was caſt in his time, and the claime made by the Father ſhall not availe him that might have claimed himſelfe. And of this opinion was Littleton himſelfe in our Books, where he holdeth, that no continual claime can avoid a Diſcent, unleſſe it be made by him that hath title to enter, and in whoſe life the dying ſeiſed was. See more of this matter hereafter, in this chapter, Sect.426.

Bracton lib.5.fo.436. Fleta lib.5.cap.52.53. 21.H.5.37.9.H.4.5 a. 15.E.4.22.

And as here Littleton putteth his caſe of the Anceſtor and heire, ſo it holdeth in all reſpects of the Predeceſſor and Succeſſor.

22.H.6.37.

tinual claime a les terres ou tenements devant le mort ſeiſie de celuy que tient les tenements, donqz coment q̄ tiel tenant mortuſt ent ſeiſi, & les terres ou tenements diſcendront a ſon heire, uncore poit celuy que avoit fait tiel claime ou ſon heire, enter ē les terres, ou tenements iſſint diſcendus, per cauſe de l' continual claim̄ fait, nient contreſtiant le diſcent. Sicome en caſe q̄ home ſoit diſſeiſie, & le diſſeiſee fait continual claime a les tenements en la vie le diſſeiſor, comēt que le diſſeiſor devie ſeiſie en fee, & la terre diſcendiſt a ſon heire uncore poit le Diſſeiſee enter ſur la poſſeſſion le heire, nient obſtant le diſcent.

ments before the dying ſeiſed of him which holdeth the Tenements, then albeit that ſuch tenant dies thereof ſeiſed, and the lands or Tenements diſcend to his heire, yet may he who hath made ſuch continual claime, or his heir, enter into the Lands or tenements ſo diſcended by reaſon of the continual claime made, notwithſtanding the Diſcent. As in caſe that a man be diſſeiſed, and the diſeiſee makes continual claime to the Tenements in the life of the diſſeiſor, although that the diſſeiſor dieth ſeiſed in Fee, and the Land diſcend to his heire, yet may the diſſeiſee enter upon the poſſeſſion of the heire, notwithſtanding the diſcent.

## *Sect.* 415.

¶ Emeisme l'manier est, ſi tenant a terme de vie alien en fee, celuy en le reverſion, ou celuy en le remainder poit enter ſur lalienee: & ſi tiel alienee devie ſeiſie de tiel eſtate ſans continual claim fait a les tenements devant le mozant ſeiſie del alienee, & les tenements per cauſe del morant ſeiſie del alienee, diſcendont a ſon heire, donques ne poit celuy en le reverſion, ne celuy en le remainder enter. Mes ſi celuy en le reverſion, ou celuy en le remainder que ad cauſe dentre ſur lalienee fait continual claime a les tenement devant le mozants ſeiſie del alienee, donques tiel hõe poit enter apres la mozt lalienee, auxibien come il puiſſoit en ſa vie.

IN the ſame manner it is, if tenant for life alien in Fee, he in the reverſion or he in the remainder may enter upon the alienee. And if ſuch alienee dieth ſeiſed of ſuch eſtate without continual claime made to the tenements, before the dying ſeiſed of the alienee, and the lands by reaſon of the dying ſeiſed of the alienee deſcend to his heire, then cannot he in the reverſion nor he in the remainder enter. But if he in the reverſion or in the remainder, who hath cauſe to enter upon the alienee, make continual claime to the land before the dying ſeiſed of the alienee, then ſuch a man may enter after the death of the alienee, as well as he might in his life time.

¶ By this it appeareth; that a continual claim may be made as well where the lands are in the hands of a Feoffee, &c, by title, as in the hands of a Diſſeiſor, Abator or Intrudor by wrong, as before hath been noted.

## *Sect.* 416.

¶ Item, ſi terr̃ ſoit leſſe a un home pur terme de ſa vie, l'remainder a un auter a terme de vie, le remainder a le tierce en fee, ſi le tenant a terme de vie aliena a un auter en fee, & celuy en le remainder pur terme de vie fait continual claime a la terre devant le morant ſeiſie dalienee,

ALſo if land be let to a man for term of his life, the remainder to another for terme of life, the remainder to the third in fee, if tenant for life alien to another in fee, and he in the remainder for life maketh continual claime to the Land before the dying ſeiſed of the Alienee, and after the

¶ *Alien a un auter en fee.* It is to be obſerved, that a forfeiture may be made by the alienation of a particular tenant, two manner of ways, either In Pais, or by matter of Record.

In Pais, of lands and tenements which lie in Livery (whereof Littleton intendeth his caſe) where a greater eſtate paſſeth by Livery, than the particular Tenant may lawfully make, whereby the reverſion or remainder is deveſted, as here in the example that Littleton putteth, when tenant for life alieneth in Vid. Sect. 581. 609. 610. 611.

in fee, which must be understood of a Feoffment, Fine, or Recovery by consent.

17. El. Dyer 339. 16. El. Dy. 324.

If tenant for life, and he in the remainder for life, in Littletons case, had joyned in a Feoffment in Fee, this had been a forfeiture of both their estates, because he in the remainder is particeps injuriæ. And so it is if he in the remainder for life had entred, & disseised tenant for life and made a Feoffment in Fee, this had ben a forfeiture of the right of his remainder.

33. E. 3. Devise 21. 15. E. 4. 9. Vid. Sect. 608, 609, 610.

A particular estate of any thing that lies in grant, cannot be forfeited by any grant in fee by Deed. As if tenant for life or yeers of an Advowson, Rent, Common, or of a reverſion or remainder of Land, by Deed grant the same in Fee, this is no forfeiture of their estates, for that nothing passes thereby, but that which lawfully may pass, and of that opinion is Littleton in our Books.

35. H. 6, 62. Tr. 32. El. in Informat. de intrusion vers Robinson purle Manor de Drayton Basset, so resolved by the Court of Exchequer.

But if tenant for life or yeers of Land, the reverſion or remainder being in the King, make a Feoffment in fee, this is a forfeiture, & yet no reverſion or remainder is divested out of the King, and the reason is, in respect of the solemnity of the feoffment by livery, tending to the Kings disherison.

By matter of Record, and that by three manner of waies: First. By alienation. Secondly, By claiming a greater estate than he ought. be in a stranger.

& puis lalienée morust seisie, & puis apres celuy en le remainder pur term de vie mozust, devaunt aſcun entry fait pur luy, en cē cas, celuy ē le remainder en Fee poit enter sur heire le alienee, per cause de continual claime fait per luy que avoit le remainder pur terme de sa vie pur ceo que tiel droit que il averoit dentre, alera & remaindera a celuy en le remainder apꝛs luy, entant que celuy en l' remainder en fee ne puissoit pas enter sꝛ lalienee en Fee durant la vie celuy en l' remainder p̄ terme d̄ sa vie, & pur ceo que il ne puissoit adonqꝛ faire cōtinual claim. (Car nul poit faire continual claim, mes quant il ad title dentrie, &c.)

alienee dieth seised, & after he in the remainder for life die before any entry made by him, in this case he in the remainder in Fee may enter upon the Heire of the Alienee, by reason of the continual claime made by him which had the remainder for life, because that such right as he had of entry shall goe and remaine to him in the remainder after him, insomuch as he in the remainder in Fee could not enter upon the Alienee in Fee during the life of him in the remainder for life, and for that he could not then make continual claime. (For none can make continual claime but when he hath title to enter, &c.)

Thirdly, By affirming the Reverſion or Remainder to

First by alienation, and that of two sorts, viz. By alienation divesting, or not divesting the reverſion or remainder. Divesting, as by levying of a fine, or suffering a common recovery of Lands, whereby the reverſion or remainder is divested: not divesting, as by levying of a fine in fee, of an advowson, Rent, Common, or any other thing that lieth in grant: and of this opinion is Littleton in our Books, and so note two diverſities: First, between a grant by Fine (which is of Record) and a grant by Deed in pais; and yet in this they both agree, That the reverſion or remainder in neither case is divested. Secondly, Between a matter of Record, as a fine, &c. and a Deed recorded, as a Deed inrolled, for that worketh no forfeiture, because the Deed is the original.

+ 15. E. 4. 9. 31. E. 3. G. 62. 14. E. 3. 3. Avow. 117.

15. E. 2. Judg. 237. 6. E. 3. 49. 9. E. 3. 4. 18. E. 2. Fines 120. 15. E. 4. 29. 36. 6. 29. 2. H. 6. 9. 4. El. Dy. 9. H. 5. 14. 22. Ass. 31. 18. E. 3. 28. 16. Ass. 26.

Secondly, By Claime, and that may be in two sorts, either expreſs or implied. Expreſs, as if tenant for life will in Court of Record claime fee, or if Lesser for yeers be ousted, and he will bring an Assise, Ut de libero Tenemente. Implied, as if in a Writ of right brought against him, he will take upon him to joyn the mise upon the meer right, which none but tenant in fee simple ought to doe. So if Lesser for yeers do lose in a præcipe, and will bring a Writ of Error for Error in Processe, this is a forfeiture.

Thirdly

Thirdly, By affirming the reuerſion or remainder to be in a ſtranger, and that either actiuely or paſſiuely: Actiuely by fiue manner of waies. As firſt, if Tenant for life pray in aide of a ſtranger, whereby he affirmes the reuerſion to be in him. Secondly, if he attorne to the grant of a ſtranger; and there note alſo a diuerſity betweene an Attornment of Record to a ſtranger, and an Attornment in paiis, for an attornment in paiis worketh no forfeiture. Thirdly, if a ſtranger bring a writ of entry in caſu proviſo, and ſuppoſe the reuerſion to be in him, if the Tenant for life confeſſe the action, this is a forfeiture. Fourthly, if Tenant for life plead couinously, to the diſherſion of him in the reuerſion, this is a forfeiture. Fifthly, If a ſtranger bring an action of Waſte againſt Leſſee for life, and he plead Nul waſte fait, this is a forfeiture, or the like. 21.E.3.14.2.5.E.4.2. 24. 8. Forſ. Br. 87. fol. 55. 56. Bucklers caſe. 27.E.3.72.17.E.3.7.2. 39.E.3.16.29.E.3.24. 5.Aſſ.5.5.E.3.tit. Cong.42.14.E.3.Receit 135.3.E.3.32. 24.E.3.68.1.H.7.

Paſſiuely, As if Tenant for life accept a fine of a ſtranger, Sur conuſans de droit come ceo, &c for hereby he affirmes of Record, the reuerſion to be in a ſtranger. 3.Mar.Dy.148.

Littleton here ſpeaketh of the forfeiture of an eſtate; and here it is to be known, that the right of a particular eſtate may be forfeited alſo, and he that hath but a right of a remainder or reuerſion, ſhall take benefit of the forfeiture. As if Tenant for life be Diſſeiſed, & he levie a fine to the Diſſeiſor, he in the reuerſion or remainder ſhall preſently enter upon the Diſſeiſor, for the forfeiture. And ſo it is, if the leſſee, after the Diſſeiſin, had levied a fine to a ſtranger, though to ſome reſpects, Partes finis nihil habuerunt, yet it is a forfeiture of his right. Lib.2.fol.55. Bucklers caſe. 13.E.4.4.

Littleton here ſpeaketh of an alienation in fee abſolutely; but ſo it is, if the Leſſee for life make a leaſe for any other mans life, or a gift in taile. If A. be Tenant for life, and make a Leaſe to B. for his life, and B. dieth, and the Leſſee re-entreth, yet the forfeiture remaineth. 39.Aſſ.15.43.E.3.Entrie Cong.30.2.H.5.7. 39.E.3.16.45.E.3.25.

If Tenant for life make a leaſe for life, or a gift in taile, or a feoffment in fee, upon condition, and entreth for the condition broken, yet the forfeiture remaineth. Littleton ſpeaketh of an eſtate for life, ſo it is of Tenant in taile apres poſſibilitie, Tenant by the Courteſie, Tenant in Dower, or of him that hath an eſtate to him and his heires, during the life of I.S. &c. and ſo of Tenant for yeers, Tenant by Statute Merchant, Statute ſtaple, or Elegit.

Littleton ſaith, that where the alienation in fee is made to another, which muſt be intended a ſtranger, for if it be made to him in reuerſion or remainder, it amounts to a ſurrender of his Eſtate, as at large hath been ſpoken in the Chapter of tenant for life.

By Littleton it appeareth, That tenant for life in remainder may enter for the forfeiture of the firſt tenant for life, and that if the tenant for life in remainder make Continual Claime, and the Alienee die ſeiſed, then may he in the remainder for life enter, and if he die before he do enter, then he in the remainder in Fee ſhall enter, becauſe he in the remainder in Fee could not make any Claime: and therefore the right of entry, which tenant for life in remainder gained by his entry, ſhall go to him in the remainder in Fee, in reſpect of the priuity of eſtate: and ſo it is of him in the reuerſion in fee in like caſe, for he is alſo priuie in eſtate.

If two Joyntenants be diſſeiſed, and the one of them make continual claim & dieth, the ſurvivor ſhall take benefit of his continual claim, in reſpect of the priuity of their eſtate.

But if tenant for life make Continual Claime, this ſhall not give any benefit to him in the remainder, unleſs the Diſſeiſor died in the life of tenant for life, for the cauſe aboueſaid; Sectione 4. 4.

If tenant in taile, the remainder in fee with garranty, have judgement to recover in value, and dieth before execution without Iſſue, he in the remainder ſhall ſue execution, for he hath right thereunto, and is priuie in eſtate.

In the ſame manner, if Seigniory be granted by fine to one for life, the remainder in fee, the Grantee for life dieth, he in the remainder ſhall have a Per quæ ſervitia, for he hath right to the remainder, and is priuie in eſtate. Here alſo it appeareth, That none can make Continual Claime, but he that hath right to entre.

## *Sect.* 417.

¶ Mes cell a veier a top (mon fits) coment & en ſi maner tiel Continual Claime ſerra fait, & ceo bien appzender trois choſes ſont a intender. La. 1. choſe

But it is to be ſeen of thee (my ſon) how and in what manner ſuch Continual Claime ſhall be made; and to learn this well, three things are to be underſtood. The firſt

¶ *Si home ad cauſe d'entrer en aſcuns terres ou tenements*, &c.

It is not ſufficient to tell one generally what he ſhould doe, but to direct him how, and in what manner he ſhall doe it, as Littleton doth in this place. And here, the general rules of our Author are to be underſtood

ſtood that the entry of a man, to recontinue his Inheritance or Freehold, muſt enſue his Action for recovery of the ſame. As if three men diſſeiſe me ſeverally of three ſeveral Acres of land, being all in one County, and I enter in one Acre, in the name of all the three Acres, this is good for no more, but for that Acre which I entred into, becauſe each Diſſeiſor is a ſeveral Tenant of the Freehold; and as I muſt have ſeveral Actions againſt them, for the recovery of the land, ſo mine entry muſt be ſeveral.

This hath been adjudged Mich.14. & 15. Eliz.Rot. 1458. in the Earle of Arundels caſe.

And ſo it is, if one man diſſeiſe me of three Acres of ground, and letteth the ſame ſeverally to three perſons for their lives, &c. there the entry upon one Leſſee, in the name of the whole, is good for no more than that Acre that he hath in his poſſeſſion. But if the diſſeiſor had letten ſeverally the ſaid three Acres to three perſons for yers, there the entry upon one of the Leſſees, in the name of all the three acres, ſhall recontinue and revеſt all the three acres in the diſſeiſee, for that the Diſſeiſee might have had one aſſiſe againſt the Diſſeiſor, becauſe he remained Tenant of the Freehold for all the three Acres, and therefore one entry ſhall ſerve for the whole.

eſt, ſi home ad cauſe dentre en alcuns terres ou Tenements que ſont en divers Villes deins un m Countie, ſil enter en un parcel de les terres ou Tenements que ſont en un Ville, en noſme de touts ſes terres ou Tenements as queux il ad droit dentr deins touts les Villes de meſme le Countie, per tiel entrie il avera auxy bone poſſeſſion, & ſeiſin de touts terres ou tenements dont il ad title dentrie, ſicome il avoit enter en fait en chelcun parcel, & ceo ſemble grand reaſon.

thing is, if a man hath cauſe to enter into any lands or tenements in divers Towns in one ſame Countie, if he enter into one parcel of the lands or tenements which are in one Town, in the name of all the Lands or Tenements into the which he hath right to enter, within all the Townes of the ſame County: By ſuch entry he ſhall have as good a poſſeſſion and ſeiſin of all the Lands and tenements whereof he hath title of entry, as if he had entred indeed into every parcel; and this ſeemeth great reaſon.

7.Aſſ.18.12.E.4.10. 36.H.6.27.32.Aſſ. pl.1. If one diſſeiſe me of one Acre at one time, and after diſſeiſe me of another Acre in the ſame County at another time, in this caſe my entry into one of them in the name of both is good, for that one aſſiſe might be brought againſt him for both Diſſeiſins.

11.H.7.25. Dier 16.Pl. 337. But if I infeoffe one of one Acre of ground upon condition, and at another time I infeoffee the ſame man of another Acre in the ſame County upon condition alſo, and both the Conditions are broken, an entry into one Acre in the name of both is not ſufficient, for that I have no right to the land, nor action to recover the ſame, but a bare title, and therefore ſeveral entries muſt be made into the ſame, in reſpect of the ſeveral Conditions. But an entry in one part of the Land in the name of all the Land ſubject to one Condition, is good, although the parcels be ſeveral and in ſeveral Townes. And ſo note a diverſity between ſeveral rights of entry, and ſeveral titles of entry, by force of a Condition.

¶ *Deins meſme la Countie.* For if the lands lie in ſeveral Counties, there muſt be ſeveral actions, and conſequently ſeveral entries, as hath been ſaid.

¶ *En noſme de tout*, &c. If one diſſeiſe me of two ſeveral Acres in one County, and I enter into one of them generally, without ſaying, In the name of both, this ſhall revеſt only that Acre wherein entry is made, as hath been ſaid; and that is proved by our Books, which ſay, That if I bring an Aſſiſe of two Acres, if I enter into one, hanging the Writ, albeit it ſhall revеſt that only Acre, yet the Writ ſhall abate.

3.H.7.7.4.E.4.19. 11.E.4.11.a. ¶ *Dont il ad title dentrie.* Here in a large ſence, title of Entrie is taken for a right of Entry.

*Sect.*

## *Sect.* 418.

¶ CAr ſi home voile enfeoffer un auter ſans fait de certaine terres ou tenements, que il ad deins pluſours villes en un Countie, & il voile liverer ſeiſin al feoffée de parcel de tenements deins un ville en noſme de touts les terres ou tenemẽts quel il ad en meſme le ville, & en les auters villes, &c. touts les dits tenemẽts, &c. paſſont per force de le dit livery de ſeiſin celuy a q̃ tiel feoffement en tiel maner eſt fait, & unque celuy a que tiel livery de ſeiſin fuit fait, navoit droit en touts les terres ou tenements en touts les villes, mes per cauſeũ livery de ſeiſin fait de parcel de les terres ou tenements en un ville: A multo fortiori il ſemble bone reaſon, que quant home ad title denter en les terres ou tenements en diverſ villes deins un m County devant aſcun entry per luy fait, que per lentry fait p̃ luy en parcel de les terres en un ville en le noſme de touts les terres & tenements as queux il ad title denter deins meſme le County, ceo veſt un ſeiſin de touts en luy, & per tiel entry il ad poſſeſſion & ſeiſin en fait, ſi come il avoit enter en chaſcun parcel, &c.

FOr if a man will infeoffe another without deed of certain lands or tenements which he hath in many towns in one County, and he will deliver ſeiſin to the feoffee of parcel of the tenements within one Town in the name of all the lands or tenements which he hath in the ſame Town, and in other Towns, &c. all the ſaid tenements, &c. paſs by force of the ſaid livery of ſeiſin to him to whom ſuch feoffment in ſuch manner is made; and yet he to whom ſuch livery of ſeiſin was made hath no right in all the lands or tenements in all the Towns, but by reaſon of the livery of ſeiſin made of parcell of the lands or tenements in one Town: *A multo fortiori* it ſeemeth good reaſon that when a man hath title to enter into the Lands or Tenements in divers Towns in one ſame county, before entry by him made, that by the entry made by him into parcell of the lands in one Town in the name of all the lands and tenements to which he hath title to enter within the ſame County, this ſhall veſt a ſeiſin of all in him; and by ſuch entry he hath poſſeſſion and ſeiſin in deed, as if he had entred into every parcel.

¶ This is evident, but here is a diverſity between a feoffment and an entry, for a man may make a feoffment of lands in another County and make livery of ſeiſin within the view, albeit he might peaceably enter & make actual livery, and ſo may be ſhew the recognitors in an Aſſiſe, the view of lands in another County; but a man cannot make an entry into lands within the view where he may enter without any fear (for it is one thing to inveſt, & another to deveſt) as hereafter ſhall be ſaid in the Section next following. 38. E. 3. 11. 38. Aſſ. 23. (*) Vide Sect. next following.

¶ *A multo fortiori.* Or A Minore ad majus, is an argument frequent in our Author, & in our Books: the force of argument in this place ſtandeth thus: if it be ſo in a feoffment paſſing a new right, much more is it for the reſtitution of an antient right as the worthier and more reſpected in law, which holdeth affirmatively, as our Author here teacheth us. Vide Sect 438.

The thing (&c.) in this Section need no explication.

## *Sect.* 419.

Vide Sect. preced.

¶ Here is to be obſerved, that every doubt or fear is not ſufficient, for it muſt concern the ſafety of the perſon of a man, and not his houſes or goods; for if he fear the burning of his houſes, or the taking away or ſpoiling of his goods, this is not

7.E.4.21.39.H.6.5. ſufficient, becauſe he may recover the ſame, or damages to the value, without any corporal hurt.

Again, if the fear do concern the perſon, yet it muſt not be a vaine feare, but ſuch as may befall a conſtant man; as if the adverſe party lie in wait in the way with weapons, or by words menace, to beat, maim or kill him; that would enter; and ſo in pleading muſt he ſhew ſome juſt cauſe of fear, for fear of it ſelfe is intervalit and ſecret. But in a ſpeciall verdict, if the Jurors do finde, that the Diſſeiſee did not enter for

39.E.3.38. 11.R.2.tit.dures 2. 12.H.4.19.20. feare of corporall hurt, this is ſufficient, and ſhall be intended that they had evidence to prove the ſame. Talis enim debet eſſe metus qui cadere poteſt in

Bract.lib.2.fol.16.b. Britton fol.19.66. Fleta lib.3.cap.7.& lib.2.cap. 54.49.E.3.14.14.H.4.13 39.Aſſ.11. virum conſtantem, & qui in ſe continet mortis periculum, & corporis cruciatum. Et nemo tenetur ſe infortuniis & periculis exponere.

11.H.6.51.38.H.6.27. 39.H.6 36.5.20.H.6.28. 4.E.4.17.12.E.4.28. H.6.8.41.E.3.9 11.H.4. 6. 8.Aſſ.25. Vide Sect.431. W.2 cap.49. 13.H.4.dures 20. And it ſeemeth that fear of impriſonment is alſo ſufficient, for ſuch a fear ſufficeth to avoid a Bond or a Deed, for the Law hath a ſpecial regard to the ſafety and liberty of a man. And impriſonment is a corporal damage, a reſtraint of liberty, and a kind of captivity. But ſee in the ſecond part of the Inſtitutes, W. 2. cap. 49. a notable diverſity between a claim or an entry into land, and the avoidance of an Act or Deed for fear of battery.

¶ *Per tiel claime il ad un poſſeſſion & ſeiſin, &c.* Here is to be obſerved, that there be two manner of Entries, viz. an Entry in Deed, and an Entry in Law. An entry in Deed is ſufficiently known; an entry in law is when ſuch a claim is made as is here expreſſed, which entry in Law is as ſtrong and as forcible in law as an entry in Deed, and that as well where the lands are in the hands of one by title as by wrong. And therefore upon ſuch an entry in Law any Writ doth lie, as well as upon an entry in Deed, and ſuch an entry in Law ſhall avoid a warranty, &c.

Vide Sect.378. 11.H.6.51.

Vide Sect.442. Pl.Com.93.in Aſſ. de freſh force. The Parſon of Honylanes caſe. But here is a diverſity to be obſerved between an entry in Law, and an Entry in Deed, for that a continual claim of the Diſſeiſee being an entry in law ſhall veſt the poſſeſſion and ſeiſin in him for his advantage, but not for his diſadvantage. And therefore if the Diſſeiſee bring an aſſiſe, and hanging the aſſiſe, he make continual claim, this ſhall not abate the aſſiſe, but he ſhall recover damages from the beginning; but otherwiſe it is of an entry in Deed. See more of this matter after, in this Chapter, Sect. 422.

¶ Lẽ ſecond chaſe eſt a entender, q̃ ſi home ad title denter en aſcuns terres ou tenements, ſil ne oſa̅t enter en meſmes terres ou tenements, ne en aſcun parcel de ẽ p doubt de battery, ou per doubt de mayhem, ou pur doubt de mort, ſil alaſt e approach aupry pres la tenements, come il oſa̅t pur tiel doubt, & claime pur parol les tenements eſtre les ſoens, maintenant per tiel claime il ad un poſſeſſion, & ſeiſin e les tenemẽts, auxy bien come ſil null enter en fait, tement que il naveit unque poſſeſſion ou ſeiſin d meſme les terres ou tenẽts devant le dit claime.

THe ſecond thing to be underſtood is, that if a man hath title to enter into any lands or tenements, if he dares not enter into the ſame Lands or Tenements, nor into any parcel thereof, for doubt of beating, or for doubt of maiming, or for doubt of death, if he goeth and approach as neer to the tenements as he dare for ſuch doubt, and by word claime the Land to be his, preſently by ſuch claime he hath a poſſeſſion and ſeiſin in the lands, as well as if he had entred indeed, although he never had poſſeſſion or ſeiſin of the ſame lands or tenements before the ſaid claime.

## *Sect.* 420.

¶ ET que la ley eſt tiel, il eſt bien proue per un plee dun aſſiſe en le Liuer daſſ. An. 38. E. 3. P. 32. le tenor de quel enſuiſt en tiel forme. En le County de Dorſet devant les Juſtice trove fuit per verdict daſſiſe, que le Plaintife que avoit droit per diſcent de heritage daver les Tenements mis en plaint, al temps del morant ſon anceſtor, fuit demurront en le ville ou les tenements fueront, & per parolx claim les tenements enter ſes vicines, mes pur doubt de mort il nosa approcher les tenements, mes port laſſiſe, & ſur ceſt matter trove, agard fuit il recovera, &c.

AND that the law is ſo, it is well proved by a plea of an Aſſiſe, in the Book of Aſſiſes, *An.* 38. *E.* 3. *P.* 32. the tenor whereof followeth in this manner. In the County of *Dorſet*, before the Juſtices, it was found by verdict of Aſſiſe, that the Plaintiffe which had right by diſcent of Inheritance, to have the tenements put in plaint, at the deceaſe of his Anceſtor was abiding in the Town where the Tenements were, and by parol claimed the tenements amongſt his Neighbors, but for fear of death he durſt not approach the tenements, but bringeth his Aſſiſe; and upon this matter found, it was awarded that he ſhould recover, &c.

¶ Here it appeareth that our Book Caſes are the beſt proofs what the Law is. Argumentum ab authoritate eſt fortiſſimum in Lege. And for proof of the Law in this particular, caſe Littleton here citeth a caſe in 38. E. 3. but it is miſprinted, for the original according to the truth is, In the Book of Aſſiſes, 38. E. 3. p. 23. and not placito 32. for there be not ſo many pleas in that year. And after the example of Littleton, Book caſes are principally ſo to be cited for deciding of caſes in queſtion, and not any private opinion, Teſte meipſo. More ſhall be ſaid of the matter implied in this Section, in the next following. 38. Aſſ. p. 23.

## *Sect.* 421.

¶ LA tierce choſe eſt a entender, deins quel temps & per quel temps le claime que eſt dit continual claime, ſerbeta & aidera celuy que fit le claime & ſes heirs. Et quant a ceo eſt alcaboir, que celuy que ad title dē ter, quant il voyer faire ſon claime, ſi il oſaſt approcher la

THE third thing is to know within what time & by what time the claime which is ſaid continual claim ſhall ſerve and aid him that maketh the claim, & his heirs. And as to this, it is to be underſtood, that he which hath title to enter, when he will make his claime, if he dare approach the Land then

¶ *Covient a luy daler & approcher auxi pres, &c.* By this it ſhould ſeem, that by the authority of our Author, if the Diſſeiſee cometh as neer to the Land as he dare, &c. and maketh his claim, this ſhould be ſufficient, albeit he be not within the view.

And the great authority of the Booke * in 9. H. 4. (being by the whole Court) is not againſt this, for that caſe is put where there is no ſuch fear, as here our Author mentioneth in him that makes the continual claim. (*) 9. H. 4. 5.

and then he that makes the continual claim ought to be within the view of the Land; and therefore the authority of this book, as it is commonly conceived, is not against the opinion of our Author in the point aforesaid. But then it is further objected, that the said book is against another opinion of our Author in this Section, viz. that where there is no fear, &c. he that maketh a continual claime ought to go to the Land or to parcel thereof to make his claim; and therefore in that case he cannot make a claim within the view of the Land.

terre donqz il covient alera a la terre ou a parcel de ceo, & faire son claime, et sil nosa approcher la fre pur doubt ou pavor d batterie, ou mayhē, ou mort, donques covient a luy aler & approcher aury pres come il osa vers la terre, ou parcel de ceo, a faire son claim.

he ought to go to the land, or to parcel of it, and make his claime, and if he dare not approach the Land for doubt or fear of beating or maiming, or death, then ought he to go and approach as neer as he dare towards the land or parcel of it, to make his claim.

(*) 11. H. 6. 51. agrees with our Author in this point.

To this it is answered, that where a continual claim shall devest any estate in any other person in any lands or tenements, there, as it hath been said, he that maketh the claim ought to enter into the land or some part thereof, according to the opinion of our Author: but where the claim is not to devest any estate, but to bring him that maketh it into actual possession, there a claim within the view sufficeth, as upon a discent, the heir having the freehold in law may claim land within the view to bring himself into actual possession, and in that sense is the opinion of Hull and the Court to be intended. Et sic in similibus. But yet the entry into some parcel in the name of the residue is the surest way.

Vide Sect. 177.

## Sect. 422.

Vide Sect. 385.426. 9.4.5.14.H.4.36. 7.E.3.37.Pl Com.356. 357.367. Mittor cap.2.Sect.18. Britton fol.45.b.& 126.

¶ *Deins lan, & le jour.* It is to be observed that the Law in many cases hath limited a year and a day to be a legal and convenient time for many purposes. As at the common Law upon a fine or final judgment given in a writ of right, the party grieved had a year and a day to make his claim. So the wife or Heir hath a year and a day to bring an appeal of death. If a Villein remained in antient Demesne a year and a day, he is privileged. If a man be wounded or poysoned, &c. and dyeth thereof within the year and the day, it is felony. By the antient Law if the Feoffee of a Disseisor had continued a year and a day, the entry of the Disseisee for his negligence had been taken away. After judgment given in a real action, the plaintiffe within the year and the day may have a Habere facias seisinam, and in an action of debt, &c. a Capias, Fieri facias, or a Levari facias. A protection shall be allowed but for a year and a day, and no longer, and in many other cases.

¶ Et si son adversary q̄ occupia le terre mourust seisie en fee, ou en fee taile deins l'an & le jour apres tiel claim, per que les tenemēts discendont a son fits come heire a luy, uncore poit celuy que fist le claime entrer sur le possession le heire, &c.

And if his adversary who occupieth the land dyeth seised in fee, or in fee taile within the year and a day after such claim, whereby the lands descend to his son as heir to him, yet may he which makes the claim enter upon the possession of the heir, &c.

Vid.Sect.385.

But this time of a year and a day in case of continuall claim, is since our Author wrote, altered by the said Statute of 32.H.8.cap.33. as before it appeareth.

Sect.

## *Sect.* 423.

¶ MEs en ceſt cas apres lan & le jour que tiel claime fuit fait, ſi le pere donques morust ſeiſie ademain prochein apres lan & le jour, ou un auter jour apres, &c. donques ne poit celuy que fit le claim entrer: & pur ceo ſi celuy que fit le claime voit eſtre ſure a touts temps que ſon entre ne ſerra toll per tiel diſcent, &c. il covient a luy que deins lan & le jour apres le primer claime fait, de faire un auter claime en le forme avantdit, & deins lan & le jour apres le ſecond claime fait, de faire le tierce claime en meſme le maner, & deins lan & le jour de le tierce claime de faire un auter claime, & iſſint ouſter, ceſſaſcaboir, de faire un claime deins cheſcun an & jour prochein aps cheſcun claime fait durant la vie ſon adverſary, & donques, a quecunqz temps q̄ ſon adverſary morust ſeiſie ſon entry ne ſerra tolle per nul tiel diſcent. Et tiel claim en tiel maner fait, eſt pluis communement priſe & noſme Continual Claime de luy que fit le claime.

BUt in this caſe after the year and the day that ſuch claime was made, if the Father then dyed ſeiſed the morrow next after the year and the day, or any other day after, &c. then cannot he which made the claim enter: And therefore if he which made the claime will be ſure at all times that his entry ſhall not be taken away by ſuch diſcent, &c. it behoveth him, that within the year and the day after the firſt claim made, to make another claim in form aforeſaid, and within the year and the day after the ſecond claim made, to make the third claim in the ſame maner, and within the year and the day after the third claim to make another claim, and ſo over, that is to ſay, to make a claim within every year and day next after every claim made during the life of his adverſary; and then at what time ſoever his adverſary dieth ſeiſed, his entry ſhall not be taken away by any diſcent. And ſuch claim in ſuch manner made is moſt commonly taken and named Continual Claim of him which maketh the claim, &c.

¶ IT is to be obſerved, that the year and the day ſhall be ſo accounted, as the day whereon the Claim was made ſhall be accounted one: as for example, If the Claim were made 2. Die Martii, that day ſhall be accounted for one, for Littleton ſaith in the Section next before (after the Claim made) and then the year muſt end the firſt day of March, and the day after is the ſecond day of March. Vide Sect. 385.

See for the Computation of the year De anno biſextili, and of the day natural and artificial, and other parts of the year, (a) Bracton, (b) Britton, and (c) Fleta, excellent matter. (a) Brac. fol. 264. 344. 359. (b) Britton fol. 209. (c) Fleta lib. 6. cap. 11. Srature de anno Biſex. 21. H. 3. Dyer 17. Eliz. 345.

## *Sect.* 424.

¶ MEs uncore en le cas avantdit, lou ſon adver-

BUt yet in the caſe aforeſaid, where his Adverſary dyeth

ſarie mozuſt deins lan & la jour prochein apres le claime, ceo eſt en Ley un Continual Claime entant, que ladverſary deins lan & le jour prochein apres meſme la claime mozuſt. Car il ne beloigne a celuy que fiſt ſon claime de faire altrun auter claime, mes a quel temps que il voit deins meſm lan & jour, &c.

within the year and the day next after the claim, this is in law a continual claim, inſomuch as his adverſary within the year and the day next after the ſame claim, dieth. For he which made his Claim, needeth not to make any other claim, but at what time he will within the ſame year and day, &c.

Vide Sect. 414.

This is evident.

## Sect. 425.

¶ ITem, ſi ladverſary ſoit diſſeiſie deins lan & le jour apres tiel claime, & le diſſeiſor ent mozuſt ſeiſie deins lan & le jour, &c. tiel mozant ſeiſie ne griebera my celuy que fiſt le claim mes que il poit enter, &c. Car quecunque ſoit que mozuſt ſeiſie deins lan & le jour prochein apres tiel claim fait ceo ne griebera my celuy que fiſt le claime, mes que il poit enter, &c. coment que fueront pluſors mozant ſeiſie, & pluſors Diſcents deins ſm lan & le jour, &c.

ALſo if the adverſary be diſſeiſed with the year and the day after ſuch claim, and the Diſſeiſor thereof dieth ſeiſed within the year and the day, &c. ſuch dying ſeiſed ſhall not grieve him which made the claim, but that he may enter, &c. for whoſoever he be that dyeth ſeiſed within the year and the day after ſuch claim made, this ſhall not hurt him that made the claim but that he may enter, &c. albeit there were many dying ſeiſed, and many Diſcents within the ſame year and day, &c.

¶ HEre it appeareth, that the Continual Claim doth not only extend to the firſt Diſſeiſor, in whoſe poſſeſſion it was made, but to any other Diſſeiſor, that dyeth ſeiſed within the year and day after the Continual Claim made. And whereas our Author ſpeaketh of a ſecond Diſſeiſor, &c. herein is likewiſe implyed not only Abators and Intruders, but the Feoffees or Donees of the Diſſeiſors, Abators or Intruders, and any other Feoffee or Donee immediate or mediate, dying ſeiſed within the year and day of ſuch Continual Claim made.

## Sect. 426.

¶ ITem, ſi home ſoit diſſeiſie, & le Diſſeiſor mozuſt ſeiſie deins lan & le jour prochein apres le diſſeiſin fait, per que les Tenements diſcendont a ſon

ALſo if a man be diſſeiſed, and the diſſeiſor dieth ſeiſed, within the year and day next after the Diſſeiſin made, whereby the tenements diſcend to his Heir, in this

heire

heire, en cell case lentrie le Disseisee est tollie car lan & le jour que auoit le Disseisee en tiel case, ne serra pris de temps de title dentre a luy accrue, mes tantsolement de temps del claime per luy fait en le manner avantdit: & pur cel cause il serroit bon pur tiel disseisee, pur faire son claime en aury breve temps que il puissoit apres le disseisin, &c.

case the entry of the disseisee is taken away; for the year and day which should aid the Disseisee in such case, shall not be taken from the time of title of entry accrued unto him, but only from the time of the claime made by him in manner aforesaid: and for this cause it shall be good for such disseisee to make his claime in as short time as he can after the Disseisin, &c.

¶ This in case of a Disseisor is now holpen by the Statute made since Littleton wrote, as hath been said; for if the Disseisor die seised within five years after the Disseisin, though there be no Continual Claim made, it shall not take away the Entry of the Disseisee; but after the five years, there must be such Continual Claim as was at the Common Law: But that Statute extendeth not to any Feoffee or Donee of the Disseisor immediate or mediate, but they remain still at the Common Law, as hath been said. 32. H. 8. cap. 33. Vide Sect. 385. 422.

## Sect. 274.

¶ Item, si tiel Disseisee occupia la terre per cynk ans, ou per pluisors ans sans aleun claim fait per le disseisee, &c. Et le Disseisee per petit space devaunt le mort del Disseisor fait un claime en le forme avantdit, si issint fortunast que deins lan & le jour apres tiel claime le Disseisor morust, &c. lentry le Disseisee est congeable, &c. & pur ceo il serroit bone pur tiel home que ne fit claime que ad bone title dentrie, quant il oyet que son adversary gist languishment, de faire son claime, &c.

Also if such Disseisor occupieth the lands forty years, or more years, without any claime made by the Disseisee, &c. and the Disseisee a little before the death of the Disseisor makes a claime in the forme aforesaid, if so it fortuneth, that within the year and the day after such claim, the Disseisor die, &c. the entry of the Disseisee in congeable, &c. And therefore it shall be good for such a man which hath not made claim, and which hath good title of entry, when he heareth that his adversary lieth languishing, to make his claim, &c.

¶ This is evident enough, and in respect of that which hath been said, needth not to be explained.

## Sect. 428.

¶ Item, si com est dit en les cases mises, lou home

Also as it is said in the cases, put where a man hath title

¶ Here title is taken in big, large sense to include a right.

¶ *Aseun auter title, &c.*

&c. Here is implied Abators or Intruders, and not only their Diſſeiſors, but the Feoffees or Donees of diſſeiſors, Abators, or Intruders, or any other, ſo long as the entry is congeable.

ad title dentre pur cauſe dun Diſſeiſin, &c. Meſme la Ley eſt lou home ad droit dentre per cauſe de alcun auter title, &c.

of entry by cauſe of a Diſſeiſin, &c. the ſame Law is where a man hath rent to right by cauſe of another title, &c.

## Sect. 429.

¶ Item, ō les dits Preūdents poies ſcaver (mon fits) deux choſes. Un eſt, lou home ad title dentre ſur un Tenant en le taile, il fait un tiel claim a la fre donques eſt leſtate Taile defeat, car cel claime eſt come entre fait pur luy, & eſt de meſme leffect en Ley, ūcome il fuiſſoit ſur meſmes tenements, & uſt entr̄ en meſmes les Tenements, come devant eſt dit. Et donques quant le Tenant en le taile immediate puis tiel claime continua ſon occupation en les tenements, ceo eſt un diſſeiſin fait de meſmes les tenements, a celuy que fit tiel claim, & ſic per conſequens, le Tenant adonques ad fee ſimple.

ALſo, of the ſaid foreſaying thou maiſt know (my ſon) two things. One is, where a man hath title to enter upon a tenant in taile, if he maketh ſuch a claime to the land, then is the eſtate tail defeated, for this claime is as an entry made by him, and is of the ſame effect in law, as if he had been upon the ſame tenements, and had entred into the ſame, as before is ſaid. And then when the Tenant in taile immediately after ſuch claim continue his occupation in the lands, this is a Diſſeiſin made of the ſame tenements to him which made ſuch claim; and ſo by conſequent, the tenant then hath a Fee ſimple.

¶ *Preſidents.* This ſhould be Precedents, and ſo is the original; and this agreeth with the right ſenſe of Littleton.

And here it appeareth, That a Continual Claim, which is an Entry in Law, is as ſtrong as an Entry in deed.

Vide Sect. 650, and 659. &c.

¶ *Title de entry.* Here Title de entrie is taken in the large ſenſe, for right of Entry.

## Sect. 430.

¶ LE ſecond choſe eſt, que aury ſovent que il que ad droit dentre fait tiel claim, & ceo nient contrileant ſon adverſary continua ſon occupation, aury ſovent la adverſary fait tort & diſſeiſin a celuy que fit le claim. Et

THe ſecond thing is, That as often as he which hath right of entry maketh ſuch claime, and this notwithſtanding his adverſary continue his occupation, ſo often the Adverſary doth wrong and Diſſeiſin to him which made the claime.

pur

pur cel cause auxy sovent poit celuy que fist m̃ le claime pur chescun tiel tort & disseisin fait a luy, aver un briefe de trũs. Quare clausum fregit, &c. & recovera ses damages, &c.

And for this cause so often may he which makes the same claime for every such wrong & disseisin done unto him, have a writ of trespass. *Quare clausum fregit, &c.* and recover his damages, &c.

¶ HEreby also it appeareth, that an entry in Law is equivalent to an entry indeed. ¶ *Aver a breve de trespasse*, Quare clausum fregit, *& recovera ses damages.* The Disseisee shall have an action of trespass against the Disseisor, and recover his damages for the first entry without any regress, but after regress he may have an action of trespass with a Continuando, and recover as well for all the mean occupation as for the first entry. And here note that Littleton doth here include costs within damages.

37.H.35.34.H.6.30. 13..H.7.15.10.H.14. 1.E.4.18.21.E.4.5.74. 13. E.2.3.27.Ass.64. 38.Ass.9.44.E.3.20. 10.H.7.27.Keylwey 1.b. 5.R.2.cap.7.

## *Sect.* 431.

¶ OU il poit aver un briefe sur l'statute le Roy R. l'second, fait lan de son raigne 5. suppolant p son briefe, que son adversary avoit ent & les terres ou tenements celui, que fist le claime, ou son entry ne fuit pas done per la ley, &c. & per tiel action il recovera ses dammages, &c. Et ũ le case fuit tiel, que adversary occupiast les tenements oue force & armes ou oue multitude de gents a tẽps de tiel claime, &c. immediate apres meme le claime, poit celuy que fist le claime, pur chescun tiel fait aver un briefe de forcible entry, & recovera ses treble dammages, &c.

OR he may have a Writ upon the statute of *R.* 2. made in the fift yeare of his Reign, supposing by his Writ that his Adversary had entred into the Lands or tenements of him that made the Claime, where his entry was not given by the Law, &c. and by this action he shall recover his damages, &c. and if the case were such that the adversary occupied the tenements with force and armes, or with a multitude of people at the time of such claime, &c. immediately after the same claime may he which made the claime for every such act have a Writ of forcible entry, & shall recover his treble damages, &c.

¶ THis is the statute of 5. R. 2. cap. 7.

¶ *Per tiel action il recovera ses dammages.*

This is to be understood, that he shall recover damages for the first tortious entry, but not for the mean profits in this action, though he made a regress: And here note, that also he shall recover his costs of suit expense litis which Littleton doth include within these words (damages, &c.)

2.E.4.24.b.9.E.4.4.b. 16.H.7.6.2.

¶ *Damages.* Dimna in the Common Law hath a special signification for the recompence that is given by the Jury for the Plaintiffe or Defendant, for the wrong the Defendant hath done unto him.

¶ *Multitude.* One or more may commit a force, three or more may commit an unlawful assembly, a riot or a rout. A multitude here spoken of (as some have said) must be ten or more. Multitudinem decem faciunt. And so (say they) it is said, de grege hominum. But I could never read it restrained by the common law to any certain number, but left to the discretion of the Judges.

¶ *Un briefe de forcible entrie & recovera ses treble damages.* This writ is

8.H.6.cap.9.3.E.4. 19.24. F.N.E.248 11.E.4.11.b. 6.H.7.12.b.22. H.6.37. 19.H.6.Regiſter.97. 22.H.6.57.F.N.B.249.a.

is grounded upon the ſtatute of 8.H 6. and lieth either where one entreth with force, or where he entreth peaceably and detaineth it with force, or where he entreth by force, and detaineth it by force. And in this action without any regreſs the Plaintiffe ſhall recover treble damages, as well for the mean occupation, as for the firſt entry, by force of the ſtatute. And albeit he ſhall recover treble damages, yet ſhall he recover coſts, which ſhall be trebled alſo.

10.H.7.22.

One may commit a forcible entry, as hath been ſaid, in reſpect of the armour or weapons which he hath, that are not uſually born, or if he do uſe violence and threats, to the terror of another. And if three or four go to make a forcible entry, albeit one alone uſe the violence, all are guilty of force. If the Maſter cometh with a greater number of ſervants than uſually attend on him, it is a forcible entry.

33.H.6.20.

It is to be underſtood that there is a force implied in Law, as every Treſpaſs and Reſcous and Diſſeiſin implieth a force, and is vi & armis; and there is an actual force, as with weapons, number of perſons, &c. and when an entry is made with ſuch actual force, an action doth lie upon the ſaid ſtatute. See before more of force and armes, Sect. 240.

## *Sect.* 432.

¶ Item, il eſt a veier, ſi le ſervant dun home que ad title denter, poit per l' commandement ſon Maſter fait continual claim pur ſon Maſter, ou non.

Alſo it is to be ſeen, if the ſervant of a man who hath title to enter, may by the commandment of his Maſter make a continual claime for his Maſter, or not.

This needeth no explication.

## *Sect.* 433.

¶ Et il ſemble que en aſcuns caſes il poit ceo faire, car ſi per ſon commandement vient a aſcun parcel de la terre & la fait claime, &c. en le noſme ſon Maſter, ceſt claime eſt aſſets bone pur ſon Maſter, pur ceo que il fait tout ceo que ſon Maſter covient faire ou deboit faire en tiel cas, &c. Aux ſi le Maſter dit a ſon ſervant, que il ne oſaſt venir a la terre, ne aſcun parcel de la terre, pur fair ſon claime, &c. & que il ne oſaſt approcher pluis prochein a la terre forſque a tiel lieu appel Dale, & commanda ſon ſervant dale a meſme le lieu de Dale, & la faire un claime pur luy, &c. ſi le ſervant iſſint fait, &c. ceo ſemble auxy bone claime pur ſon Maſter, ſicome

And it ſeemeth that in ſome caſes he may do this; for if he by his commandment cometh to any parcel of the Land, and there maketh claime, &c. in the name of his Maſter, this claim is good enough for his Maſter, for that he doth all that which his Maſter ſhould or ought to do in ſuch caſe, &c. Alſo if the Maſter, ſay to his ſervant that he dares not come to the land, nor to any pareel of it to make his claim, &c. and that he dare approach no neerer to the land than to ſuch a place called Dale, and command his ſervant to go to the ſame place of Dale, and there make a claime for him, &c. if the ſervant doth this, &c. this alſo ſeemeth a good claime for his Maſter, as if his Maſter were

ſon

ſon Maſter la ſuit en proper perſon, pur ceo que le ſervant fiſt tout ceo que ſon Maſter oſaſt & devoit faire per la ley en tiel caſe, &c.

there in his proper perſon, for that the ſervant did all that which his Maſter durſt, and ought to do by the law in ſuch a caſe, &c.

¶ Here it appeareth, that where the ſervant doth all that which he is commanded, and which his Maſter ought to do, there it is as ſufficient as if his maſter did it himſelf; for the rule is, Qui per alium facit, per ſeipſum facere videtur.

¶ *Per Commandement.* If an infant or any man of full age have any right of Entry into any lands, any ſtranger in the name and to the uſe of the Infant or man of full age may enter into the lands; and this regularly ſhall veſt the lands in them without any commandment precedent or agreement ſubſequent. (*) But if a diſſeiſor levy a fine, with Proclamation according to the Statute, an ſtranger without a commandment precedent, or an agreement ſubſequent, within the five years cannot enter in the name of the Diſſeiſee to avoid the Fine. And that reſolution was grounded upon the conſtruction of the Statute of 4. H. 7. cap. 24. But an aſſent ſubſequent within the five years ſhould be ſufficient; Omnis enim ratihabitio retrotrahitur, & mandato æquiparatur, as hath been ſaid.

7.E.3.69.a.b. 45.E.3.Releaſe 28. 45.E.3.tit.Briefe 589. 20.E.3.62.per Thorp. 11.Aſſ.p.11,39.Aſſ.p.18 10.H.7.12.a. 21.H.8.tit.entr. Cong. & tit.Fauxtifier recovery 29. (*)Lib.9.fo.106.a. the Lord Awdleys caſe.

¶ *Auxi ſi le maſter mi a ſon ſervant que il ne oſaſt, &c.* Here it appeareth that where the ſervant purſueth the commandment of his Maſter, and doth all that which his Maſter durſt and ought to do by the Law, this is ſufficient. And although the Maſter feareth more than the ſervant, or admit that the ſervant hath no fear at all, yet if he goeth as far as his maſter durſt, and as he commanded, it is ſufficient. And this is implied in this ſection.

## Sect. 434.

¶ AUry ſi home ſoit ey languiſhant, ou ey decreppte, que il ne poit per nul maner bener a le terre, ne a alcun parcel d'icel, ou ſi un reclule ſoit, q̄ ne poit per cauſe de ſon ordre aler hors de ſa meaſon. Sitiel maner de perſon commaunder ſon ſervant aler & faire claime pur luy, & tiel ſervant ne oſaſt aler a le fre, ne a alcun parcel de ceo pur doubt de batery, mayhem, ou mort, &c. & pur cel cauſe tiel ſervãt dit, aury nes a la terre come il oſaſt pur tiel

ALſo if a man be ſo languiſhing, or ſo decrepite, that he cannot by any meanes come to the land nor to any parcell of it, or if there be a recluſe which may not by reaſon of his order goe out of his houſe, if ſuch manner of perſon command his ſervant to go and make claim for him, and ſuch ſervant dare not go to the land, nor to any parcell of it for doubt of beating, maim, or death, &c. and for this cauſe the ſervant commeth as neer to the land as he dareth for ſuch doubt

¶ REgularly it is true, that where a man doth leſs than the Commandment or Authority contained unto him, there (the Commandment or Authority being not purſued) the act is void. And where a man doth that which hath authorized to doe and more there it is good for that which is warranted, and void for the reſt; yet both theſe rules have divers exceptions and limitations.

For the firſt Littleton here putteth a caſe where the ſervant doth leſs than he is commanded; and yet is ſufficient, for that Impotentia excuſat legem, for ſeeing the maſter cannot, and the ſervant dareth not (out of fear of death or maim) that he come as neer to the land as he dareth.

11.H.4.3. 21.Aſſ.24.26.Aſſ.3.4.

A man made a Leaſe of Ware-land to Baldwin ſeiſed to I.S. upon condition, and the Leaſe was delivered to Baldwin, this is void; and ſo ſome hold, if the warrant be abſolute, and he delivereth ſeiſin

See before, Sect. 419.

ſeiſin upon Condition the livery is void.

¶ *Pur battery, mayhem ou mort.* See the ſecond part of the Inſtitutes W.2. cap. 49. a diverſity betweene the making of an Entry or Claime, and the avoidance of an Act or Deed.

¶ *Autrement le maſter ſerroit en treſgrand miſchiefe.* Argumentum ab inconvenienti eſt validum in lege, quia lex non permittit aliquod inconveniens. And as hath ben often obſerved before, Nihil quod eſt inconveniens eſt licitum.

46.E.3.Petition 18.
33.H.6.8.
43.E.3.8.b.30.2.

¶ *Recluſe.* Recluſus, Heremita, ſeu Anchoreta, ſo called by the order of his religion, he is ſo mured or ſhut up, Quod ſolus ſemper ſit, & in clauſura ſua ſedet, and can neber come out of his place. Secluſus enim & extra converſationem civilem hoc profeſſionis genus ſemper habitat: Note here, albeit the Recluſe or Inachorite be ſhut up himſelf, ſo as he by his order is not to come out in perſon, yet to avoid a diſcont, he muſt command one to make claim; and ſuch a Recluſe ſhall always appear by Attorney in ſuch caſes where others muſt appear in proper perſon. Impotentia enim excuſat legem.

doubt, & fait l'claim, &c. pur ſon Maſter il ſemble que tiel claim pur ſon Maſter eſt aſſets fort, & bon en ley. Car autrement ſon Maſter ſerroit en treſgrand miſchiefe, car il bien poit eſtre que tiel perſon q̄ eſt languiſhant, decrepite, ou recluſe, ne poit trober alcun ſervant que oſaſt aler a la terr̄, ne alcun parcel de cel pur faire le claime pur luy, &c.

and maketh the claim, &c. for his Maſter, it ſeemeth that ſuch claime for his Maſter is ſtrong enough, and good in Law. For otherwiſe his Maſter ſhould be in a very great miſchief; for it may well be that ſuch perſon which is ſicke, decrepit, or recluſe, cannot finde any ſervant which dare go to the land or to any parcel of it to make the claim for him, &c.

## Sect. 435.

MEs ſi le Maſter d̄ tiel ſervant ſoit de bone ſane, & poit & oſaſt bien aler a les Tenements, ou a parcel de ceo de faire ſon claime, &c. ſi tiel Maſter commanda ſon ſervant daler a alcun parcel de la terre a faire claime pur luy, & quant le ſervant eſt an alant de faire le commandement de ſon Maſter, il oye per le voy tiels choſes que il ne oſaſt bener a alcun parcel de la terre pur faire le claime pur ſon Maſter, & pur cel cauſe il vient auxy pres la r̄re come il oſaſt pur doubt de mort, & la fait claime pur ſon Maſter, & en le noſme de ſon Maſter, &c. il ſemble que le doubt en le ley en tiel caſe ſerroit, ſi tiel claime a-vaillera ſon Maſter, ou nemy,

BUt if the Maſter of ſuch ſervant be in good health, and can and dare well go to the lands or to parcell of it to make his claime, &c. if ſuch Maſter command his ſervant to go to any parcell of the land to make claim for him, and when the ſervant is in going to do the commandment of his Maſter, he heareth by the way ſuch things as he dare not come to any parcel of the land to make the claim for his Maſter, and therefore he commeth as neer to the land as he dare for doubt of death, and there maketh claime for his Maſter, and in the name of his Maſter, &c. it ſeemeth that the doubt in law in ſuch caſe ſhall be, whether ſuch claime ſhall avail his Maſter

pur

pur ceo que le ſervant ne fiſt tout ceo que ſon Maſter al temps de ſon commandement oſaſt faire, &c. Quære.

or not, for that the ſervant did not all that which his Maſter at the time of his commandment durſt have done, &c. *Quære.*

¶ This Continual Claim is void, for that the ſervant doth leſs than that which is expreſſly commanded, and there is no impotency or fear in the Maſter.

## *Sect.* 436.

¶ Item alcũs ont dit que lou home eſt en priſon, & eſt diſſeiſie, & le diſſeiſor morust ſeiſie durant le temps q̃ le diſſeiſee eſt en priſon, per q̃ les tenements diſcendront al heire del diſſeiſor, ils ont dit, que ceo ne nuiera my le diſſeiſee que eſt en priſon, mes que il bien poit enter, nient obſtant tiel diſcent, pur ceo que il ne puiſſoit faire continual claim, quant il fuit en priſon.

ALSO ſome have ſaid that where a man is in priſon and is diſſeiſed, and the Diſſeiſor dyeth ſeiſed during the time that the Diſſeiſee is in priſon, whereby the tenements diſcend to the Heir of the Diſſeiſor, they have ſaid that this ſhall not hurt the diſſeiſee which is in priſon, but that he well may enter, notwithſtanding ſuch a deſcent, becauſe he could not make Continuall Claim when he was in priſon.

¶ *Quant home eſt en priſon & eſt diſſeiſie.* For if he be diſſeiſed when he is at large, & the diſcent is caſt during the time of his impriſonment, this diſcent ſhall bind him. 9. H. 24. Pl. Com. 360.

Excuſatur autem quis quod clameum ſuum non apposuerit; ſi tempore litigii in priſona detentus fuerit, ita quod venire non poſſit, nec mittere, quia nulli vertitur in dubium, & ubi eadem ratio & idem jus eſt, ideo videtur quod Excuſari debet quis ſi per vim majorem, vel per fraudem, extra priſonam detentus fuerit, ita quod venire non poſſit, nec mittere, dum tamen hoc per certa judicia probari poterit. Bracton, lib. 5. fol. 436. Britton, fol. 116. b. Fleta, lib. 6. cap. 52, 53. & lib. 6. cap. 7. & 14.

¶ *Pur ceo que il ne pois faire continual claime quant il fuit en priſon.* Here it is to be obſerved, by the authority of Littleton, that he is not enforced in this caſe by Law to do it by his ſervant, or any other by his warrant or commandment; for things done by Deputy are ſeldome well done, but every man will ſee his own buſineſs moſt effectually ſpeeded and performed; and that it may be once ſpoken for all, the reaſon that a man impriſoned ſhall not be bound in this and the like caſes is, for that by the intendment of Law he is kept (as it is preſumed in Law) without intelligence of things abroad; and alſo that he hath not liberty to go at large to make Entry or claim, or ſeek counſel. And ſo note a diverſity between a Recluſe, who might have intelligence, and a man in priſon. Pl. Com. 360. in Stowels caſe.

## *Sect.* 437.

¶ MEs lopinion de tours les Juſtices, P. 11. H. 7. fuit q̃ ſi le diſſeiſin ſoit avant lenpriſonment, coment que le mourant ſeiſie ſoit, il eſteant en le priſon, ſon entrie eſt tolle.

BUt the opinion of all the Juſtices, P. 11. H. 7. was, that if the diſſeiſin be before the impriſonment, although the dying ſeiſed be, he being in the priſon, his entry is taken away.

¶ This is of a new addition, and miſtaken, for there is no ſuch opinion P. 11. H. 7. but it is, 9. H. fol. 24. b.

Mirror cap.3. Britton, fol.21 Fleta, lib.1.cap. 28.& lib.2.cap.56. Bracton, lib.2. 2.E.4,1.4.E.4.10.21.E. 4.73. 11.H.7.5.21.H.6. 50.9.H.4 3.21.H.6.Utlagarie 36.7.H.6.27. 21.E.4.88.22.E.4.37. 18.E.2.Villenage 47. 21.E.4.37.33.H.6.45.16 44.E.3.Villein 41. 4.H.4.19.11.H.4.34. 3.Eliz.Dier 192.2.Eliz. 176.5. Eliz.ibid.223. 19.H.6.2.8.H.6.37. 37.H.6.19.

¶ *Il reversera tiel utlagarie.* Note, the original is, Reversera tiel utlagarie per Briefe de Error, and so it would be amended: for Outlawries may be reversed two manner of ways, viz. by Plea, or by Writ of Error. By Plea, when the Defendant cometh in upon the Capias utlagatum, &c. he may by Plea reverse the same for matters apparent; as in respect of a Supersedeas, Omission of Process, Variance, or other matter apparent in the Record; and yet in their cases some hold, That in another Term the Defendant is driven to his Writ of Error.

¶ ET auxi si tiel que est en prison soit utlage in Action de debt, ou trespas, ou en appeale de Robberie, &c. il reversera tiel utlagarie envers luy pronounce, &c.

AND also if he which is in prison be outlawed in an Action of Debt, or Trespass, or in an Appeale of Robbery, &c. he shall reverse this outlawry pronounced against him, &c.

8.H.4.7.21.H.7.13. 10.H.6.58.29.H.6.20. 21.H.6.55.22.H.6.18. 39.H.6.1.33.H.6.51.45 38.H.6.33.21.E.4.94. 21.H.7 33.5.H.7.1. 12.H.6.8.11.H.6.67.19. 1.E.4.2.27.H.8.2. 38.Ass.pl.17.Vid.Sect. 439.

But for any matters in fact; as death, imprisonment, service of the King, &c. he is driven to his Writ of Error, unless it be in case of Felony; and there in favorem vitæ he may plead it.

But albeit imprisonment be a good cause to reverse an Outlawry; yet it must be by process of Law in invitum, and not by consent or colour, for such imprisonment shall not avoid the Outlawry, because upon the matter it is his own act.

## *Sect.* 438.

5.E.3.50.b.7.H.6.38.

¶ This is evident enough.

Fleta lib.6.cap.67.& 24 Vid.W.2.cap.48. and the exposition thereof, 2.part Instit. 4.E.2.Discent 51.

¶ *Per Briefe derror.* For he shall have no Writ of Discent, because the Summons was according to the Law of the Land, by Summoners and Viewes, and the Land taken into the Kings hand by the Perol.

¶ AUXY si un recoverie soit p default vers tiel que est en prison, il avoidera le judgement p Briefe de Error, pur ceo que il fuit en prison al temps de le default fait, &c. Et pur ceo que tiels matters de Record ne noyer celuy que est en prison, mes que ils serront reverses, &c. à multo fortiori, il semble que un matter en fait, s. tiel discent ewe quant il fuit en prison ne luy noyera, &c. specialment pur ceo que il ne puisse aler hors de prison pur faire Continual Claime, &c.

ALSO if a recovery be by default against such a one as is in prison, he shall avoid the judgement by a writ of Error, because he was in prison at the time of the default made, &c. And for that such matters of Record shall not hurt him which is in prison, but that they shall be reversed, &c. *à multo fortiori*, it seemeth that a matter in fact, s. such a discent had when he was in prison, shall not hurt him, &c. especially seeing he could not go out of prison, to make Continuall Claime, &c.

¶ *Per default.* Default is a French word, e Defalta is legally taken for Non-appearance in Court. There be divers causes allowed by Law for saving a mans default; as first, by Imprisonment, whereof Littleton here speaketh. 2. Per inundationem aquarum. 3. Per tempestatem. 4. Per pontem fractum. 5. Per navigium substractum per fraudem potentis; non enim debet quis se periculis & infortuniis gratis exponere, vel subjicere. 6. Per minorem ætatem, 7. Per defensionem summonitionis per Legem. 8. Per mortem Attornati, si tenens in tempore non novit. 9. Si petens essoniatus sit. 10. Si placitum mittatur sine die. 11. Per Breve de Warrantia Diei. But sickness (as one holds) is no cause of saving a default, because it may be so artificially counterfeited, that it cannot be known.

Bracton, lib.5.tract.3. Fleta, lib.6.cap.7.14. 3.H.6.46.38.E.3.5. 31.H.6.Barre.66. 12.H.4.13.50.E.3.9. 3.H.6.48.2.H.4.8. 5.H.7.3.F.N.B.17. Bract.lib.4. f.367.369. Glan.lib.1.cap.8. 28.H.6.11. 4.H.5.Challenge 153. Br.Saver.Def.45.

¶ *Record.* Recordum is a memorial or remembrance in Rolls of Parchment, of the proceedings and acts of a Court of Justice, which hath power to hold plea according to the course of the common Law, of real or mixt actions, or of Actions quare vi & armis, or of personal Actions, whereof the debt or damage amounts to 40. shillings or above, which we call Courts of Record, and are created by Parliament, Letters Patents, or Prescription. GIanvil. lib. 8. cap. 8. Bracton. lib. 3. fol. 156. Britton in proœmio & cap. 27.

It is aptly derived of Recordari, which is to keep in memory, to record, as it is said, Quod dicere nihil aliud est quàm recordari; and in the same sense the Poet useth it, Si te audiam recordor. But legally Records are restrained to the Rolls of such only as are Courts of record, and not the Rolls of inferiour, nor of any other Courts which proceed not secundum legem & consuetudinem Angliæ. And the Rolls being the Records or Memorials of the Judges of the Courts of Record, import in them such incontrolable credit and verity, as they admit no averment, plea, or proof to the contrary. And if such a Record be alledged, and it be pleaded, That there is no such Record, it shall be tryed only by it self: and the reason hereof is apparent; for otherwise (as our old Authors say, and that truly, there should never be any end of controversies, which should be inconvenient. Of Courts of Record you may read in my Reports, but yet during the Term wherein any judicial act is done, the Record remaineth in the breast of the Judges of the Court, or in their remembrance and therefore the Roll is alterable during that Term, as the Judges shal direct; but when that Term is past, then the record is in the Roll, and admitteth no alteration, averment, or proof to the contrary. Cicero. Virgil. Pl. Com. 77. b. Mich. 7. & 8. Eliz. Dyer 242. 17. E. 3. 49. 37. H. 6. 21. b. 11. H. 4. 26. b. 21. H. 6. 34 Error Br. 73. 7. H. 7. 4. 19. Ass. 7. l. 4. fo. 52. in Rawlins case. Glanvil. lib. 8. cap. 8. Bracton. lib. 3. fol. 156. Britton, cap. 27. Lib. 6. f. 11. Gentlemans case, & 30. 45. Lib. 7. fol. 30. Lib. 8. fol. 60. b. & 67. a. 7. H. 6. 28. 19. H. 6. 9.

If a Grant by Letters Patents under the great Seal be pleaded and shewed forth, the adverse party cannot plead Nul riel Record; for that it appears to the Court, that there is such a Record: but inasmuch as it is in nature of a conveyance, the party may deny the operation thereof, therefore he may plead Non concessit, and prove in evidence that the King had nothing in the thing granted, or the like, and so it was adjudged. But to return to Littleton: What then? Shall a man that is in prison be privileged from Suits or Outlawries? Nothing less; for if the Tenant or Defendant be in prison, he shall upon motion by order of the Court, be brought to the Bar, and either answer according to Law, or else the same being Recorded, the Law shall proceed against him, and he shall take no advantage of his imprisonment. 18. Eliz Dyer 353. 3. Mar. Eyer 129. Pl. Com. 232. Seignior Berkleys case. 16. H. 7. 11. b. 22. H. 8. Record Br. 65. 39. H. 6. 4 3. Eliz. Dyer 167. Lib. 6. fo. 15. Edens case. Mich. 31. & 32. Eliz. Rot. 365. In Banke le Roy inter Eden, & Franklyn, & Brown.

¶ A multo fortiori. Here is an argument, A minori ad majus, and the force of our Authors argument is this. If a man in prison shall not be bound by a recovery by default for want of answer in court of Record in a real Action, which is matter of Record (the height and strength whereof hath been somewhat touched) à multo fortiori, a Difcent in the Country, which is matter of deed, shall not for want of claim bind him that is in prison. And as the argument à minori ad majus doth ever hold (as our Author hath already told us) affirmatively, so the argument à majori ad minus, doth ever hold negatively, as our Author here teacheth us: and the reason hereof is this, Quod in minori valet, valebit in majori; & quod in majori non valet, nec valebit in minori. 7. H. 6. 38. 8. H. 6. 16. Vide Sect. 418.

¶ *Pur ceo que il ne poit aler hors de prison, &c.* By this it appeareth, That a man in prison by process of Law ought to be kept in salva & arcta custodia, and by the Law ought not to go out, though it be with a Keeper, and with the leave and sufferance of the Gaoler: but yet imprisonment must be custodia, & non pœna; for Carcer ad homines custodiendos, non ad puniendos dari debet.

## *Sect.* 439.

EN meisme le manner il semble, lou home est hors du Royalme, en service le Roy, pur besoigne del Royalme, si tiel hõe soit disseisie quant il est en service le Roy, & le disseisor mort seisie, le disseisee

IN the same manner it seemeth, where a man is out of the Realm, in the Kings service, for the business of the Realm if such a one be disseised when he is in service of the King, and the disseisor dyeth,

¶ Hors du Royalme, (id est) extra Regnum; as much to say, as out of the power of the King of England, as of his Crown of England: for if a man be upon the Sea of England, he is within the Kingdom or Realm of England and within the liegeance of the King of England, as of his Crown of England; And yet a man may be out of the jurisdiction of the common 6. R. 2. Protect. 46. Vide Sect. 198. 440, 441.

Rot.Par. { 8.H.3. 9.H.3. 15.H.3.
Temps.E.1.Avowry 192
Rot.Vasc.22.E.1.m.8.
Pat.23.E.1.1.pars Pat.
10.E.2.8.E.2.Coron. 399.
Stanf.Pl.Coron.51.

Law, and within the jurisdiction of the Lord Admiral, whose jurisdiction is very ancient, and long before the reign of Edward the third, as some have supposed, as may appear by the Laws of Oleron, (so called, for that they were made by King Richard the first when he was there) that there had been then an Admiral time out of mind, and by many other ancient records in the reignes of Henry the third, Edward the first, and Edward the second, is most manifest.

Vide Sect.677.

See hereafter in another case, which Littleton puts in his Chapter of Remitter, where he saith, Ouster le mere, beyond the sea. This great Officer in the Saxon Language is called, Aen mereal (i) over all the sea, Præfectus maris, sive classis, archithalassus: and in ancient time the office of the Admiralty was called, Custodia marinæ Angliæ, or Maritimæ Angliæ.

3.R.3.Cont.Claims 13.
4.E.3.46.

And note, Littleton saith not, Beyond the sea, or extra quatuor maria, for a man revera may be infra quatuor maria; and yet out of the Realm of England. But infra quatuor maria, or extra, is taken by construction to be within the Realm of England, or the Dominions of the same.

But here a question may be demanded: What if a man be out of the Realm, and a Recovery is had against him in a Præcipe by default, whether shall he avoid it in a Writ of Error, as well as he should do the Outlawry, or if he had been imprisoned at the time of such recovery by default? And it seemeth that he shall not avoid the recovery; for by that means a man might be infinitely delayed of his Freehold and Inheritance, wherein the Law hath so great a regard. And few or none go over, but it is either of their own freewil, or by suit, for what cause soever; and he is not in that case without his ordinary remedy, either by his Writ of higher nature, or by a Quod ei deforceat. But Outlawry in a personal Action shall be avoided in that case, quia de minimis non curat Lex; and otherwise he should be without remedy. See Section 437. and note the diversity between that case of the imprisonment, and this of being beyond sea. And Littleton putteth the case of imprisonment, and omitteth the being beyond sea here: neither have I seen any Book to warrant, That he that is beyond sea shall in this case avoid the recovery by default.

Bract.lib.5.fol.436.

¶ *En service le Roy.* Bracton sheweth, That the exception of being beyond sea is quia fuit in servitio Domini Regis ultra mare, viz. apud talem locum, and that case is clear: but you shall hear the opinion of Bracton in this next Section, where he is not in the service of the King.

seisee eileant en le service le Roy, que tiel disrent ne grieverroit le Disseisee, mes pur ceo que il ne puisse faire Continual Claim, il semble a eux, que quant il vient en Engleterre, il poit enter sur l'heir le Disseisor, &c. Car tiel home reversera un utlagarie pronunc envers luy durant le temps que il fuit en le service le Roy, &c. Ergo a multo fortiori, avera aid & indempnitie per la Ley en lauter case, &c.

seised, &c. the disseisee being in the Kings service, that such discent shall not hurt the Disseisee; but for that he could not make Continual Claim, it seems to them that when he cometh into *England* he may enter upon the Heir of the Disseisor, &c. for such a man shall reverse an outlawry pronounced against him during the time that he was in the Kings service, &c. Therefore a *multo fortiori*, he shall have aid and indempnity by the other case, &c.

## Sect. 440.

Bract.l.5.fol.436. b&. 163.Brit.fo.61.216,217. Flet.lib.6.cap.52,53. 13.H.4.Trial 6.9.H.4.3 21.H.6.Error 27. 33.H.6.1.21.H.6.34. 26.H.8.cap.18. 5.&6.E.6.cap.11.

¶ AND herewith the ancient law of England is agreeable with Littleton, and the Law at this day. So as it is Verus & constans opinio, Excusatur etiam quis quod clamcum

¶ Item, auters ont dit, que si aliun soit hors du Royalm comment que il ne soit en service le Roy, si

ALso others have said, that if a man bee out of the Realme, though he bee not in the Kings

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tiel home eſteant hors de le Royalme, eſt diſſeiſie en terres ou tenements deins le Royalme, & le diſſeiſor deby leiſie, &c. le Diſſeiſee eſteant hors du Royalme, il ſemble a eux q̄ quant l'diſſeiſor, vient diens le Royalme, que il poit enter ſur l'heire le diſſeiſor, & ceo ſemble a eux per deux cauſes. Un eſt, que celuy que eſt hors du Royalme ne poit aver conuſans del diſſeiſin fait a luy per entendement de ley, nient pluis que choſe fait hors du Royalme poit eſtre try deins le Royalme per le ſerement de 12. & de compeller tiel home per la ley de faire continual claime, le quel per lentendement de le ley ne poit aver aſcun notice, ou conuſance de tiel diſſeiſin, ceo ſerra inconvenient, & noſmeſnt quant tiel diſſeiſin eſt fait a luy quant il eſt hors du Royalme, & aury le moyant leiſie fuit quāt il fuit hors du Royalm: Car ē tiel caſe il ne poit per nul poſſibility ſolonque common preſumption faire continual claime. Mes auter-

Service; if ſuch a man being out of the Realm be diſſeiſed of Lands or Tenements within the Realm, and the Diſſeiſor dye ſeiſed, *&c.* the Diſſeiſee being out of the Realm, it ſeemeth unto them, that when the Diſſeiſee cometh into the Realm, that he may well enter upon the heir of the diſſeiſor, *&c.* and this ſeemeth unto them for two cauſes: One is, that he that is out of the Realm cannot have knowledg of the Diſſeiſin made unto him by underſtanding of the Law, no more than that a thing done out of the Realm may be tryed within this Realm by the oath of 12. men, & to compel ſuch a man to make continual claim which by the underſtanding of the law can have no knowledge or conuſance of ſuch Diſſeiſin made or done: this ſhal be incōvenient, namely, when ſuch a diſſeiſin is done unto him when he was out of the Realm, and alſo the dying ſeiſed was done when he was out of the Realm; or in ſuch caſe he may not by poſſibility after the common

non appoſuerit, ut ſi toto tempore litigii fuit ultra mare quacunque occaſione. And this is alſo agreeable with our Year Books.

¶ *Nient pluis que choſe fait hors del royalm poit eſtre try deins le royalm per le ſerement de 12.*

And in this rule of Law there is warily and truly put by Littleton, theſe words (by th oath of twelve men) meaning by a Jury. For by certificate a thing done beyond ſea may be tryed, as Littleton himſelf, Sect. 102. hath ſet down. And all matters done out of the Realm of England concerning warre, combate, or deds of armes, ſhall be tryed and termined before the Conſtable and Marſhal of England, before whom the tryal is by witneſſes, or by combate; and their proceeding is according to the civil Law, and not by the oath of twelve men, as Littleton here ſpeaketh. 42.E.3.2.& 3. V. de Sect. 102. 1.H.4.ca.ca.14.13.H.4. fol.48.E.3.2.& 3.

This rule here rehearſed by Littleton, is worthy explication. If an alien (for example, born in Fraunce) bring a real Action, and the tenant plead that the Demandant is an alien, born under the obedience of the French King, and out of the leigeance of the King of England; ſhall this caſe want tryal, becauſe the matter alledged is out of the Realm? then by the fiction of this plea, no Demandant ſhal recover; therefore in this caſe the Demandant ſhall reply, that he was born at ſuch a place in England, within the Kings leigeance; and hereupon a Jury of 12. ſhall be charged: and if they have ſufficient evidence that he was born in France, or in any other place out of the Realm, then ſhall they find, that he was born out of the Kings alleigeance, and if they have ſufficient evidence that he was born in England or Ireland or Jerſey, or Jerſey, or elſewhere within the Kings obe- 20.E.3. averment 34.27 Aſſ.24.32.H.6.25.15.E. b.15.7.H.6.15.R.2.13. 6.H.7.6.7.H.7.8. F.N.B. 196.29.Aſſ.11.13.E.1. mord.47.12.H.3.ib.55. Lib.7.fol.26,27.Calvins caſe. Lib.6.fol.47. Dowdales caſe.

dience, they shall find that he was born within the Kings ligeance. And this hath ever been the pleading & manner of trial in that case. And so it is in the case that Littleton here putteth; if a man in avoidance of a fine or a discent allege that he was out of this Realm, in Spain, at the time of levying of the fine, and at the time of the disseisin and discent; the adverse party may allege that he was at such a place in England, &c. whereupon issue shall be taken; and then in evidence he may prove that he was out of the Realm, &c. which upon sufficient evidence the Jury ought to find. And in both these cases, and the like, in a special verdict the Jury may find that he was born beyond sea, or was beyond sea at that time, &c.

mẽt ſerroit ũ tiel diſſeiſæ fuit deins l' Royalm al, tẽps d̃ le diſſeiſin, ou al temps del mozant del diſſeiſour.

presumption make continual claim; but otherwise it should be if the Disseisee were within the Realm at the time of the Disseisin, or at the time of the dying seised of the Disseisor.

The Statute of 25.E.3. De proditionibus, doth declare, that it is Treason by the common Law to adhere to the enemies of the King within the Realm, or without; if he be thereof probablement attaint of overt fact, and that he shall forfeit all his lands, &c. A man must not imagine that seing by the common Law declared by authority of Parliament, that adhering to the Kings enemies without the Realm is high Treason, and that the Delinquent may be attainted thereof, &c. that this should want trial; for then the judgment of the common Law, and declaration of the Parliament should be illusory, which no well-advised man will think, in a matter of so great consequence. But certain it is, that for necessity sake the adherency without the realm must be alledged in some place within England. And if upon evidence they shall find any adherency out of the Realm, they shall find the Delinquent guilty: But most commonly they indited him (if he had lands) in some county where his lands did lie, that were to be forfeited; and this, as appeareth in our books, was the common use. And so it is declared by the Statute (*) of 35.H.8. and that it shall be tried by twelve men of the county, where the Kings Bench shall sit, and be determined before the Justices of that Bench, or else before such Commissioners, and in such shire of the Realm, as shall be assigned by the Kings Majesties Commission; and this Statute for this point remains in force at this day; and so it was resolved (a) by all the Judges in my time, viz. in 33.Eliz. in the case of Ourke. And An.(b) 34.Eliz. in Sir John Perots case, done in Ireland, for that is out of the Realm of England; and the case (c) in Mich. 19.& 20.Eliz. was utterly denied; and Sir Christopher Wray himself (who is supposed to give his opinion in that case) protested that he never gave any such opinion, but did hold the contrary. When part of the Act, especially the original, is done in England, and part out of the Realm; that part that is to be performed out of the Realm, if issue be taken thereupon, shall be tried here by 12. men, and those twelve men shall come out of the place where the Writ is brought. For example (which ever doth illustrate) it was covenanted by Indenture, by Charter party, that a Ship should sail from Blackney Haven in Norfolk, to Mutrel in Spain, and there remain by certain days.

5.R.2.tryal 54.

(*) 35.H.8.cap.2. Stanford. pl.cor.90.

(a) 33.Eliz.case Orurk.
(b) 34. Eliz. case de Sir John Perots.
(c) Mich 19.& 20.Eliz. Dyer 360.

48.E.3.3.11.H.7.16. 2.R.3.4.

In an Action of covenant brought upon this Charter party; the Indenture was alledged to be made at Thetford in the county of Norfolk, and upon pleading the Issue was joyned, whether the said Ship remained at Mutrel in Spain by the said certain days. And it was adjudged that this Issue should be tryed at Thetford where the action was brought, because there the contract took his original by making of the Charter party; and so hath it been often adjudged in such like case.

Pasch.28.Eliz.in action de covenant inter Evangelist. Constantine Pl.& Hughgyn defendant in the Kings Bench.

An obligation made beyond the seas may be sued here in England, in what place the plaintiff will: what then if it bear date at Burdeaux in France? where shall it be sued? And answer is made, that it may be alledged to be made In quodam loco vocat. Burdeaux in France, in Islington in the county of Middlesex, and there it shall be tryed; for whether there be such a place in Islington or no, is not traversable in that case. These points are necessary to be known, in respect of the variety of opinions in our books: And of these thus much shall suffice; and now is Littleton worthy to be heard.

Ll.6.f.47. Dowdales case. Vide 32.H.6.25. 48.E.3.3.11.H.7.16. 2.E.2.Obligation 15.

Entendement de le ley

¶ *Per entendement de le ley.* Vide, for intendment of Law, Sect.99.100.110.293. 377.393. 406.367.462.463. &c. 439.

Vide Sect.269.

¶ *Ceo ſerr inconvenient.* Here also, as hath been often said, appeareth, that argumentum ab inconvenienti, is strong in Law.

¶ *Auterment eſt ſi le diſſeiſee fuit deins le royalm al temps del diſſeiſin, &c.* So as if a man be disseised before he goeth over sea, or cometh into the Realm again before the Discent, the Discent shall take away his entry.

Sect.

## Sect. 441.

¶ UN autre matter ils alegeont pur prover que devant lestatute fait en le temps de Roy E. 3. An. 34 cap. 16. de son raigne, per quel estatute nonclaim est oustè, &c. le ley fuit tiel, que si un fine soit levie de certaine terres ou Tenements, si aucun que fuit estrange al fine avoit droit daver & recover mesmes les terres ou tenements, il ne deust & fuit son claime a ceo deins lan & le jour prothein apres le fine levie, il serra barre a touts jours, Quia dicebat', finis finem litib' imponebat. Et que la ley fuit tiel, il est prove per lestatute de Westminster. 2. De donis conditionalibus, ou il est parl' que si fine soit levie de les tenements en taile, &c. Quod finis ipso jure sit nullus, nec habeant hæred'. aut illi ad quod spect' reversio (licet fuerint plenæ ætat' in Anglia, & extra prisonam) necesse habet apponere clameum suum, &c. Issint ceo

ANother matter they alledge for a proof, that before the Statute of King *Edward* the Third, made the 34 yeare of his Raigne, by which Statute Nonclaime is ousted, &c. the law was such, that if a fine were levied of certain Lands or Tenements, if any that was a stranger to the fine had right to have and to recover the same Lands or Tenements, if he came not, and made his claime thereof within a year and a day next after the fine levied, he shall be barred for ever, *Quia dicebatur quod finis finem litibus imponebat.* And that the Law was such, it is proved by the Stat. of Westm. the 2. *De donis conditionalibus*, where it is spoken, if the fine be levied of Tenements given in the taile, &c. *Quod finis ipso jure sit nullus, nec habeant hæredes, aut illi ad quos spectat reversio (licet plenæ ætatis fuerint in Anglia, & extra prisonam) necesse apponere clameum suum.* So it is proved,

¶ HEre it appeareth, what the Common Law was before the said Statute for Non-claime upon a fine levied. But now since Littleton wrote, by the Statute of 4. H. 7. five years after Proclamations made upon the fine are given to him that right hath to make his Claime, or pursue his Action, where the Common Law gave him but a year and a day. But this Statute of 4. H. 7. extends onely to Fines, and not to Nonclaime upon a Judgement in a Writ of right, and therefore the said Statute of 34. E. 3. here cited by Littleton, which ousteth Nonclaime onely to fines levied, extendeth not to a Judgement in a Writ of right at this day; and therefore the Common Law in that case remaineth to this day, viz. that Claime must be made within a year and a day after Judgment. Also if a fine be levied without Proclamations, or without so many as the Law requireth, then the Statute of Nonclaime doth extend to such a fine.

34. H. 7. cap. 24.

4. H. 7. cap. 24. See as well this Stat. as the Statute of 32. H. 8. cap. 36. well expounded in my reports. Lib. 3. fol. 44. 45. &c. case del fines per totum. lib. 5. fol. 96. 97. in Shelleyes case lib. 2. fol. 93. Binghams case lib. 8. fol. 100. Lechfords case lib. 9. fol. 139, 140, 241. Beaumonds case lib. 10. fol. 49. b. Lampots case, & 99. a. lib. 9. fol. 105, 106. Margaret Podgers case. lib. 5, fol. 124. Saffyns case lib. 10. 96, 97. Seymors case lib. 8. fol. 72. Grosleyes case lib. 11. fol. 69. 71. 78. Pl. Com. in Smith & Stapl. case, & in Stowes case, & Howels case, & Glanvil. li. 13. cap. 11. Bract. 435. Fleta, lib. 6. ca. 53. Brit. 216.

¶ *Dicebatur finis, quia finem litibus imponebat.* Here you may observe the Etymologie of a fine. And herewith agreeth (a) Antiquity, Finis idem dicitur finalis concordia, quia imponit finem litibus. And after the example (b) of Littleton, it is good to search out the Etymologie or right derivation of words, for thereby ignorantia terminis, ignorantia rei, as hath been often observed in other places. And the Civilians call this judicial concord, Transactionem Judicialem de re immobili.

(a) Glanvil. lib. 8 cap. 3. Bract. lib. 5. fol. 435. Fleta, lib. 6. cap. 52. 43.

(b) Etymologies, &c. Vide Sect. 74. 174. 194. 441. 520. 592.

¶ *Licet*

¶ *Licet fuerit plenæ ætatis, in Anglia, & extra prisonam.* In this Act of 13.E.1. De donis conditionalibus is one omitted, who is added in the Statute Demodo levandi fines, viz. & sanæ memoriæ (c) But a Feme covert had no priviledge of non-claim at the Common Law, as some have said, because she had a husband that might make claime for her. For yet Bracton saith; Item excusatur uxor quæ sub potestate viri supposita quod clameum non apposuerit, licet mittere possit. And citeth a judgment in the point, Trin.4.H.3 in Cusins case. But Fleta saith, Excusatur si fuerit uxor alicujus, si fuerit per virum impedita, quod non potuit apponere clameum. Also they in reversion or remainder expectant upon any estate of freehold were barred by the common Law, and yet they could make no claime, because, as hath been said, it belonged to the particular tenant, & not to them, because their entry was not lawful, which was one of the principal causes of making of the said Statute of 34.E.3. which ousted Non-claim. But these cases of Coverture, & of them in reversion and remainder, are now without question holpen, and just provision made for the saving of their rights and titles, by the said Statute of 4.H.7. as by the said act appeareth.

Stat. de anno. 18.E.1.

(c) Pl.Com.Stowels case.359.

Bracton, lib.5. fol.436. Britton, fol.216.b. Fleta.lib.6.cap.53.

*Sect.* 442.

¶ *Arraigne un assise.* To arraigne the Assise is to cause the Tenant to be called to make the plaint, and to set the cause in such order as the Tenant may be enforced to answer thereunto; and is derived of the French word Arraigner, which signifieth to order or set in right place. An Arraignment is sometime called an Assitution, of the Verb Assiuo, compounded of Ad & Statuo, that is, to place or set in order one by another. In the same sense that Littleton here useth it, it is used when an appeal is

Item, Quære si home soit disseisi, & il arraigne un Assise envers le disseisor, & les recognitors de le assise chasta pur le plaintife, & les Justices dassise doyle estre advises de lour judgment, tanqz al prochein assise, &c. Et en le dementiers le disseisor morust seisie, &c. si le dit fuit

Also inquire if a man be disseised, and he arraigne an assise against the disseisor, and the recognitors of the assise chante for the Plaintife, and the Justices of assise will be advised of their judgments until the next assise, &c. and in the meane season the disseisor dieth seised, &c. yet the

del

vel assise terra pris en ley pur le dit disseisee un continual claime, entant que nul default fuit en luy, &c.

said suit of the assise shall be taken in Law for the disseisee a continual claime, insomuch that no default was in him, &c.

arraigned, both which are arraigned in French, but entred in Latine. And it is to be observed, that Littleton saith here, Arraigne un Assise, and saith not that the Tenant is arraigned, and so of the appeal, for there are the suits of the Subject, and no man is said to be arraigned, but may

ly at the suit of the King, upon an Enditement found against him, or other record therewith he is charged. And there the arraignment of the prisoner is to take order, that he appear, and for the certainty of the person to hold up his hand, and to plead a sufficient plea to the enditement or other record, whereupon they which follow for the King may orderly proceed.

2. & 3. E. 6. c. 24. towards the end. Stanf. pl. cor. 105. C. 3. H. 7. cap. 1.

¶ *Justices d'assise.* Justices of Assise are assigned and constituted by the King, of the Judges and Sages of the Law, and are called Justices of Assise, for that the writs of Assise of Novel disseisin, (which in former times were accounted Festiva remedia, and very frequent and common) were returnable before them to be taken in their proper Counties twice every year at the least, whereupon they had authority to give judgement, and award seisin and execution: and therefore both for the number of them in times past, and for the greater authority they had then as Justices of Nisi prius (which was to try issues only, except in a Quare impedit, and Assises De darreine presentment, in which cases the Justices of Nisi prius might give judgement) they were denominated Justices of assise. And divers Acts of Parliament have given to them great authority both in Criminal causes, and common pleas. These Justices of Assise have also Commissions of Oier and Terminer, of Easte-delivery, and of the peace, of association, and Si non omnes throughout their whole circuits, so as they are armed with ample, prudent, but yet ordinary jurisdiction, for all their Commissions are bounded with this expresse limitation, Facturi quod ad justiciam pertinet secundum legem & consuetudinem Angliæ. And in former times according to the original institution and their Commission, both the Justices joyned in common pleas, and pleas of the Crown.

Vide Sect. 514. 233. 234. Magna Charta. 30. W. 2. cap. 2. 30. 39. Stat. de Ebor. cap. 3, 4. Artic. Sup. Cart. cap. 10 4. E. 3. cap. 11. 7. R. 2. c. 4 27. E. 1. De finibus ca. 4 28. E. 1. de appellatis. 4. E. 3. ca. 2. 2. H. 5. ca. 8. North. 2. E. 3. cap. 3. 2. E. 3. c. 5. 14. H. 6. c. 1. 21. H. 6. c. 10. 3. H. 7. c. 1. 33. H. 8. c. 9. 34. & 35. H. 8. c. 14. 2. & 3. E. 6. c. 24. 1. E. 6. c. 7. 2. Mar. Dier. 99. 3. & 4. Eliz. Die. 266.

¶ *Si le dit fuit del assise, ferra prise en ley, &c. un continual claime.* And it is holden at this day that it shall amount to a Claim, for that there was no default in him, as Littleton saith. (d) Some have objected, that if the bringing of an assise should amount to continual claime, and every continual claime made by the Disseisee dest the possession and freehold in him, therefore is bringing the Assise, &c. should amount to a continual claime, that then the writ should abate. But hereunto it hath been answered in this Chapter, that a continual claime is an entry by construction of Law for the advantage of the Disseisee, but not for his disadvantage.

(d) See before in this chapter, Sect. 419. Vid. Sect. 416.

In a writ of entry Sur disseisin against one, supposing that he had not entred but by S. who disseised him, the Tenant said that S. died seised, and the land descended to him, and prayed his age, the Plaintiff counterpleaded his age, for that he arraigned an assise against S. who died hanging the assise, and he was ousted of his age, for that the bringing of the assise amounted to a claime.

24. E. 3. 25. 9. E. 2. age 141. 15. E. 3. Counter plea de gar. 5.

If tenant in Dower alien in fee with warranty, and the heire in the reversion bring a writ of entry In casu proviso, &c. and hanging the plea the Tenant dieth, the heire shall not be rebutted or barred by this warranty, for that the Precipe pid amount to a continual claime. And herewith agreeth (*) Antiquity. Et clameum non opponuerit, sufficit tamen si ille vel Antecessor suus fecisset quod tale tunc inde valeat, ut si placit' moverit tenens vel fecerit rem litigiosam; quia sicut plus est facto appellare, quam verbo, ita plus est clameum opponere facto, quam verbo. Et sic hoc fecit de Termino Sanctæ Trinitatis, Anno regni regis H. 3. 5. in com. Dunelm. de quodam Guidetunga, cui objectum fuit quod clameum non opposuit, & ipse respondit, quod fecit quod tenuit se quieto tempore finis facti implacitavit tenentem per aliud breve, &c.

3. E. 3. tit. garrantie 62. (*) Flet. 2. lib. 6. cap. 52. Bract. lib. 5. fol. 436.

If the goods of a Villeine (before any seisure made by the Lord) be distreined, the Lord may have a Replevin, and notwithstanding before the bringing of the writ he hath no property, yet the very bringing of the writ amounts to a claime of the goods, and setteth the property in the Lord.

33. E. 3. Replevin. 43. 42. E. 3. 18. b. 9. H. 6. 25.

¶ *Entant que nul default fuit en luy, &c.* Hereby it is implyed, that one Justice inclined to this opinion, that it should amount to a claim, for that no default was in him. Et nemo debet rem suam sine facto aut defectu suo amittere, as the rule is.

Sect.

## *Sect.* 443.

¶ HEre firſt it is to be obſerved, that albeit the Freehold and inheritance is in this caſe in no perſon, but in abeiance or in conſideration of Law, yet an entry and Claime by one that hath no right ſhall gain the inheritance by wrong. For here Littleton ſaith, & of ſuch eſtate died ſeiſed, &c. And ſo it is in caſe of a Biſhop, Parſon, Vicar, Prebend, or any other ſole Corporation. And in the ſtatute of Marlebridge it is called an Intruſion.

Marleb. cap. 28.

Secondly, that ſeeing by the death of the Abbot (which is the act of God) no perſon is able to make Continual Claime, therefore a Diſcent during that time ſhall not prejudice the Succeſſor, for as hath been ſaid. Impotentia excuſat Legem. If an uſurpation be had to a Church in time of vacation, this ſhall not prejudice the Succeſſor, to put him out of poſſeſſion, but that at the next avoidance he ſhall preſent.

F.N.B. 34. M. W. 2. cap.

¶ *Nient pluis que ils ſont able de ſuer Action, &c.* Here that which hath in this Chapter been ſaid is confirmed, viz. That the entry or continual claim muſt purſue the action.

¶ *Car le Covent neſt forſque un mort perſon, &c.* This is Ratio una, but not unica: for though the reſt of the Corporation be no mort perſons, as the Chapter in caſe of Deane and Chapter, or the Commonalty in caſe of Major & Commonalty, yet cannot they when there is no Dean, or or Major make claim, becauſe they have neither ability nor capacity, to take or to ſue any Action, as our Author here ſaith.

¶ *Car en temps de*

¶ ITem, Quære ſi un Abbe de un Monaſterie morust, & durant l' temps de vacation, un home toꝛciouſement enter ẽ certaine parcel d̃ terre del Monaſtery, claymant la terre a luy & a ſes heires, & de tiel eſtate morust ſeiſie, & la ter diſcendiſt a ſon heire, & puis apres un eſt elect et fait Abbe de meſme la Monaſterie, ſi meſme l'Abbe poit enter ſur le heire, ou nemy. Et il ſemble a aſcuns que l'Abbe bien poit enter en ceo cas, pur ceo que le Covent en temps de vacation ne fuit aſcun perſon able de faire Continual Claim, car nient pluis que ils ſont perſonable de ſuer Action, nient pluis ils ſont able de faire Continual Claime, car le Covent neſt forſque un mort corps ſans Teſte, car en temps de Vacation un graunt fait a eux, ou per eux eſt void, et en ceſt caſe l'Abbe no poit aver Briefe Dentre ſur Diſſeiſin envers

ALſo, inquire if an Abbot of a Monaſtery die, & during the time of vacation, a man wrongfully entreth in certain parcels of land of the Monaſtery, claiming the land unto him and his heires, and of that eſtate dieth ſeiſed, and the Land deſcendeth unto his Heires, and after that an Abbot is choſen, and made Abbot of the Monaſtery, a queſtion is, if the Abbot may enter upon the Heire, or not. And it ſeemeth to ſome, That the Abbot may well enter in this caſe, for this that the Covent in time of vacation was no perſon able to make continual claime; for no more than they be perſonable to ſue an Action, no more be they able to make Continual Claime; for the Covent is but a dead body without Head; for in time of vacation a Grant made unto them is void; and in this caſe an abbot may not have a Writ of *Entrie* upon *Diſſeiſin*, againſt the Heire, for

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le heire, pur ceo que il ne fuit unques diſſeiſie, & ſi Labbe ne puiſſoit enter en ceo caſe, donques il ſerra mis a ſon Briefe de Droit, &c. le quel ſerra trope dure pur le meaſon, per que ſemble a eux, que Labbe dien poit enter, &c.

this, That he was never diſſeiſed. And if the Abbot may not enter in this caſe, then he ſhall be put unto his Writ of Right, *&c.* which ſhall be hard for the Houſe. By which it ſeemeth to them, that the Abbot may well enter, *&c.*

Quæras de dubiis, legem bene diſcere ſi vis:
Quærere dat ſapere, quæ ſunt legitima vere.

*Quæras de dubiis, legem bene diſcere ſi vis:*
*Quærere dat ſapere, quæ ſunt legitima vere.*

*vacation en Grannt fait a eux en per eux, eſt void, &c.* And the reaſon is becauſe the body politique, which is capable, is not complete, but maneth the Head. But this is to be underſtood of an immediate Grant; for if during the vacation of the Abathy of Dale, a Leaſe for life, or a gift in Taile be made, the remainder to the Abbot of Dale and his Succeſſors, this remainder is good, if there be an Abbot made during the particular eſtate.

2, H. 7. 13. 46, Aſſ. 26. 34. E. 3, Garrantie 63.

If there be Mayor and Commonalties of D. and the Mayor dyeth, a Grant made to the Mayor and Commonalty of D. is void, for the cauſe aforeſaid; but in that caſe if a Leaſe for life be made, the remainder to the Mayor and Commonalty of D. the remainder is good, if there be a Mayor elected during the particular eſtate.

¶ *Poit enter*, &c. Here by this (&c.) is implied, or make his continual claime in ſuch ſort as hath been before expreſſed.

¶ Quæras de dubiis, Legem bene diſcere ſi vis:
Quærere dat ſapere, quæ ſunt legitima vere.

Here Littleton expreſſeth an excellent meanes to attaine to the reaſon of the Law, by enquiring of, and conference had with learned men, of doubtful caſes.

Inter cuncta leges, & percunctabere Doctos. Horace.

For as Collatio peperit artes, ſo Collatio perficit artes: And this muſt be continual; for as knowledge increaſeth, ſo doubts therewith increaſe alſo. Creſcente ſcientia, creſcunt ſimul & dubitationes.

And here Littleton citeth very aptly two verſes; for it is truely ſaid, That Authoritates Philoſophorum, Medicorum, & Poetarum, ſunt in cauſis allegandæ & tenendæ: And our Author doth cite a Verſe for memory, but it is worthy of memory.

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## Chap. 8. Of Releaſes. *Sect.*444.

RElealesſont en divers manners, ceſtaſcavoir Releales de tout le droit que home ad en terres ou Tenements, & Releales de Actions perſonals & reals, et

RElealesare in divers manners, s. Releaſes of all the right which a man hath in lands, or Tenements, and Releaſes of Actions perſonals and Reals, and other things.

¶ HEre our Author beginneth with a diviſion of releales.

Vide Mir. cap. 2. Sect. 17. Vide Brit. fol. 101. Bract. h. 5. Tract. de Except. & Lib. 4. fol. 318. b. Fleta, lib. cap. 14.

Theſe words muſt be referred thus: Releales are of two ſorts, viz. A Releale of all the right which a man hath either in Lands and Tenements, or in Goods and Chattels: or there is a Releale of Actions Real of or in Lands or Tenements: or Perſonal, of or in

Vide Sect.492.

in Goods or Chattels: or mixt, partly in the Realty, and partly in the Perſonalty.

¶ *Releaſe.* Relaxatio: Of the Etymology of this word you have heard before. Fleta (a) calleth it, Charta de quieta clamantia.

(a) Fleta, ubi ſup.

¶ Noverint univerſi per præſentes, *&c.* Here Littleton ſheweth Preſidents of Releaſes of right: and Preſidents doe both teach and illuſtrate, and therefore our Student is to be well ſtored with Preſidents of all kinds.

Bract. lib. 4. fol. 308. Fleta, ubi ſup. 9.H.6.35.24.E.3.27. 13.H.4. Entr. congeab. 57.

¶ Remiſiſſe, relaxaſſe, & quietum clamaſſe. Here Littleton ſheweth, That there be three proper words of Releaſe, and be much of one effect: beſides, there is Renunciare, Acquietare; and there be many other words of Releaſe: as if the Leſſor grants to the Leſſee for life, that he ſhall be diſcharged of the Rent, this is a good releaſe. Vide Sect.532.

And it is to be underſtood, That there be Releaſes in Deed, or Expreſſe Releaſes, whereof Littleton here hath ſhewed an example. There be alſo Releaſes in Law, and they are ſometime by Deed, and ſometimes without Deed. As if the Lord diſſeiſe the Tenant, and maketh a Feoffment in Fee by Deed or without Deed, this is a releaſe of the Diſſeiſor, and make a Feoffment in Fee by Deed or without Deed, this is a releaſe of the right; and the ſame law it is of a right in action.

27.H.8.44. of an uſe. 34.H.6.44. of an attaint 3.E.3.38.21.E.4.81. Pl. Com. *Declimeres* caſe.

8.E.4.3 21.E.4.2.

If the Obliger make the obligor his Executor, this is a releaſe in law of the action, but the duty remaines, for the which the Executor may retaine ſo much goods of the Teſtator.

11.H.7.4.20.H.7.29. 8.E.4.3.

If the Feme Obligee take the Obligor to Husband, this is a releaſe in law. The like law is, if there be two Feme Obligees, and the one take the Debtor to husband.

If an Infant of the age of ſeventeen years releaſe a Debt, this is void. But if an Infant make the Debtor his Executor, this is a good releaſe in law of the action.

But if a Feme Executrix take the Debtor to husband, this is no releaſe in law, for that ſhould be a wrong to the Dead, and in law worke a Devaſtavit, which an act in law ſhall never worke. And ſo it was adjudged in the Kings Bench, Mich.30.& 31. Eliz. in which caſe I was of Counſel.

30.E.3.24.32.E.3. Tit. Scire fac.102.

But it is to be obſerved, That there is a diverſity between a releaſe in Deed and a releaſe in law: for if the Heire of the Diſſeiſor make a leaſe for life, & the diſſeiſee releaſe his right to the leſſee for his life, his right is gone for ever. But if the Diſſeiſee doth diſſeiſe the Heir of the Diſſeiſor, & make a leaſe for life, by this releaſe in law the right is releaſed but during the life of the leſſee: for a releaſe in law ſhal be expounded more favorable according to the intent & meaning of the parties, than a releaſe in Deed, which is the act of the party, & ſhall

auters choſes. Releases de tout le droit que homes ont en Terres ou Tenements, &c. ſont communemẽt fait en tiel ſorm ou de tiel effect.

Releaſes of all the right which men have in Lands and Tenements, *&c.* are commonly made in this forme, or of this effect.

## *Sect.* 445.

¶ Noverint univerſi per præſentes, me A. de B. remiſiſſe, relaxaſſe, & omnino de me & hæredibus meis quietum clamaſſe: *vel ſic,* Pro me & hæredibus meis quietum clamaſſe C. de D. totum jus, titulum, & clameum quæ habui, habeo, vel quoviſmodo in futur. habere potero, de & in uno meſſuagio cum pertinentiis in F. &c. Et eſt aſcavoire, que ceux Verbs, Remiſiſſe, & quietum clamaſſe, ſont de un tiel effect, ſicome tiels Verbs, Relaxaſſe.

*Know all men by theſe Preſents, That I* A. *of* B. *have remiſed, releaſed, and altogether from me and my Heires quiet claimed:* or thus, *For me and my Heires quiet claimed to* C. *of* D. *all the right, title, and claime which I have, or by any meanes may have, of and in one meſſuage, with the appurtenances in* F. *&c.* And it is to be underſtood, that theſe words, *Remiſiſſe & quietum clamaſſe,* are of the ſame effect as theſe words, *Relaxaſſe.*

shall be taken most strongly against himself; and so in the case aforesaid, where the Debtor is made Executor.

¶ Totum jus, titulum, & clameum. But note, that Jus or right in general signification includeth not only a right for the which a Writ of right doth lie; but also any title or claim either by force of a Condition, Mortmain, or the like; for the which no action is given by Law, but only an entry.

## *Sect.* 446.

¶ Item, ceux parolx q̄ sont communement mis en tielx faits de releases, s. (quæ quovismodo in futurum habere potero) sont icome voides en le ley, car nul droit palla per un releas, forsq; le droit que le relessor ad al temps de le releas fait. Car si soit pier & fits, & le pier soit disseisie, & le fits (vivant son pier) relessa per son fait a le disseisor, tout le droit que il ad, ou aver puissoit, en mesmes les tenemts sans clause de garrantie, &c. et puis le pier morust, &c. le fits poit loyalment enter sur la possession le disseisor, pur ceo que il navoit droit en la terre en la vie son pier, mes le droit discendist a luy per discent apres le releas fait, p̄ le mort son pere, &c.

ALso these words which are commonly put in such Releases, s. (*quæ quovismodo in futurum habere potero*) are as void in Law; for no right passeth by a Release, but the right which the Releator hath at the time of the Release made. For if there be Father and Sonne, and the Father be disseised, and the Son (living his Father) releaseth by his deed to the disseisor, all the right which he hath, or may have, in the same tenements, without clause of warranty, &c. and after the Father dieth, &c. the Sonne may lawfully enter upon the possession of the Disseisor, for that he had no right in the land in his fathers life, but the right descended to him after the Release made, by the death of his Father, &c.

¶ NOte, a man may have a present right, though it cannot take effect in possession, but in futuro.

As he that hath a right to a reversion or Remainder, and such a right he that hath it, may presently release: But here in the case which Littleton puts, where the Son releaseth in the life of his father, this release is void (a) because he hath no right at all at the time of the Release made; but all the right was at that time in the father; after the decease of the father, the son shall enter into the Land against his own Release. (a) Britton, fol. 101: 17.E.3.67. 42.E.2.21. 10.H.6.4.25.Ass.7. 27.E.3. execution 130.

The Baron makes a Lease for life and dyeth, the Release made by the Wife of her Dower to him in reversion is good, albeit she hath no cause of Action against him in præsenti. 16.E.3. barre 245. Hoes case 5.part f.70.71

¶ *Sans clause de garrantie.* For if there be a warranty annexed to the release, then the son shalbe barred. For albeit the Release cannot bar the right, for the cause aforesaid, yet the warranty may rebutt, and bar him and his heirs of a future right, which was not in him at that time: and the reason (which in all cases is to be sought out) wherefore a warranty being a Covenant real should bar a future right, is for avoiding of circuity of Action (which is not favoured in Law,) as he that made the warranty should recover the land against the Tenant, and be by force of the warranty to have as much in value against the same person: yet is there a diversity between a warranty and a Feoffment, (b) for if there be Grandfather Father and Son, and the Father disseiseth the Grandfather, and make a Feoffment 29.H.6.29. (b) 39.H.6.43.21.E.4.81. 15.E.tit.entr. cong.21. 9.H.7.1.b.2.E.3.38.

10.E.2.confirmation 24 8,E.2.ga.6 ..11.H.4.33 43.E.3.17.42.E.3.24. perFinchden.17 E.3.67 Lib.1 fol. 112,113.in Albanies caſe.

in fee the Grandfather dieth, the Father againſt his own feoffment ſhall not enter, but if he die, his ſon ſhall enter, and ſo note a diverſity between a Releaſe, a Feoffment, and a Warranty: a Releaſe in that caſe is void, a feoffment is good againſt the feoffor, but not againſt his heir; a warranty is good both againſt himſelf and his heirs.

And here are three diverſities worthy of obſervation, viz. Firſt, between a Power or an Authority and a Right. Secondly, between Powers and Authorities themſelves. Thirdly, between a Right and a poſſibility.

15.H.7,11.

As to the firſt, if a Man by his laſt-Will deviſeth that his Executors ſhall ſell his land, and dieth, if the Executors releaſe all their right and title in the land to the Heir, this is void, for that they have neither right nor title to the land, but only a bare Authority, which is not within Littletons caſe of a releaſe of a right. And ſo it is if ceſty que uſe had deviſed that his feoffees ſhould have ſold the land: Albeit they had made a feoffment over, yet might they ſell the uſe, for their Authority in that caſe is not given away by the Livery.

(m) Lib.1. Albanies caſe, ubi ſupra. Lib.5.Hoes caſe,70,71. 10.*H.*6.4.

As to the ſecond, there is a diverſity between ſuch Powers and Authorities as are only to the uſe of a ſtranger, nothing for the benefit of him that made the releaſe (as in the caſe before) and a power or Authority which reſpecteth the benefit of the releaſor, as in theſe uſual powers of revocation, when the feoffor, &c. hath a power to alter, change, determine, or revoke the uſes (being intended for his benefit) he may releaſe; and where the eſtates before were defeaſible, he may by his releaſe make them abſolute, and ſeclude himſelf from any alteration or revocation, as it hath been reſolved; which diverſity you may read in (m) Albanies caſe.

25.Aſſ.p.7.27.E.3.execution 130.paſch.38. Eliz.Rot.521-inter Borough and Gray.

As to the third, before Judgment the Plaintiff in an Action of debt releaſeth to the bail in the Kings Bench all demands, and after Judgment is given, this ſhal not bar the Plaintiff to have Execution againſt the bail, becauſe at the time of the releaſe he had but a mere poſſibility, and neither Jus in re, nor Jus ad rem, but the duty is to commence after upon a contingent, and therefore could not be releaſed preſently. So if the Conuſee of a ſtatute, &c. releaſe to the Conuſor all his right in the land, yet afterwards he may ſue Execution; for he hath no right in the land till Execution, but only a poſſibility; and ſo have I known it adjudged.

## *Sect.* 447.

49.E.3.28.

¶ *De tout le droit.* This muſt bee intended of a bare right, and not of a Releaſe of Right, whereby any eſtate paſſeth, as to a Leſſee for years, &c. as ſhall be ſaid hereafter. Alſo it muſt be intended of a Releaſe of a right of freehold at the leaſt, and not to a right for any term for years or chattle real; as if Leſſee for years be ouſted, and he in the Reverſion Diſſeiſed, and the Diſſeiſor maketh a Leaſe for years, the firſt Leſſee may releaſe unto him. All which is implyed in the firſt, &c. Alſo in ſome caſe a releaſe of a right made to one that hath neither freehold in Deed, nor Freehold in law, is good and abaileable in law, (c) as the Demandant may Releaſe to the vouchee, and yet the vouchee hath nothing in the land; but the reaſon of that is, for that when the vouchee entreth into the warranty, he becometh tenant to the Demandant, and may render the land to him, in reſpect of the privity; but an eſtranger cannot releaſe to the vouchee, becauſe In rei veritate, he is not tenant of the land.

(c)7.E.4.13.20.H.6.29 5.H.7.41.18.E.3.12. 8.H.4.5.5.E.3.36. 5.E.2.46. Vid.Sect.490,491.

¶ Item, en releaſes de tout le droit que home ad ẽ certein terres, &c. il covient a celuy a q̃ le Releas eſt fait en aſcun cas, que il ad l' frankteneñt en les terres en fait, ou en ley, al temps de releas fait, &c. car en chaſcun cas lou celuy a que l' releas eſt fait ad frankteneñt en fait, ou frankteneñt en ley, al temps del releas, &c. donque le releas eſt bone.

ALſo, in Releaſes of all the Right which a man hath in certain Lands, &c. it behoveth him to whom the Releaſe is made, in any caſe, that he hath the Freehold in the Lands, in Deed, or in Law at the time of the Releaſe made &c. for in every caſe where he to whom the Releaſe is made hath the Freehold in Deed, or in Law, at the time of the Releaſe, &c. there the Releaſe is good.

(d) And so it is if the tenant alien, hanging the Præcipe, the release of the Demandant to the tenant to the Præcipe is good and yet he hath nothing in the land. (d) 10.E.4.14. 12.Ass.p.41.

In time of vacation an Annuity, that the parson ought to pay, may be released to the Patron in respect of the privity; but a release to the Ordinary only seemeth not good, because the Annuity is temporal. 8.E.3.21.46.E.3.6.6. 8.H.6.23.11.H.7.41.

If a Disseisor make a Lease for life, the Disseisee may release to him; for to such a Release of a bare right there needs no privity, as shalbe said hereafter. But if the Disseisor make a Lease for years, the Disseisee cannot release to him, because he hath no Estate of Freehold. And yet in some case a right of Freehold shal drown in a chattel as if a Feme hath a right of Dower, she may release to the Gardein in Chivalry, and her right of Freehold shal drown in the chattle, because the writ of Dower doth lie against him, and the heir shall take advantage of it. And it is to be obserued, that by the ancient maxime of the Common Law, a right of entry, or a Chose in action cannot be granted or transferred to a stranger; and thereby is avoided great oppression, injury, and injustice. Nul charter, nul vende, ne nul done vault perpetualment si le donor nest seisie al temps de contracts de 2. droits, s del droit de possession, & del droit del propertie. Mirror, cap. 2. Sec. 17.

And therefore well saith Littleton, that he to whom a release of a right is made, must have a Freehold.

For the better understanding of transferring of naked rights to lands or tenements, either by Release, Feoffment, or otherwise, it is to be known, that there is Jus proprietatis, a right of ownership; Jus possessionis, a right of seisin or possession; and Jus proprietatis & possessionis, a right both of property and possession: and this is anciently called Jus duplicatum, or Droit droit. For example, if a man be disseised of an Acre of land, the Disseisee hath Jus proprietatis, the Disseisor hath Jus possessionis; and if the Disseisee release to the Disseisor, he hath Jus proprietatis & possessionis. And regularly it holdeth true, that when a naked right to land is released to one that hath Jus possessionis, and another by a mean title recover the land from him, the right of possession shall draw the naked right with it, and shall not leave a right in him to whom the Release is made. For example, if the heir of the Disseisor being in by discent, A. doth disseise him, the Disseisee release to A. now hath A. the meer right to the land. But if the heir of the Disseisor enter into the land, and regain the possession, that shall draw with it the meer right to the land, and shall not regain the possession only, and leave the meer right in A. but by the recontinuance of the possession, the meer right is therewith vested in the heir of the Disseisor. Mirror, ubi supra. Bracton, lib. 2. fol. 32. Britton, fol. 89, 121. Bracton, lib. 5 fol. 172.

But if the Donee in tail discontinue in Fee, now is the reversion of the Donor turned to a naked right, if the Donor release to the discontinuee and dye and the issue in tail doth recover the land against the Discontinuee, he shall leave the reversion in the Discontinuee, for the issue in tail can recover but the estate tail only, and by consequence must leave the reversion in the Discontinuee, for the Donor cannot have it against his release: but if the Disseisee enter upon the heir of the Disseisor, and infeoffe A. in Fee, and the heir of the Disseisor recover the whole estate, that shall draw with it the meer right, and leave nothing in the Feoffee. Note the diversity. Another diversity is observable, when the naked right is precedent before the acquisition of the defeasible estate; for there the recontinuance of the defeasible estate shall not draw with it the preceding right. (e) As if the Disseisee disseise the heir of the Disseisor, albeit the heir recover the land against the Disseisee, yet shall he leave the preceding right in the Disseisee. So if a woman that hath right of Dower disseise the heir, and he recover the land against her, yet shall he leave the right of Dower in her. (e) 3 Ass. 1. 10. Ass. 16. 50.E.3.7.4.E.3.Estop. 133. 30.Ass.5 11.E.3. Entrie 56. 12.Ass.41.27.E.3.84. 488.

Another diversity is to be noted, when the meer right is subsequent, and transferred by act in Law, there albeit the possession be continued, yet that shall not draw the naked right with it, but shall leave it with him; as if the heir of the disseisor be disseised, and the Disseisor infeoffe the heir apparent of the disseisee being of full age, and then the Disseisee dieth, and the naked right discend to him, and the heir of the Disseisor recover the land against him, yet doth he leave the naked right in the heir of the Disseisee. So if the discontinuee obtenant in tail infeoffe the issue in tail of full age, and tenant in tail die, and then the discontinuee recover the land against him, yet he leaveth the naked right in the issue. (c) But if the heir of the Disseisor be disseised, and the Disseisee release to the Disseisor upon condition, if the condition be broken, it shal revest the naked right. And so if the Disseisee had entred upon the heir of the Disseisor, and made a feoffment in fee upon condition, if he entred for the condition broken, and the heir of the Disseisor entred upon him, the naked right should be left in the Disseisee. But if the heir of the disseisor had entred before the condition broken, then the right of the Disseisee had been gone for ever. But now let us hear what Littleton saith. 23.H.8.tit.Restore al action, Br.5. 50.E.3.7.Vid.Sect.473. 475.478.487. (c) 38.E.3.16.9.H.7.24

## *Sect.* 448.

¶ HEre Littleton deſcribeth what a Freehold in Law is, for he had ſpoken before in many places of Freholds in Deed. This Bracton calleth (a) Civilem & naturalem poſſeſſionem ſeu ſeiſinam. The natural ſeiſin is the freehold in Deed, and the Civil the Freehold in Law.

(a) Bract. l.4.f.206. 236 Britton, fol.83.b. Fleta, lib.3.cap.15. Vide Sect.680.

If a man levie a fine to a man. Sur conuſance de droit come ceo que il ad de ſon done, or a Fine Sur conuſance de droit tancum: Theſe be Freeſtuments of Record, and the Conuſee hath a Freehold in Law in him before he entreth.

42.E.2.20.10.H.6.14. 17.E.3.78.2.E.3.33.

Upon an exchange the parties have neither freehold in Deed, nor in law, before they enter; ſo upon a partition the Freehold is not removed until an entry.

11.H.4.61,21,H.7.12.

(g) If Tenant for life by the agreement of him in the Reverſion ſurrender unto him; he in the reverſion hath a Freehold in Law in him before he enter. (h) Upon a livery within the view no freehold is veſted before an entry.

(a) 32.E.3.barre 262. 41.Aſſ.2.22.H.4. ſurrender 10. (b) 38.E.3.12.

17.E.3.77.18.E.4.25.

¶ FRanktenement en ley eſt, ſi come un home diſſeiſt un auter, & maruſt ſeiſie, per q̄ les tenements diſcendōt a ſon fits, coment q̄ ſon fits ne entra pas ē les tenements, uncōr il ad un franktēt en ley, quel per force de diſcent eſt jeet ſur luy, & pur ceo un releas fait a luy, iſſint eſteant ſeiſie de frāktenement en ley, eſt aſſets bone, & ſil prēt ſeme iſſint eſteant ſeiſie en ley, coment que il ne unque enter pas en fait, & mourſt ſon ſeme ſerra endow.

FReehold in Law is as if a man diſſeiſeth another and dieth ſeiſed, whereby the tenements deſcend to his ſon, albeit that his ſonne doth not enter into the tenements, yet he hath a freehold in Law, which by force of the diſcent is caſt upon him, and therefore a Releaſe made to him ſo being ſeiſed of a freehold in Law is good enough; and if he taketh wife being ſo ſeiſed in Law, although he never enter in Deed, and dieth, his wife ſhall be endowed.

If a man doth bargain and ſell land by Deed indented and inrolled, the Freehold in Law doth paſs preſently. And ſo when uſes are raiſed by Covenant upon good conſideration.

If a Tenant in a Præcipe being ſeiſed of lands in fee, confeſs himſelf to be a Villein to an eſtranger, and to hold the land in Villenage of him; the eſtranger by this acknowledgment is actually ſeiſed of the freehold and inheritance without any entry. But let us return to Littleton.

## *Sect.* 449.

¶ ITem, en aſcuns caſes de releales de tout le droit, coment que celuy a que le releale eſt fait nad reins en le franktenement en fait, ne en ley, uncore le releale eſt aſſets bone. Sicom le diſſeiſor leſſa la terre que il ad per diſſeiſin a un auter pur terme de ſa vie, ſavant le reverſion a luy, ſi le diſſeiſee ou ſon heire releſſa al diſſeiſor tout le droit, &c.

ALſo in ſome caſes of releaſes of all the right, albeit that he to whom the releaſe is made hath nothing in the Freehold in Deed nor in Law, yet the releaſe is good enough. As if the diſſeiſor letteth the land which he hath by diſſeiſin to another for terme of his life, ſaving the reverſion to him, if the diſſeiſee or his heir releaſe to the diſſeiſor all the right, *&c.* this

cel

tel releaſe eſt bone, pur ceo que celuy a que le releaſe eſt fait avoit en luy un reverſion al temps del releaſe fait.

releaſe is good, becauſe he to whom the releaſe is made had in law a reverſion at the time of the releaſe made.

¶ HEre Littleton addeth a limitation to the next precedent Section, viz. that a Releaſe of all the right may be good to him in reverſion, albeit he hath nothing in the Freehold, becauſe he hath an eſtate in him. 6.E.4.13.14. H.4.32.b. 41.E.3.17.43.E.3.28. Caſe ult.

¶ *Tout le droit, &c.* Or Title, Intereſt, Demand, or the like; and ſo it is, if he in reverſion hath an eſtate for life or in taile in reverſion; as in the like caſe it appeareth in the next Section.

## *Sect.* 450.

¶ EN meſme le maner eſt, lou leas eſt fait a un home pur terme de vie, le remainder a un auter pur terme de auter vie, le remainder a le tierce en le taile, le remainder a le quart en fee, ſi un eſtranger que droit ad a la terre, releſſa tout ſon droit a altun de eux en l' remainder, tiel releaſe eſt bone, pur ceo que cheſcun de eux ad un remainder en fait veſtue en luy.

IN the ſame manner it is, where a Leaſe is made to a man for terme of life, the remainder to another for term of another mans life; the remainder to the third in taile; the remainder to the fourth in fee; if a ſtranger which hath right to the Land releaſeth all his right to any of them in the remainder, ſuch releaſe is good, becauſe every of them hath a remainder in Deed veſted in him.

¶ HEre is another limitation, that a Releaſe is good to him in the remainder, albeit he hath nothing in the Freehold in poſſeſſion, becauſe he hath an eſtate in him, as hath been ſaid. In both theſe limitations it is to be obſerved, that the ſtate which maketh a man Tenant to the Præcipe is ſaid to be the Freehold, as here the ſtate of Tenant for life, and not the reverſion in fee. 7.E.4.13.41.E.3.19. 7.E.3.54.18.E.2.Tit. Entry 74. 3.E.2.Tit.Entry 7. E.N.B.207.E.

## *Sect.* 451.

¶ MES ſi le tenant a terme de vie ſoit diſſeiſie, & puis celuy q̄ ad droit (eſteant le poſſeſſion en l' Diſſeiſor) releſſa a un de eux a que le remainder fuit fait tout ſon droit, cel releaſe eſt void pur ceo que il n'avoit un remainder en fait al temps de releaſe fait, forſq; tantſolement un droit del remainder.

BUt if the Tenant for terme of life be diſſeiſed, and afterwards he that hath right (the poſſeſſion being in the Diſſeiſor) releaſeth to one of them to whom the remainder was made all his right, this releaſe is void, becauſe he had not a remainder in Deed at the time of the Releaſe made, but only a right of a remainder.

¶ *Forſque tantſolement un droit del remainder.* For a Releaſe of a right to one that hath but a bare right regularly is void; for as Littleton hath before ſaid, he to whom a releaſe is made of a bare right in Lands and Tenements muſt have either a Freehold in Deed or in Law in poſſeſſion, or a ſtate in remainder, or reverſion in fee or fee taile, or for life. Vide Sect. 454.

## Sect. 452.

¶ By this it appeareth, that as a Release made of a right to him in reversion or Remainder shall aid and benefit him that hath the particular Estate for years, life, or estate tail; so a Release of right made to a particular tenant for life, or in taile, shall aid and benefit him or them in in the remainder.

If two Tenants in Common of Land grant a Rent charge of 40. s. out of the same, to one in Fee, and the Grantee Releaseth to one of them; this shall extinguish but twenty shillings, for that the Grant in Judgment of Law was several. So it is if two men be seised of several Acres, and grant a Rent, ut supra. But there is a diversity between severall Estates in severall lands, and several estates in one land; for if one be tenant for life of lands, the reversion in Fee over to another, if they two joyn in a grant of a Rent out of the Lands, if the Grantee Releaseth either to him in the reversion, or to Tenant for life, the whole rent is extinguished, for it is but one Rent, and issueth out of both estates; and so note the diversity.

¶ *Si le Tenant ad le fait en son poigne a pleader.* And so it is in both cases; for albeit he in the Reversion or remainder is a stranger to the Deed when the release is made to the Tenant, and the Tenant for life or in taile is a stranger to the Deed, when the release is made to him in reversion or remainder; yet seeing they are privies in estate, none of them in pleading shall take benefit thereof without shewing the same in Court, which is worthy to be observed.

35. H. 6. 8.

¶ *Sils ceo poient monstre,* The one cannot plead the Release made to the other, without shewing of it, for that they are privy in Estate, as hath been said. The reason of these two Sections needs no explication.

¶ ET nota, Que chescun Release fait a celuy que ad un Reversion ou un Remainder en Fait, servera & aidera celuy que ad le Franktenement, auxy bien come a celuy a que le Release fuit fait, si le Tenant avoit le Release en son poigne de pleader.

And note, that every Release made to him which hath a reversion or a Remainder in Deed, shall serve and aide him who hath the Freehold, as well as him to whom the Release was made, if the Tenant hath the Release in his hand to plead.

## Sect. 453.

¶ ET en meisme le manner est lou un Release fait al Tenant pur term de vie, ou al Tenant en le Taile, ceo urera a eux en le reversiõ, ou a eux en le Remainder, auxy bien come al Tenant de Franktenement, & averont auxy grand advantage de cel, sils ceo poyent monstre.

IN the same maner it is, where a Release is made to the tenant for life, or to the Tenant in taile; this shall enure to them in the reversion, or to them in the remainder, as well as to the tenant of the Freehold; and they shall have as great advantage of this, if they can shew it.

## Sect. 454.

¶ ITem, ſi ſoit Seignior & Tenant, & le Tenant ſoit diſſeiſe, & le ſeignior releſſa al Diſſeiſee tout le droit que il avoit en le ſeigniorie, ou en le terre, cel releaſe eſt bone, & le Seigniorie eſt extinct, & ceo eſt pur cauſe del privitie, que eſt perenter le Seignior, & le Diſſeiſee: car ſi les avers le diſſeiſee ſoient pris, & de eux le Diſſeiſee ſuiſt un Replevin envers le Seignior, il compellera le Seignior davower ſe luy, car il avower ſur le Diſſeiſor, donques ſur l'matter monſtre lavowrie abatera, car le Diſſeiſee eſt Tenant a luy en droit & en la Ley.

ALſo if there be Lord and tenant, and the Tenant be diſſeiſed, and the Lord releaſeth to the Diſſeiſee all the right which he hath in the Seigniory or in the Land, this Releaſe is good, and the Seigniory is extinct: And this is by reaſon of the privity which is between the Lord and the Diſſeiſee: for if the Beaſts of the Diſſeiſee be taken, and of them the Diſſeiſee ſueth a Replevin againſt the Lord, he ſhall compel the Lord to avow upon him; for if he avow upon the diſſeiſor, then upon the matter ſhewen the Avowrie ſhall abate; for the diſſeiſee is Tenant to him in right and in Law.

¶ HEreupon may be cold ſeen and obſerved two diverſities: Firſt, between a Seigniorie or rent ſervice, and a Rent Charge: for a Seigniory or rent ſervice may be releaſed and extinguiſhed to him that hath but a bare right in the Land. And the reaſon hereof is in reſpect of the privity between the Lord and the Tenant in right, for he is not only as Tenant to the Avowrie: but if he die his heire within age, he ſhall be in ward; and if of full age, he ſhall pay reliefe; and if he die without heire, the land ſhall eſcheat. But there is no ſuch privity in caſe of a rent charge, for there the charge only lieth upon the land.

The ſecond diverſity is between a Seigniorie and a bare right to land: for a Releaſe of a bare right to land, ſo one that hath but a bare right, is void, as hath been ſaid. But here in the caſe of our Author, a releaſe of a Seigniory to him that hath but a right, is good to extinguiſh the Seigniory. Vide Sect. 431.

Note, a Seigniory, rent, or Right, either in præſenti, or in futuro, may be releaſed five manner of wales, and the firſt three without any privity. Firſt, to the Tenant of the Freehold in Deed or in law. Secondly, To him in remainder. Thirdly, To him in the reverſion. The other two in reſpect of Privity; as firſt, here the lord releaſeth his Seigniory to the tenant being diſſeiſed, having but a right, and no eſtate at all. Secondly, in reſpect of the privity, without any eſtate or right, as by the Demandant to the Mouchee or Donor to the Donee, after the Donee hath diſcontinued intee, as you ſhall hereafter in this Chapter. Lib. 10. fol. 48. Lampets caſe.

¶ *Per cauſe de privitie*, &c. See for this word (Privity) Sect. 461.

¶ *Ile compellera le Seignior davower ſur luy* &c. This is regularly true; but if the Lord hath accepted ſervices of the Diſſeiſor, then the Diſſeiſee cannot enforce the lord to avow upon him, though his beaſts be taken, &c. Sect 455.

If a man hath title to have a writ of Eſcheat, if he accept homage or fealty of the tenant, he is barred of his writ of Eſcheat: but if he accept rent of the tenant, that is no bar to him, for it may be received by the hands of a Bayliffe. (d) But ſome do hold, that if there be Lord and tenant, and the tenant be diſſeiſed, and the Diſſeiſee die without heire, the Lord accepts rent by the hand of the diſſeiſor, this is no bar to him. Contrary it is, if he avow for the rent in Court of Record, or if he take a corporal ſervice, as Homage or Fealty for the Diſſeiſor is in by wrong: but if the lord accept the rent by the hands of the heir of the diſſeiſor, or of his Feoffee, becauſe they be in by title, this ſhall bar him of his Eſcheat, which is to be 22. H. 6. 9 b. 41. B. 3. 26. 48. E. 3. 9 2 E. 3. 6. a. 31. E. 1. Diſcent 17. 26. E. 3. 72. 4. H. 6. 21. F. N. B. 141. c. (d) 7. E. 6. tit. Eſcheat Br. 1. 8.

(e) 7.H.17.3.R.2. entr.cong.38.2.H.4.8. 6.H.7.9. Vide Sect. 556.

(f) 21.H.8.cap.19.

Lib.9.fol.136. Ascoughs case.

27.H.8.fol.4.32.H.8. cap.2.

Lib.9.fol.36. Bucknals case.

34.H.8. Avowrie Br. 113.27.H.8.4. & 20. Bucknals case, ubi supra

Lib.9. fol.22. in case Davowrie. 44.E.3.20.11. H.7.4. 21.H.7.40.34.H.6.18. 16.E.4.10.6.R.2. Rescou.11.

be understood of a discent or Feoffment, after the title of Escheat accrued; (e) for if the disseisor make a feoffment in Fee, or die seised, and after the Disseisee die without heire, then there is no Escheat at all, because the lord hath a tenant in by Title. And when Littleton wrote, the disseisee, in the case here put, should have compelled the lord to have avowed upon him, as Littleton holdeth. But now this is altered by a latter Stat. of (f) 21.H.8. for whereas by Fines, recoveries, Grants, and secret Feoffments, &c. made by tenants to persons unknown, the lords were put from knowledge of their tenants, upon whom by order of law they should make their avowry, &c. It is by that Statute enacted, that if the Lord shall distreine upon the lands and Tenements holden, &c. that he may avow, &c. upon the same lands, &c. as in lands, &c. within his Fee or Seigniory, &c. without naming of any person certaine, and without making avowry upon a person in certain. Upon which Statute these four points are to be observed: First, that the lord hath still election either to avow according to the Common law, by force of the Statute, by reason of this word (May) Secondly, Albeit the purview of the Act be general, yet all necessary incidents are to be supplied, and the scope & end of the Act to be taken: and therefore though he need not to make his avowry upon any person certain, yet he must alledge Seisin by the hands of some tenant in certain, within forty years. Thirdly, that if the avowry be made according to the Statute, every Plaintife in the replevin, or second deliverance, be he Termor or other, may have every answer to the Avowry that is sufficient, and also have aid, and every other advantage in law, (disclaimer only except) for disclaim he cannot, because in that case the avowry is made upon no certain person. Fourthly, where the words of the Statute be, If the Lord distreine upon the Lands and Tenements holden, yet if the Lord come to distreine, and the Tenant enchase his Beasts which were within the view out of the land holden, and there the lord distrein, albeit the distress be taken out of his fee and Seigniory, in that case, yet is it within the said Statute; for in judgment of law the distresse is lawful, and as taken within his Fee and Seigniory; and this Statute being made to suppresse Fraud, is to be taken by Equity.

## Sect. 455.

¶ ITem, si terre soit done a un home en Taile, reservant al Donor & a ses heires un certain Rent, si le Donee soit disseisie, & puis le Donor relessa al Donee & a ses heires tout le droit que il avoit en la terre, & puis le Donée enter en la terre sur le Disseisor, en cest case l'rent est ale, pur ceo que le Disseisee al temps de release fait, fuit tenant en droit, & en le Ley al Donor, & avowr̄ a fine force covient de estre Fait sur luy per le Donor pur le rent aderere, &c. Mes uncore rein de droit de terres, ẽ. de le droit, de le reversion passera per tiel Release, pur ceo que le Donee a que le Release est fait, adonque navoit riens en la terre forsque tantsolement un droit, & isint le droit del terre ne puissoit adonques passer al Donee per tiel Release.

ALso if land be given to a man in Taile, reserving to the Donor and to his Heirs a certain rent, if the Donee be disseised, and after the Donor release to the Donee and his Heires all the right which he hath in the land, and after the Donee enter into the land upon the Disseisor, in this case the Rent is gone, for that the Disseisee at the time of the Release made, was Tenant in right, and in law, to the Donor; and the Avowry of Fine force ought to be made upon him by the Donor for the rent behind, *&c.* but yet nothing of the right of the lands, (*viz.*) of the reversion, shall passe by such release, for that the Donee to whom the Release is made, then had nothing in the land, but onely a right, and so the right of the Land could not then passe to the Donee by such Release.

¶ *Si*

¶ *Si le donee soit disseisie*, &c. This is evident by that which hath been said. But admit that the Donee maketh a Feoffment in fee, and the Donor releaseth unto him and his heires all the right in the land, this shall extinguish the rent, because the lord must avow upon him, and yet the Tenant in tail after the Feoffment hath no right in the law. But the reason is in respect of the privity, and that the (m) Donor is by necessity compellible to avow upon him only; for if he should avow upon the discontinuee, then it should appear of his own shewing, that the reversion whereunto the rent is incident should be out of him, and consequently the avowry should abate; and so was it (n) resolved Trin. 18. Eliz. in the Court of Common Pleas, in Sir Thomas Wiats case, which I heard and observed. And Littleton saith here, that in case of the Disseisin of fine force, the avowry must be made upon the Donee.

¶ *Uncore riens de droit*, &c. *de reversion*, &c. Here the diversity aforesaid between the rent service, and a bare right to the land, appeareth.

Vide Sect. 454. 1. H. 5. tit. grant. 42. 14. H. 4. 38. lib. 3. fol. 29. lib. 6. 58. Lampetscase, ubi supra.

(m) 10. E. 3. 26. 48. E. 3. 8. b. 31. E. 2. gard. 116. 5. E. 4. 7. E 4. 27. 15. E. 4. 13

(n) Trin. 18. Eliz. Sir Thomas Wiats case in Communi Banco.

## Sect. 456.

¶ EN meisme le manner est, si leas soit a un pur terme de vie, reservant al lessor & a ses heires certaine rent, si le lessee soit disseisie, & puis lessor relessa al lessee, & a ses heires, tout le droit que il ad en la terre, & apres le lessee enter, coment que en cest cas le rent est extinct, uncore rien del droit de la reversion passera, Causa qua supra.

IN the same manner it is, if a lease be made to one for term of life, reserving to the lessor and to his heires a certaine rent, if the lessee be disseised, and after the Lessor release to the Lessee and to his heires all the right which he hath in the land, and after the lessee entreth, albeit in this case the rent is extinct, yet nothing of the right of the reversion shall passe, *Causa qua supra.*

¶ HEreby the diversity is made apparent between a release of a rent Service out of land, and a release of right to land, in this Section.

## Sect. 457.

¶ MEs si soit veray seignior et veray tenant, et le tenãt fait un feoffment en fee, le quel feoffee ne unque devient tenant al Seignior, si l'Seignior relessa al feoffor tout le droit, &c. cest release est en tout void, pur ceo q̃ le feoffor ad nul droit en la terre, et il nest Tenant en droit al

BUt if there be very lord & very tenant, and the tenant maketh a feoffment in fee, the which feoffee doth never become tenant to the Lord, if the Lord release to the Feoffor all his right, &c. this release is altogether void, because the Feoffor hath no right in the land, and he is not Tenant in right to the

¶ *Veray Seignior & veray tenant.* This is to be understood of a lord in fee simple, and of a Tenant of like estate.

There be foure manner of avowries for rents and Services, &c. viz. 1. Super verum tenentem, as in the case next put. 2. Super verum tenentem in forma predicta, as where a lease for life, or a gift in tail be made, the remainder in fee. 3. upon one as upon his tenant by the manor, omitting (very) and this is when the lord hath a particular estate in the Seignory, and so shall the Donor upon

Vide Ascoughs case, 1. 9. fol. 135. 136. 20. H. 6. 9. 2. H. 4. 24. 12. E. 4. 2. 26. H. 6. Avowrie 17. 9. Eliz. Dier 257. 5. H. 7. 11. 7. E. 4. 24. 20. E. 3. avowrie 231.

upon the Donee, or elſe upon the leſſee. 4. Sur le matter en la terre, as within his Fee and Seigniory. As where the Tenant by Knights Service maketh a leaſe for life reſerving a rent, and die his heir within age, the Gardeine ſhall avow upon the leſſee, viz. Super materiam prædictam in terris & tenementis prædictis ut infra feodum & Demium ſuum. Now by the Statute the very lord may avow, as in lands within his Fee and Seigniory, without avowing upon any perſon in certaine.

47.E.3. fol. ultimo
38.H.6.23.
21.H.8. cap.19.

Seignior, mes tant ſolement tenant quãt al avowrie faire, & il ne unques compelle-ra le Seignior davower ſur luy, car le Seignior avowera ſur le feoffee ſil voile.

Lord, but onely tenant as to make the avowrie, and he ſhall never compel the Lord to avow upon him; for the Lord ſhall avow upon the feoffee if he will.

Here appeareth the diverſity between a Tenant in taile, and a Tenant in Fee ſimple; for albeit tenant in taile make a feoffment in fee, yet the right of the Entaile remains, and ſhall deſcend to the iſſue in taile. But when the Tenant in Fee ſimple makes a Feoffment in fee, no right at all remains of his eſtate, but the whole is transferred to the Feoffee.

Alſo the Lord is not compellable in that caſe to avow upon the Feoffor, but if he will, as Lit leton here ſaith, he may avow on the Feoffee; but ſo it is not, as hath been ſaid, in caſe of Tenant in taile.

Note a diverſity between actions and Acts which concern the right, and actions and acts which concern the poſſeſſion only. For a Writ of Cuſtomes and ſervices lieth not againſt the feoffor, nor a leaſe to him ſhall extinguiſh the Seigniory. So if a Reſcous be made, an Aſſiſe ſhall not lie againſt the feoffor, and him that made the Reſcous, becauſe the feoffee is Tenant, and in Aſſiſe, the ſurpluſage incroached ſhall be avowed. For theſe actions and acts concern the right; but of a ſeiſin and an avowrie which concern the poſſeſſion, it is otherwiſe. And if the Lord releaſe to the feoffor, this is good between them, as to the poſſeſſion and diſcharge of the Arrerages, but the feoffee ſhall not take benefit of it, for that, as hath bin ſaid, it extendeth not to the right. But the feoffor ſhall plead a releaſe to the feoffee, for thereby the Seigniory is extinct: as if Leſſee for life doth waſte, and grant over his eſtate, and the leſſor releaſe to the Grantee, in an action of Waſte againſt the leſſee, he ſhall plead the releaſe, and yet he hath nothing in the land. And ſo in Waſte ſhall Tenant in Dower or by the Courteſie in the like caſe, and the voucher, and the Tenant in a Præcipe after a feoffment made. And ſo in a Contra formam collationis.

4.E.3.22.7.E.3.8.7.E.4.27.
29.H.8.tit.avowrie.
Br.111.
Li.3.fo.65.66.Pennants caſe.7.H.4.14.
2.E.4.6.34.H.6.46.
37.H.6.29.H.8.avowrie

¶ *Le feoffee ne unques deveigne tenant.* Note, here an excellent point of Learning, viz. if there be Lord and Tenant, and the Rent is behind by divers years, and the tenant make a feoffment in fee, if the Lord accept the ſervice or Rent of the feoffee due in his time, he ſhall loſe the Arrerages due in time of the feoffor; for after ſuch acceptance he ſhall not avow upon the feoffor, nor upon the feoffee, for the Arrerages incurred in the time of the feoffor. But in that caſe, if the feoffor dieth, albeit the Lord accept the Rent or ſervice by the hand of the feoffee due in his time, he ſhall not loſe the Arrearages, for now the law compelleth him to avow upon the feoffee; and that which the law compelleth him unto, ſhall not prejudice him.

So it is, and for the ſame reaſon if there be Lord, Meine, and Tenant, and the rent due by the Meine is behind, and after the Tenant ſurſe-judge the Meine, and the Lord receive the Services of the Meine which iſſue out of the Tenancy, he ſhall not be barred of the Arrerages which iſſued out of the Meinalty; and ſo if the rent be behind, and the Tenant dieth, the acceptance of the Services by the hand of the heir ſhall not barre him of the Arrerages, for in theſe caſes albeit the perſons be altered, yet the lord doth accept the ſervices of him which only ought to do them.

But as long as the feoffor liveth, the lord ſhall not be compelled to avow upon the feoffee, unleſſe he giveth the lord notice, and tender unto him all the Arrerages.

4.E.3.22.47.E.3.4.

But now by the Statute the lord may avow upon the lands ſo holden, as in lands within his Fee or Seigniory without naming of any perſon certain to be Tenant of the ſame, and without making of any avowry upon any perſon certain, as hath been ſaid, which hath much altered the Common Law in the caſes aboveſaid, for the benefit and ſafety of the lord.

21.H.8.cap.19.

But yet theſe caſes are neceſſary to be known (for which purpoſe I have added them) for that the lord may avow ſtill at the Common law if he will.

Sect.

## *Sect.* 458.

¶ Auterment eſt lou le veray tenant eſt diſſeiſe, come en le cas avantdit, car ſi le veray tenant que eſt diſſeiſe teigne del Seignior, per ſervice de chivaler, & morust (ſon heir eſteant deins age) le Seignior avera & ſeiſera l'garde del heire, & iſſint navera, il my le gard del feoffor que fiſt le feoffment en fee, &c. iſſint il eſt graund diverſity enter les deux caſes, &c.

Otherwiſe it is where the very Tenant is diſſeiſed, as in the caſe aforeſaid; for if the very tenant who is diſſeiſed, hold of the Lord by Knights Service, and dieth, (his heire being within age) the Lord ſhall have and ſeize the Wardſhip of the heire, and ſo ſhall he not have the ward of the feoffor that made the feoffment in fee, *&c.* So there is a great diverſity between theſe two caſes.

Of this ſufficient hath been ſaid before.

12.H.4.13.36.E.3.tit. gard.
10.6.H.7.9.37.H.6.1.
32.H.6.27.7.E.6,tit. gard.Br.

## *Sect.* 459.

¶ Item, ſi un home leſſa a un auter ſon terre pur terme dans, ſi le leſſor releſſa al leſſee tout ſon droit, &c. devant que le leſſee avoit enter en meſme le terre per force d meſme l'leas, tiel releas eſt void, pur ceo que le leſſee navoit poſs. en la terre al temps del releas fait, mes tantſolement un droit daver meſme la terre per force de meſme le leas. Mes ſi le leſſee enter en meſme la terre, & ent eit poſs. per force de meſme le leas, donque tiel releas fait a luy per le feoffor, ou per ſon heire, eſt ſufficient a luy per cauſe del privitie, que per force del leas eſt perenter eux, &c.

Alſo, if a man letteth to another his land for terme of yeares, if the leſſor releaſe to the Leſſee all his right, *&c.* before that the Leſſee had entred into the ſame land by force of the ſame leaſe, ſuch releaſe is voide, for that the leſſee had not poſſeſſion in the land at the time of the Releaſe made, but onely a right to have the ſame land by force of the leaſe. But if the leſſee enter into the land, and hath poſſeſſion of it by force of the ſaid leaſe, then ſuch releaſe made to him by the feoffor, or by his heir, is ſufficient to him, by reaſon of the privity which by force of the leaſe is between them, *&c.*

¶ Devant que le leſſee avoit enter, &c. For before entry the leſſee hath but intereſſe termini, an intereſt of a term, & no poſſeſſion, and therefore a releaſe, which enures by way of enlarging of an eſtate, cannot worke without a poſſeſſion, for before poſſeſſion there is no reverſion, & yet if a Tenant for 20 years in poſſeſſion make a leaſe to B. for five yeares, and B. enter, a releaſe to the firſt leſſee is good, for he had an actual poſſeſſion, and the poſſeſſion of the Leſſee is his poſſeſſion. And ſo it is if a man make a Leaſe for years, the remainder for years, and the firſt leſſee doth enter, a releaſe to him in the remainder for years is good, to enlarge his eſtate.

49.E.3 28.32.H.6.8. 37.H.6.18.22.E.4.37. 4.H.7.10. 15.H.7.14.

21.E.4.Surrender 6.

But if a man make a leaſe for years, to begin preſently, reſerving a rent, if before the leſſee doth enter the leſſor releaſeth all the right that he hath in the Land, albeit this releaſe cannot enlarge his eſtate, yet it ſhall in reſpect of the privity extinguiſh the rent. And ſo it is if a leaſe be made to begin at Michelmas, reſerving a rent, and before the day the leſſor releaſe all the right that he hath in the land, this cannot enure to enlarge

(b) Mich 39. & 40. Eliz. in Scaccario, between Sir Henry Woodhouse, & Sir William Paston.

enlarge the estate, but to extinguish the rent in respect of the privity, as it was resolved (b) in the Exchequer, which I observed.

A man granteth the next avoidance of an Advowson or two, the one of them may before the Church become void release to the other; for although the grantor cannot release to them to increase their estate, because their interest is future, and not in possession, yet one of them to extinguish his interest may release to the other in respect of the privity. But after the Church become void, then such a release is void, because then it is (as it were) but a thing in action. And this was resolved (c) by the whole court of Common pleas, which I my selfe heard and observed. And by consequent, in the case of Littleton, if a lease for years be made to two, albeit the lessor before they enter cannot release to them to inlarge their estate, yet one of them may before entry release to the other.

(c) Pasch. 38 Eliz. in quare impedit per Bennet, vers. leveſque de Norwich in Communi banco. Pl. Com. 423.

¶ *Mes sans ſolement un droit*, &c. Which is not so to be understood that he hath but a naked right, for then he could not grant it over; but seeing he hath Interesse termini, before entry, he may grant it over, albeit for want of an actual possession he is not capable of a release to enlarge his estate.

¶ *Mes ſi le leſſee enter en meſme le terre*, &c. This is evident. And herein note a diversity between a lease for life, and for years; for before the lessee for years enter, a release cannot be made unto him; but if a man make a lease for life, the Remainder for life, and the first lessee dieth, a release to him in the remainder and to his heires is good before he doth enter to enlarge his estate; for that he hath an estate of a Freehold in law in him, which may be enlarged by Release before entry.

And where our author speaketh only of a Lessee for years, the same law it is of a tenant by Statute merchant or Staple, or Tenant by Elegit, or the like.

25. E. 3. 53. 31. E. 3. Confirmat. 14. 31. Ass. Pl. 13.

## Sect. 460, 461.

¶ By these two Sections is to be observed a diversity between a Tenant at will, and a Tenant at sufferance, for a release to a Tenant at will is good, because between them there is a possession with a privity but a Release to a Tenant at sufferance is void, because he hath a possession without privity. As if lesse for years hold over his term, &c. a Release to him is void, for that there is no privity between them; and so are the books that speak of this matter to be understood.

21. H. 6. 37. 2. E. 4. 6. b. 7. E. 4. 27. 8. E. 4. 16. 29. H. 6. Release 6.

¶ * *Sed contrarium tenetur*, &c. This is of a new addition, and the book here cited ill understood, for it is to be understood of a Tenant at sufferance.

¶ *De ſa teſte demeſne occupia.* He doth not say, De ſa teſte

¶ EN meſme le maner eſt, come il ſemble, ou leaſe eſt fait a un home, a tener de l'leſſor a ſa volunt, per force de quel leas le leſſee eit poſſeſſion, ſi le leſſor en ceſt caſe fait un releas al leſſee, de tout ſon droit, &c. ceſt releas eſt aſſets bon pur le privitie que eſt penter eux, car en vain ſerra de faire eſtate per un livery de ſeiſin a un auter, lou il ad poſſeſſion de meſmes les tenements per le leas de meſm celuy devant, &c.

¶ * Sed contrarium tenetur, Paſc. 2. Ed. 4. p touts les Juſtices.

IN the ſame manner it is, as it ſeemeth, where a Leaſe is made to a man to hold of the leſſor at his will, by force of which Leaſe the Leſſee hath poſſeſſion, if the leſſor in this caſe make a releaſe to the Leſſee of all his right, *&c.* this releaſe is good enough for the privity which is between them; for it ſhall be in vain to make an eſtate by a livery of ſeiſin to another where he hath poſſeſſion of the ſame land by the leaſe of the ſame man before, *&c.*

But the contrary is holden, *Paſch. 2. Ed. 4.* by all the Juſtices.

*Sect.*

*Section* 461.

¶ MEs lou home de la teſte demeſn occupia terres ou tenemẽts a la volunt celuy que ad le Franktenemẽt, & tiel occupier ne claima riens forſq; a volunt, &c. ſi celuy que ad le Franktenemẽt voile releaſer tout ſõ droit al occupier, &c. tiel Releaſe eſt void, pur ceo q̃ nul privity eſt perenter eux per leaſe fait a l'occupier, ne p auter manner, &c.

BUt where a man of his own head occupieth Lands or Tenements at the will of him which hath the Freehold, and ſuch occupier claimeth nothing but at will, &c. if hee which hath the Freehold will releaſe all his right to the occupier, &c. this Releaſe is void, becauſe there is no privity between them by the leaſe made to the occupier, nor by other manner, &c.

demeſne enter, &c. ſo as this is to be underſtood of a Tenant at ſufferance, viz. where a man commeth to the poſſeſſion firſt lawfully, and holdeth over. Vide Sect. 68.

(m) For if a man entreth into Land of his own wrong, and take the profits, his words to hold it at the will of the owner cannot qualifie his wrong; but he is a Diſſeiſor, and then the Releaſe to him is good, or if the owner conſented thereunto, then he is a Tenant at will, and that way alſo the Releaſe is good. But there is a diverſity when one cometh to a particular Eſtate in land by the Act of the party, and when by Act in Law; for if the Gardein hold over, he is an Abator, becauſe his intereſt came by act in Law. (m) Temps H.8. tit. Tenant a volunt. Br. 15. 2. E. 4. 31. 18. E. 4. 25. 39. E. 3. 28. 12. E. 3. Aſſ. 86. 11. E. 3. ibid. 87. 12. Aſſ 21. 13. E. 3. Aſſ. 92 28. Aſſ. 11. 34. Aſſ. 10. 10. E. 3. 41. 8. E. 3. 63. Vide 2. part of the Inſtitutes Marlb. ca. 16. & 10. E. 4. 9. 10.

¶ *Nul Privitie.*

Privitie, is a word common as well to the Engliſh, as to the French, and in the underſtanding of the common Law is four-fold. Old N. B. 117. 137. Lib. 3. fol. 23. Walkers caſe Lib. 4. fol. 223, 124. Vide Sect. 454.

1. Is Privies in Eſtate, whereof Littleton here ſpeaketh, as between the Donor and Donee, Leſſor and Leſſee, which privity is ever immediate.

2. Privies in Bloud as the Heir to the Anceſtor, or between Coparceners, &c.

3. Privies in Repreſentation, as Executors, &c. to the Teſtator.

And fourthly, Privies in Tenure, as the Lord and Tenant, &c. which may be reduced to two general heads, Privies in Deed, and Privies in Law.

## *Sect.* 462, & 463.

¶ ITem, ſi home enfeoffe auters hões de la terre, ſur confidence, & al entent de performer ſa darrein volunt, & le Feoffor occupiaſt meſm la teñ a le volunt de ſes feoffees, & puis les feoffees releſſont per lour fait a lour feoffor tout lour droit, &c. ceo ad eſte un queſtion, ſi tiel releaſe ſoit bon ou non. Et aſcuns ont dit, tiel releaſe

ALſo, if a man enfeoffe other men of his land, upon confidence, and to the intent to perform his laſt will, and the Feoffor occupieth the ſame Land at the will of his Feoffees, land after the Feoffees releaſe by their Deed to their Feoffor all their right, &c. this hath been a queſtion, if ſuch releaſe be good or no. And ſome have ſaid, that

¶ HEre is a queſtion moved, and the reaſons of both ſides ſhewed, and as it hath been obſerved, the latter opinion is the better, being Littletons own opinion. 12. E. 4. 12. b. 15. E. 4. 9. H. 7. 25. Vide Sect. 302. 176. 34. 2.

¶ *Il ſerra entendue per la Ley que le Feoffor doit maintenant occupie la terre a la voluntde les Feoffees.* For intendments of law mentioned by our Author, ſee the Sections, in the margent. 4 E. 4. 8. b. 9. H. 7. fol. ultimo. 15. H. 7. 2. b. 14. H. 8. 9. 2. Sect. 99. 100. 110. 367. 377. 393. 406. 346.

Here is to be obſerved the intendment of Law, that when a Feoffment is made to a future uſe, as to the performance of his laſt will, the Feoffees 35. H. 6. Subpena. 22. 15. H. 7. 12. b. 37 H. 7. 36. 11. H. 4. 52. 7. H. 4. 22. 1 Mar. 111. Dyer.

Feoffees ſhall be ſeiſed to the uſe of the Feoffor and of his heirs in the mean time.

Ipſæ enim Leges cupiunt ut jure regantur.

And reaſon would that ſeeing the Feoffment is made without conſideration, and the Feoffor hath not diſpoſed of the profits in the mean time, that by conſtruction & intendment of law the Feoffor ought to occupy the ſame in the mean time. And ſo it is, when the Feoffor diſpoſeth the profits for a particular time: in præmi. the uſe of the Inheritance ſhall be to the Feoffor and his heirs, and a thing not diſpoſed of. Wherein it is to be obſerved, That lands and Tenements conveyed upon confidences, uſes, and truſts, are to be ruled and decided, if queſtion groweth upon the confidences, uſes, or truſts, by the Judges of the Law: for that it appeareth by this & the next Section, they are within the Entendment and conſtruction of the Laws of the Realm.

35.H.6.Subpena.22. 30.H 6.tit.Deviſe. 174

And it is be obſerved (as hath been ſaid) that there is a diverſity between a Feoffment of Lands at this day upon confidence, or to the intent to perform his laſt will, and a Feoffment to the uſe of ſuch perſon, and perſons, and of ſuch eſtate and eſtates, as he ſhall appoint by his laſt will; for in the firſt caſe, the Land paſſeth by the Will, and not by the Feoffment; for after the Feoffment the Feoffor was ſeiſed in Fee ſimple as he was before; but in the latter Caſe the will purſuing his power is but a direction of the uſes of the Feoffment, and the Eſtates paſs by execution of the uſes which were raiſed upon the Feoffment; but in both caſes the Feoffees are ſeiſed to the uſe of the Feoffor and his heirs in the mean time; and all this, and much more, concerning this matter, hath been adjudged.

Lib.6.fol.17.18. Sir Edward Clares caſe. Dillon & Frayns caſe.b. &c.fol.113.

Note, uſes are raiſed either by tranſmutation of the eſtate, as by Fine, Feoffment, Common recovery, &c. or out of the ſtate of the owner of the Land, by bargain and ſale by Deed indented and inrolled, or by covenant upon lawful conſideration; whereof you may read plentifully in my Reports.

A Feoffee to the uſe of A. & his heirs before the Statute of 27.H.8. for money bargaineth and ſelleth the Land to C. & his heirs, who hath no notice of the former uſe, per no uſe paſſeth by this bargain and ſale; for there cannot be two uſes in Eſſe, of one and the ſame Land; & ſeeing there is no tranſmutation of poſſeſſion by the Tertenant, the former uſe can neither be extinct nor altered. And if there could be two uſes of one & the ſame land, then could not

eſt voyd, pur ceo que nul privitie fuit perenter les Feoffees & lour Feoffor, entant que nul Leaſe fuit fait apres tiel Feoffement per les Feoffees al Feoffor, a tener a lour volunt. Et altuns ont dit le contrarie, & ceo per deux cauſes.

## Sect. 463.

UN eſt, Que quād tiel feoffment eſt fait ſur confidence a performer la volunt del Feoffor il ſerra intendue per la Ley, que le Feoffor doit maintenant occupier la terre a la volunt de ſes Feoffees, & iſſint il eſt tiel manner de privitie enter eux come hõe fait un Feoffment as auters, & ils incontinent ſur le Feoffment, voylent & granteront quõ lour Feoffor occupier a la Terre a lour volunt, &c.

ONe is, That when ſuch Feoffment is made upon confidence to perform the will of the Feoffor, it ſhall be intended by the law, that the Feoffor ought preſently to occupy the Land at the will of his Feoffees; and ſo there is the like kinde of privity between them; as if a man make a Feoffement to others, & they immediately upon the Feoffment will and grant, that their Feoffor ſhall occupy the Land at their will, &c.

not the ſaid Statute execute either of them for the uncertainty. But if A diſſeiſe one to the uſe of B. and A. doth bargain and ſell the land for mony to C. C. hath an uſe: and here be two uſes of one land, but of ſeveral natures, the one, viz. upon the bargain and ſale to be executed by the Statute, and the other not.

But ſince Littleton wrote, all uſes are transferred by Act of Parliament, (c) into poſſeſſion; ſo as the caſe which Littleton here puts is thereby altogether altered. Yet it is neceſſary to be known, what the Common law was before the making of the Statute, and may ſerve for the knowledge of the law in like caſe. (c) 27. H. 8. cap. 10.

¶ *Incontinent ſur le Feoffment.* Quæ incontinenti fiunt ineſſe videntur.

¶ *A lour volunt, &c.* Here is implyed, every Tenancy at will is at the will of both parties, as before in his proper place hath been ſhewed.

## *Sect.* 464.

¶ UMauter cauſe ils allegeont, Que ſi tiel fre vault xl. s. per an, &c. donque tiel Feoffor ſerra jure en Aſſiſes & en auters enquells en pleas realx, & auxy en Pleas perſonals de quel graund ſum que les Plaintiffes voilent counter, &c. Et ceo eſt per le Common Ley de la terre, Ergo, ceo eſt pur un graund cauſe, & la cauſe eſt, que la Ley voet que tiels Feoffors & lour heires doient occupier, &c. & prender & enjoyer touts maner de profits, iſſues, & rebenues, &c. ſicome les Tenements fueront lour meſmes ſans interruption de les Feoffees, nient obſtant tiel Feoffment, Ergo, meſme la Ley done privitie perenter tiels Feoffors & Feoffees upon confidence,

ANother cauſe they alledge, That if ſuch Land bee worth forty ſhillings a year, &c. then ſuch Feoffor ſhall be ſworn in Aſſiſe and other enqueſts in Pleas reals, and alſo in Pleas perſonals, of what great ſumme ſoever the Plaintiffe will declare, &c. And this is by the Common Law of the land, *Ergo*, this is for a great cauſe; and the cauſe is, for that the Law will that ſuch feoffors and their Heires ought to occupy, &c. and take and enjoy all manner of profits, iſſues, and revenues, &c. as if the Lands were their own, without interruption of the Feoffees, notwithſtanding ſuch Feoffement, *Ergo*, the ſame Law giveth a privity between ſuch Feoffors and the Feoffees upon confidence,

¶ BY the Statute of 2. H. 5. cap. 3. Statut. 2. it is enacted, That in three caſes he that paſſeth in an Enqueſt, ought to have lands and Tenements to the value of forty ſhillings, viz. Firſt, Upon tryal of the death of a man. Secondly, in Plea real betwixt party and party. And thirdly, In Plea perſonal, where the debt, or the damages in the Declaration amount unto forty Marks. And it is worth the noting, That the Judges that were at the making of that Statute did conſtrue it by equity: for where the Statute ſpeaks in the disjunctive, debt or damages, they adjudged that where the debt and damages amounted to forty marks, that it was within the Statute. Forteſcue (f) ſaith, Ubi damna vel debitum in perſonalibus Actionibus non excedunt quadraginta Marcas monetæ Angliconæ, hinc non requiritur, quod Juratores in Actionibus hujuſmodi tantum expendere poſſint: habebunt tamen terram vel redditum, ad valorem competentem, juxta diſcretionem juſticiariorum, &c. And foraſmuch as at the time of the making of this Statute, the greater part of the lands in England in thoſe troubleſome and dangerous times (when that unhappy controverſie between the houſes of York and Lancaſter was begun) were in uſe. And the Statute was made

28. H. 8. Dy. fol. 9. Vid. W. 2 cap. 38. Leſtat de 21. E. 1. de uratis ponendis in Aſſ. &c.

9. H. 5. fol. 4. (f) Forteſc. cap. 15.

made to remedy a mischief, that the Sheriff use to return simple men of small or no understanding; and therefore the Statute provided, That he should return sufficient men, and albeit in Law the Land was the Feoffees, yet for that they had it but upon trust, and Cesty que use took the whole profits, as our Author here saith, and in equity and conscience the land was his, therefore the Judges for advancement and expedition of Justice, extended the Statute (against the Letter) to Cesty que use, and not to the Feoffees.

13.H.7.13.b.13.H.7.7.b 5.E.4.7.a.

(n) But note if a man hath a Freehold pur terme dauer vie, or is seised in his Wives right and is returned on a Jury, yet if after he be returned, Cesty que vie, or his wife die, he may be challenged; and so it is if after the return the lands be evicted.

(n)3.H.6.39.Challenge 19.21 H.6.39.

¶ *Et ceo est per le Common Ley.* Here three things are to be observed. First, That the surest construction of a Statute is by the rule and reason of the common Law. Secondly, That uses were at the Common Law. Thirdly, That now seeing the Statute (g) of 27.H.8.ca.10. which hath been enacted since Littleton wrote, hath transferred the possession to the use, this case holdeth not at this day; but this latter opinion before that was good law, as Littleton here taketh it.

(g)27.H.8.cap.10.

¶ *Mesme la Ley done privitie, &c.* Hereof it followeth, That when the law gives to any man any estate or possession, the law giveth a privity and other necessaries to the same: and Littleton concludeth it with an Illative; Ergo, mesme la Ley done privitie, which is very observable for a conclusion in other cases.

27.Fl.cap.6. And the (Quære) here made in the end of this Section is not in the Original, but added by some other, and therefore to be rejected.

Also since Littleton wrote, the said Statute of 2. H. 5. is altered: for where that Statute limited forty shillings, now a later Statute hath raised it to four pounds; and so it ought to be contained in the Venire facias.

Pl.Com.352,b.in Delameres case,& 349.b. Lib.1.fol.121,122.127. 140,in Chudleys case. Lib.2.fol.58.78. Lib.6.fol.64. Lib.7.fol.13.&.34. Note, an Use is a trust or confidence reposed in some other, which is not issuing out of the land but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land, sc. that Cesty que use shall take the profit, and that the Ter-tenant shall make an estate according to his direction. So as Cesty que use had neither Jus in re, nor Jus ad rem, but only a confidence and trust, for which he had no remedy by the Common law; but for breach of trust his remedy was only by Subpœna, in Chancery: and yet the Judges for the cause aforesaid, made the said construction upon the said Statute.

Now how Jurors shall be returned both in Common Pleas, and also in Pleas of the Crown, and in what manner evidence shall be given to them, & how they shall be kept until they give their verdict, you may read in Fortescue, & therefore need not to be here inserted.

Fortesc.cap.25,26,27.

## Sect. 465.

¶ IT is a certaine rule, that when a release doth enure by way of Enlarging of an Estate, that there must be privitie of estate, as between lessor and lessee, Manor and Donee. For if A. make a lease to B. for life, and the

Flet.lib 5.cap.34. 15.H.7.14.22.E.44.

¶ ITem, Releases solonqz le matter en fait, ascũ foits ont lour effect per force denlarger lestate celuy, a que les Feoffees sur confidence, &c. pur queux causes ils ont dit que tiels Releases faits per tiels Feoffees sur confidere a lour feoffor ou a ses heires, &c. ilsint occupant la tre, terra assets bon, & cest le meliqr opinion come il semble &c.

¶ Quære, car ceo semble nul Ley a cest jour.

ALso, Releases according to the matter in fact, sometimes have their effect by force to enlarge the state of him to

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le releale eſt fait, Si come jeo leſſa certain terre a un home pur terme des ans, per force de que il eſt en poſſ. & puis jeo releſſa a luy tout le droit que jeo aye en le terre ſans pluis parolx mitter en le fait, & deliver a luy le fait, donques il ad eſtate forſque pur terme de ſa vie. Et la cauſe eſt, pur ceo que quant le reverſion ou le remainder eſt en un home, le quel voile enlarger per ſon releas leſtate le tenant, &c. il nabera pluis greinder eſtate mes en tiel manner & forme, ſicome tiel feoffor fuit ſeiſie en fee, & voiloit per ſon fait faire eſtate a un en certain forme, &c. deliver a luy ſeiſin p force dmeſme le fait: ſi en tiel fait de feoffement ne ſoit aſcun parol de enheritance, donques il ad forſqz eſtate pur terme de vie, & iſſint il eſt en tiels releaſes faits per eux en la reverſion, ou en le remainder. Car ſi jeo leſſa la terre a un home pur terme d ſa vie, & puis jeo releſſa a luy tout mon droit, ſauns pluis dire & le releas, whom the releaſe is made. As if I let certain Land to one for terme of yeares, by force whereof he is in poſſeſſion, and after I releaſe to him all the right which I have in the land, without putting more words in the Deed, and deliver to him the Deed, then hath he an eſtate but for terme of his life. And the reaſon is, for that when the reverſion or remainder is in a man who will by his releaſe enlarge the eſtate of the Tenant, &c. he ſhall have no greater eſtate, but in ſuch manner & form, as if ſuch Leſſor were ſeiſed in fee, and by his Deed will make an eſtate to one in a certain form, and deliver to him ſeiſin by force of the ſame Deed: if in ſuch Deed of feoffement there bee not any word of Inheritance, then he hath but an eſtate for life, & ſo it is in ſuch Releaſes made by thoſe in the reverſion or in the remainder. For if I let land to a man for term of his life, and after I releaſe to him all my right without more ſaying in the releaſe, his eſtate is not

Leſſee maketh a Leaſe for years, and after A. releaſeth to the Leſſee for years, and his heirs, this releaſe is void to enlarge the eſtate, becauſe there is no privity between A. and the leſſee for years.

If a man make a leaſe for twenty years, and the Leſſee make a leaſe for ten years, if the firſt Leſſor doth releaſe to the ſecond Leſſee and his heirs, this releaſe is void for the cauſe aforeſaid.

For the ſame cauſe, if the Donee in taile make a Leaſe for his own life, and the Donor releaſe to the Leſſee and his heirs, this releaſe is void to enlarge the eſtate.

And as privity is neceſſary in this caſe, ſo privity only is not ſufficient. As if an Infant make a Leaſe for life, and the Leſſee granteth over his eſtate with warranty, the Infant at full age bringeth a Dum fuit infra ætatem, the Tenant voucheth his Grantor, who entreth into warranty, the demandant releaſeth to him and his heirs; Here is privity in Law, and a tenancy in ſuppoſition of Law; and yet becauſe he in rei veritate hath no eſtate, it cannot enure to him by way of inlargement; for how can his eſtate be enlarged, that hath not any?

If a Tenant by the courteſie grant over his eſtate; yet he is tenant as to an Action of Waſte, Attornement, &c. and yet a Releaſe to him and his heirs cannot enure to enlarge his eſtate that hath no eſtate at all.

But if a man make a Leaſe for years, the remainder for life, a Releaſe by the leſſor to the Leſſee for years, and to his heirs, is good, for that he hath both a privity and an eſtate, and the releaſe alſo to him in the remainder for life and his heirs, is good alſo.

If I grant the reverſion of my Tenant for life, to another for life, now ſhall not I have an Action of Waſte, but if I releaſe to the Grantee for life, and his heirs, now he hath

43 E. 3. 16, a. per Perſey & Finchden.
41 E. 3. 17, a. 7 E. 4. 17.

hath the Fee ſimple, and ſhall puniſh the waſte done after.

It is further to be obſerved, that to a releaſe that enureth by way of enlargement of the eſtate, there is not only required priuity as hath been ſaid, and an eſtate alſo, but ſufficient wordes in law, to raiſe or create a new eſtate. If a man make a leaſe to A. for term of the life of B. and after releaſe to A. all his right in the land, by this A. hath an eſtate for term of his own life; for a leaſe for term of his own life is higher in judgement of law, then an eſtate for term of another mans life.

ſon eſtate nemy en large. Mes ſi jeo releſſa a luy & a ſes heirs, donques il ad fee ſimple, & ſi jeo releſſa a luy & a ſes heires de ſon corps engendres, donques il ad fee taile, &c. Et iſſint il covient de ſpecifier en le fait que leſtate celuy a q̃ le releas eſt fait avera.

enlarged: but if I releaſe to him and to his heirs, then he hath a Fee ſimple; and if I releaſe to him and to his heires of his body begotten, then he hath a fee taile, &c. And ſo it behoveth to ſpecifie in the Deed what eſtate he to whom the Releaſe is made ſhall have.

16.H.6.releaſe 45. 22.E.2.releaſe Statham. (a)13 H.4.6.Stanſ. prer.7.b. 18.E.4,5.22.Aſſ.12. 11.H.7.19.10.H.6.11.

If a Feme Covert be Tenant for life, a releaſe to the husband and his heirs is good, for there is both priuity and an eſtate in the husband, whereupon the releaſe may ſufficiently enure by way of enlargement; (a) for by the entermarriage he gaineth a Freehold in his wives right.

¶ *Tout le droit.* Vide Sect. 650.

¶ *Pur terme des ans.* So it is if a Releaſe be made to Tenant by Statute Staple, or Merchant, or tenant by Elegit, as hath been ſaid; and ſo likewiſe to Gardein in Chivalry which holdeth in for the value, by him in the reverſion of all his righte in the land, by this a freehold paſſeth for the life of him to whom the releaſe is made; for that is the greateſt eſtate that can paſs without apt wordes of Inheritance.

If a man make a leaſe for ten years, the remainder for twenty years, he in the remainder releaſeth all his right to the Leſſe, he ſhall have an eſtate for thirty years, for one Chattle cannot drown another, and years cannot be conſumed in years.

¶ *Mes ſi jeo Releaſe a luy & a ſes heires, &c.* Here it is to be obſerved, that when a releaſe doth enure by way of enlargement of an eſtate, no Inheritance either in Fee ſimple or Fee tail, can paſs without apt wordes of Inheritance.

9.Eliz.Dier.263.10.El. Bendloes Litrl.lib.f.68. 69.70-b-130.b.

But there is a diverſity between a Releaſe that enureth by way of enlargement of the ſtate, and by way of mitter leſtate; for when an eſtate paſſeth by way of mitter leſtate, there ſometime there need not any wordes of Inheritance. As if a joynt eſtate be made to the husband and to his wife, and to a third perſon and to their heirs, the third perſon releaſeth all his right to the husband, this ſhall enure by way of mitter leſtate, and not by way of enlargement of the eſtate, becauſe the husband had a fee ſimple, and needeth not to have any wordes of Inheritance. So it is if the Releaſe had been made to the Wife.

See before in the chapter of Fee ſimple. (b) 40.E.3.41.46.E.3. 19.H.6.33.H.6.5.10. E.4.3.

(b) If there be three joyntenants, and one releaſe to one of the other all his right, this enureth by way of mitter leſtate, and paſſeth the whole fee ſimple without theſe wordes (heirs.) But if there be two Joyntenants, and the one of them releaſe all his right to the other, this doth not to all purpoſes entre by way of mitter leſtate, for it maketh no degree; and he to whom the Releaſe is made ſhall for many purpoſes be adjudged in from the firſt feoffor, and this Releaſe ſhall veſt all in the other Joyntenant without theſe wordes (heirs.)

10.E.4.3.b.37.H.8.tit. alienation.Br.31.8.H.4 8.40.Aſſ.5.9.Eliz.Dyer. 263.

But if there be two Coparceners, and the one releaſe all his right to the other, this ſhall enure by way of mitter leſtate, and ſhall make a degree, and without theſe wordes (heirs) ſhall paſs the whole Fee ſimple. And it is to be obſerved, that to Releaſes that enure by way of mitter leſtate, there muſt be priuity of eſtate at the time of the Releaſe.

If two Coparceners be of a rent, and the one of them take the Ter-tenant to husband, the other may releaſe to her, notwithſtanding the rent be in ſuſpence and it ſhall enure by way of Mitter leſtate, and ſhe may releaſe alſo to the ter-tenant, and that ſhall enure by way of extinguiſhment: but if ſhe releaſe to her ſiſter and to her husband, it is good to be ſeen how it ſhall enure.

Vide Litt.fol.68,69.

Littleton having now ſpoken of Releaſes that enure by way of enlargement of the eſtate, and of releaſes that enure by way of Mitter leſtate, proceedeth to releaſes that enure by way of Mitter le droit. So as of that which hath been and ſhall be ſaid by our Author of releaſes, it appeareth that ſome do enure by way of Enlargement of eſtate, ſome by way of Mitter leſtate, ſome by way of Mitter le droit, by way of Entry and Feoffment, and ſome by Extinguiſhment,

## Sect. 466.

¶ Item, alcuns foits releases urera de mitter & vester le droit celuy que fait le Release, a celuy a que le releas eſt fait. Sicome un home eſt diſſeiſi, & il releſſa a ſon diſſeiſor tout le droit que il ad, en ceſt cas le diſſeiſor ad ſon droit, iſſint que lour ſon eſtate avevant fuit tortious ore per tiel releas il eſt fait loyal & droiturel.

ALſo, ſometimes Releaſes ſhall enure de mitter and veſt the right of him which makes the Releaſe to him to whom the Releaſe is made. As if a man be diſſeiſed, and he releaſeth to his diſſeiſor all his right; in this caſe the Diſſeiſor hath his right, ſo as where before his ſtate was wrongfull, now by this releaſe it is made lawfull and right.

¶ *Et il relſſa a ſon diſſeiſor, &c.* This releaſe ſo putteth the right of the diſſeiſee to the Diſſeiſor, that it changeth the quality of the eſtate of the Diſſeiſor, for where his eſtate was before wrongful, it is by this releaſe made lawful. But how far and to what reſpects his eſtate is changed ſhall be ſaid hereafter in this Chapter, in his proper place.

## Sect. 467.

¶ Mes hic nota, q̄ quāt home eſt ſeiſi en fee ſimple, daſcun terres ou tenements, & un auter voile releaſer a luy tout le droit que il ad ẽ meſmes les teñts, il ne beſoigne de parler ō les heires celuy a q̄ le releas eſt fait, pur ceo que il avoit fee ſimple al temps de releas fait. Car ſi releas fuit fait a luy pur un jour, ou pur un heure, ceo ſerroit auxy fort a luy en ley, ſicome il uſt releas a luy & a ſes heires. Car quant ſon droit fuit ale de luy a un foits per ſon releas ſans aſcun condition

BUt here note, that when a man is ſeiſed in fee ſimple of any lands or tenements, and another willreleaſe to him all the right which he hath in the ſame tenements, hee needeth not to ſpeak of the heirs of him to whom the releaſe is made, for that he hath a fee ſimple at the time of the releaſe made: for if the releaſe was made to him for a day or an hour, this ſhall be as ſtrong to him in law, as if he had releaſed to him and his heirs. For when his right was once gone from him by his Releaſe without any con-

¶ *Il ne beſoigne a parler de les heirs &c.* And the reaſon of Littleton herein is, for that the Diſſeiſor hath a Fee ſimple at the time of the Releaſe made. And this appeareth by that which hath been ſaid before, ſo as regularly he that hath a Fee ſimple at the time of the Releaſe made of a right, &c. needeth not ſpeak of of his heirs.

¶ *Car ſi releaſe fuit fait a luy pur un jour, &c.* For the diverſity is between a Releaſe of part of the eſtate of a Right, and between a releaſe of a Right in part of the Land. And therefore Littleton here ſaith, that a Releaſe of a Right for a day or an hour is of as good force, as if he had releaſed his right to him and his heirs. But if a man be diſſeiſed of two acres, he may releaſe his right in one of them, and yet enter into the other. Vide 6.E.3.17. 12.E.4.tit.Diſcent.F. 29.

¶ *Sans aſcun condition,*

tion, &c. Herein is imply-
ed two diverſities, firſt be-
tween the quantity of the e-
ſtate in a Right, and the qua-
lity thereof; for albeit the Diſſeiſee cannot releaſe part of the ſtate, as hath been ſaid; yet
(c) 4.E.2.Releaſe 50. 43.Aſſ.12.17.Aſſ.2. 31.Aſſ.13.21.H.24. may he releaſe his right upon condition, as here it appeareth by Littleton, (c) and it a-
greeth with our Books.

Alſo here is another diverſity between a right, whereof Littleton putteth his caſe, which is favoured in Law, and a condition created by the party which is odious in Law, for that it defeateth eſtates. And therefore if a condition be releaſed upon condition, the Releaſe is good, and the condition void.

What things may be done upon condition is too large a matter to handle in this place; our Author having treated of conditions before; only to give a touch of ſome things omitted there, ſhall ſuffice. An expreſs Manumiſſion of a Villein cannot be upon condition, for once free in that caſe, and ever free; alſo an Attornment to a Grantee upon condition, the condition is void becauſe the Grantee is once ſetled. But this is to bee under-
Rot.Parliament.18.H.6 num.29.Ap. Gwilliams caſe. 10.E.3.cap.2.3.H.7.f.6 ſtood of a condition ſubſequent, and not of a condition precedent; for in both thoſe caſes the condition precedent is good. But Letters patents of Denization made to an Alien may be either upon condition ſubſequent or precedent; and ſo may the King make a Charter of pardon to a man of his life upon condition, as is abovelaid.

## Sect. 468.

¶ MEs lou home ad un reverſion en fee ſimple, ou un remainder en fee ſimple, al temps de releas fait, la il voit releaſer al tenant per term dans, ou pur terme de vie, ou al tenant en le taile, il covient a determiner leſtate que celuy, a que le releas eſt fait avera per force de meſme le releas, pur ceo que tiel releas enurera pur enlarger leſtate de celuy, a que le releas eſt fait.

BUt where a man hath a reverſion in fee ſimple, or a remainder in fee ſimple, at the time of the releaſe made, there if he will releaſe to the tenant for years, or for life, or to the tenant in taile, he ought to determine the Eſtate, which he to whom the releaſe is made ſhall have by force of the ſame releaſe, for that ſuch releaſe ſhall enure to enlarge the eſtate of him to whom the releaſe is made.

Of this ſufficient hath been ſaid before.

## Sect. 469.

¶ MEs auterment eſt lou home ad forſque droit a la terre, & nad reins en le reverſion ne en le remainder en fait. Car ſi tiel home releſſa tout ſon droit a un que eſt ten de le franktenement, tout ſon droit eſt ale, coment que nul mention ſoit fait de les heires celuy a que le releas eſt fait. Car ſi jeo leſſa terres a un home pur term

BUt otherwiſe it is where a man hath but a right to the Land, and hath nothing in the reverſion, nor in the remainder in Deed. For if ſuch a man releaſe all his right to one which is tenant of the Freehold, all his right is gone, albeit no mention be made of the heires of him to whom the Releaſe is made: for if I let lands to one for term of his life, if I after releaſe

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de la vie, ũ jeo puis releale a luy pur enlarger son estate, il covient que jeo relessa a luy & a ses heires de son corps engender, ou a luy & a ses heires, ou per tiels parols: A aver & tener a luy & a ses heirs de son corps engendres, ou a ses heires males de son corps engendres, ou tiels semblables estates, ou autrement il nad pluis greind estate q̃ il avoit avebant.

to him to enlarge his estate, it behoveth that I release to him and his heirs of his body engendred, or to him and his Heirs, or by these words: To have and to hold to him and to his heirs, of his body engendred, or to the Heirs Males of his body engendred, or such like estates, or otherwise he hath no greater estate then he had before.

¶ *A Un que est Tenant de Franktenement.* Here it appeareth, that to a Release of a right made to any that hath an estate of Freehold in Deed or in Law, no privity at all is requisite. As if a Disseisor make a Lease for life, if the disseisee release to the Lessee, this is good, and directly within the rule of Littleton, because the Lessee hath an estate of Freehold, albeit there be no privity. And so it is if a Disseisor make a Lease to A. and his Heirs, during the life of B. and A. dyeth, a release by the Disseisee to his Heir, before he doth actually enter, is good.

## Sect. 470.

¶ Mes ũ mon ten̄ a term̄ de vie, lessa meisme la tre ouster a un auter pur terme de vie de son Lessee, le Remainder a un auter en fee, ore ũ jeo relessa a celuy a que mon Tenant lessa pur terme de vie, ceo serra bayre a touts jours, coment que nul mention soit fait de ses heires, pur ceo que al temps de release fait jeo avoy nul reb̄cion, mes tantsolement un droit daver la reb̄cion car p̄ tiel leas, & le remainder ouster que mon Ten̄t fit en ten̄as mon reb̄cion fuit discontinue, &c. & tiel releas urera a celuy en l'remainder, daver advantage de ceo gueriben come al Tenant a terme de vie.

¶ But if my Tenant for life letteth the same Land over to another for term of the life of his Lessee, the remainder to another in Fee, now if I release to him to whom my tenant made a lease for term of life, I shall be barred for ever, albeit that no mention be made of his Heirs, for that at the time of the release made I had no reversion, but only a right to have the reversion. For by such a release and the remainder over which my Tenant made, in this case my reversion was discontinued, &c. and this release shall enure to him in the remainder to have advantage of it as well as to the Tenant for terme of life.

¶ Littleton having before spoken of releases, which enure by way of enlargement, by way of mitter l'estate, and by way of mitter le droit, here speaketh of a release of a right which in some respects enureth by way of extinguishment, as in this case which Littleton here putteth, the release to the Lessee of the Lessee doth not enure by way of mitter le droit, for then should he have the whole right, but as it were by way of extinguishment, in respect of him that made the release, and that it shall enure to him in the remainder, which is

is a quality of an inheritance extinguished. But yet the right is not extinct in deed, as shall be said hereafter in this chapter.

¶ *Mon reversion fuit discontinue, &c.* Here Discontinue is in a large sense taken for Devested, though the entry of the Lessor be not taken away, which is implyed in this (&c.)

## Sect. 471.

¶ *Sont come un Tenant en Ley.* Which is certainly true in this case of Remainder; and so it is also in case of a reversion; as if a Disseisor make a lease for life, and the Disseisee doth release all his right to the lessee, this Release shall enure to him in the Reversion, albeit they have several estates, as hath been said, which is implyed in this (&c.)

¶ CAr a cel intent le Tenant a terme de vie, celuy en le remainder sont sicome un Tenant en Ley, & sont sicome un Tenant fuit sole seisie en son demesne come de fee al temps de tiel Release fait a luy, &c.

FOr to this intent the Tenant for term of life, and he in the Remainder, are as one Tenant in Law, and are as if one Tenant were sole seised in his Demesne as of fee at the time of such release made unto him, &c.

But if a Disseisor make a lease for life, the remainder in fee, albeit they to some purposes (as here is said) are as one Tenant in law; yet if the Disseisee release all Actions to the Tenant for life, after the death of the Tenant for life, he in the remainder shall not take benefit of this release, for it extended only to the tenant for life, as it is holden(a) in Edward Althams case. And in like manner, if the Disseisor make a lease for life, and the Disseisee release all Actions to the lessee, this enureth not to him in the reversion; and so our Author is to be understood of a release of rights; and not of a release of Actions, to the Tenant for life, as to or for the benefit of him in the remainder or reversion.

(a) Lib.8.fol.148.Edw. Althams case.

## Sect. 472.

¶ *Si home soit disseisie, &c.* This is to be understood where Tenant in fee simple is Disseised and releases; for if Tenant for life be disseised by two, and he releaseth to one of them, this shall enure to them both; for he to whom the Release is made, hath a longer estate then he that releaseth, and therefore cannot enure to him alone, to hold out his companion, for then should the Release enure by way of entry and grant of his estate, and consequently the Disseisor to whom the release is made should become Tenant for life, and the Reversion revested in the Lessor; (b) which strange transmutation and change of Estates in this case the law will not suffer. But if lessee for years be ousted, and he in the rever-

11.H.6.41.

(b) 13.E.4.tit. Discent. F.29.

¶ ITem, ſi hõe ſoit diſſeiſie pur deux, ſil releſſa a un d eux, il tiendra ſon compaignon hors de Terre, & per tiel Releaſe il avera le ſole poſſeſſion & eſtate en la Terre. Mes ſi un Diſſeiſor enfeoffa deux en Fee, & le Diſſeiſee releſſa a lun des feoffees, ceo urera a ambideux de les Feoffees, & la cauſe de diverſity enſ ceux deux caſes eſt aſſets pregnant. ¶ Pur

ALſo, if a man be diſſeiſed by two, if he releaſe to one of them, he ſhall hold his Companion out of the Land, and by ſuch Releaſe he ſhall have the ſole poſſeſſion and eſtate in the Land. But if a Diſſeiſor infeoff two in fee, and the Diſſeiſee releaſe to one of the Feoffees, this ſhall enure to both the Feoffees, and the cauſe of the diverſity between theſe two caſes is pregnant e-

ceo

teo que ils veignont eins per feoffment, & lauters per tort, &c.

nough. For that they come in by Feoffement, and the others by wrong, &c.

ſion diſſeiſed and the Leſſee releaſe to the Diſſeiſor, the Diſſeiſee may enter, for the term for years is extinct and determined. But otherwiſe it is in caſe of a Leſſee for life; for the Diſſeiſor hath a Freehold, wherupon the releaſe of Tenant for life may enure, but the Diſſeiſor hath no term for years, whereupon the releaſe of the Leſſee for years may enure.

And ſo it is if Donee in Taile be diſſeiſed by two, and releaſeth to one of them, it ſhall enure to them both. But if the Kings Tenant for life be diſſeiſed by two, and he releaſeth to one of them, he ſhall hold out his companion, for the Diſſeiſor gained but the eſtate for life. So if two Joyntenants make a Leaſe for life, and after do diſſeiſe the Tenant for life, and he releaſe to one of them, he ſhall hold out his companion, for the Diſſeiſin was but of an eſtate for life.

If Tenant for life be diſſeiſed by two, and he in the reverſion and tenant for life joyn in a Releaſe to one of the Diſſeiſors, he ſhall hold his Companion out; and yet it cannot enure by way of Entry and Feoffment. But if they ſeverally releaſe their ſeveral rights, their ſeveral Releaſes ſhall enure to both the Diſſeiſors.

But here in Littletons caſe, where Tenant in Fee ſimple is diſſeiſed by two, and releaſeth to one of them, this for many purpoſes enureth by way of entry and Feoffment, and therefore he to whom the Releaſe is made ſhall hold out his companion, and be made ſole Tenant of the Fee ſimple. And this holdeth not only in caſe of a diſſeiſin, but alſo in caſe of Intruſion and Abatement: but neceſſarily he to whom the Releaſe is made muſt be in by wrong, and not by title.

If two men do gain an Advowſon by uſurpation, and the right Patron releaſeth to one of them, he ſhall not hold out his companion, but it ſhall enure to them both; for ſeing their Clerk came in by admiſſion and inſtitution, which are judicial acts, they are not merely in by wrong: for an uſurpation ſhall cauſe a Remitter, as it appeareth in F. N. B. 31. m.

But if a Leaſe for life be made, the remainder for life, the remainder in fee, and he in remainder for life diſſeiſeth the tenant for life, and then Tenant for life dieth, the diſſeiſin is purged; and he in the remainder for life hath but an eſtate for life. And ſo note a diverſity, where the particular eſtate for life is precedent, and where ſubſequent. 19.H.6.22.38.H.6.28. Caſe de Occupant.

Where our Author putteth his caſe of one diſſeiſed, put the caſe that two Joyntenants in Fee be diſſeiſed by two, and one of the Diſſeiſees releaſe to one of the Diſſeiſors all his right, he ſhall not hold out his Companion, becauſe the Releaſe is but of the moity without any certainty.

If a man be diſſeiſed by two women, and one of them take Huſband, and the Diſſeiſee releaſe to the Huſband, this ſhall enure to the advantage of both the Diſſeiſors, becauſe the Huſband was no wrong-doer, but in a manner in by title.

¶ *Il aura le ſole poſſeſſion & eſtate.* If two Diſſeiſors be, and they make a Leaſe for life, and the Diſſeiſee releaſe to one of them, this ſhall enure to them both, and to the benefit of the Leſſee for life alſo: for he cannot by the releaſe have the ſole poſſeſſion and eſtate, for part of the eſtate is in another.

And ſo it is (as it ſeemeth) if the Diſſeiſors make a Leaſe for years, and the Diſſeiſee releaſe to one of them, this ſhall enure to them both; for by the releaſe he cannot have the ſole poſſeſſion: And it appeareth by Littleton, That he muſt have the ſole poſſeſſion, and hold his companion out. But the Mortgager upon condition having broken the condition, is diſſeiſed by two, the Mortgagor having title of entry for the condition broken, releaſe to the one Diſſeiſor, albeit they be in by wrong; yet the releaſe ſhall enure to them both for two cauſes; Firſt, for that they are not wrong-doers to the Mortgagor, but to the Mortgager, and by Littletons caſe it appeareth, That wrong is done to him that made the Releaſe. Secondly, that he that makes the Releaſe hath but a title by force of a condition, and Littletons caſe is of a right. Like Law of an entry for Mortmain, or a conſent to a ſubſtituent, &c.

¶ *Mes ſi un Diſſeiſor infeoffa deux, &c.* And the reaſon of this diverſity is, For that the Feoffees are in by Title, and are preſumed to have a Warranty, which is much favoured in Law, and the Diſſeiſors are merely in by wrong. And the nature of the Law doth preſerve, in this caſe, the benefit of the ſtranger to the releaſe, coming in by one joynt Title. 21.H.6.41.

¶ *Pur ceo que ils veignont eins per Feoffment, & lauters per Tort.* This is of a new addition, and not in the original, and therefore I paſs it over.

Sect.

## *Sect.* 473.

¶ Item, ſi jeo ſue diſſeiſée, & mon Diſſeiſor eſt diſſeiſée, ſi jeo releaſe a le Diſſeiſor de mon Diſſeiſor, jeo navera a unq̃ act. ne entra ſur le Diſſeiſor, pur ceo que ſon Diſſeiſor ad mon droit per mon releaſe, &c. Et iſſint il ſemble en tiel cas, ſi joyent xx. diſſeiſors, chelcun apres auter, & jeo releſſa a le darreine Diſſeiſor, celuy Diſſeiſor barrera touts les auters de lour actions & lour titles. Et la cauſe eſt, come il ſemble, pur ceo que en mults caſes, quant un home ad loyal title dentre, coment que il nentra pas, il defeatera touts meane titles per ſon releaſe, &c. Mes ceo neſt my en chelcun caſe, come ſerr̃ dit apres.

ALſo, if I be diſſeiſed, and my Diſſeiſor is diſſeiſed, if I releaſe to the Diſſeiſor of my Diſſeiſor, I ſhall not have an aſſiſe nor enter upon the Diſſeiſor, becauſe his Diſſeiſor hath my right by my releaſe, &c. And ſo it ſeemeth in this caſe, if there be xx. diſſeiſed one after another, and I releaſe to the laſt Diſſeiſor, this Diſſeiſor ſhall barre all the others of their actions and their titles. And the cauſe is, as it ſeemeth, for that in many caſes when a man hath lawful title of entry, although he doth not enter, he ſhall defeat all mean titles by his releaſe, &c. but this holds not in every caſe, as ſhall be ſaid hereafter.

¶ Here it is to be obſerved, that a Releaſe by one whoſe Entry is lawful to him that is in by wrong, ſhall purge and take away all mean Eſtates and titles. And where our Author firſt putteth his caſe of two Eſtates by wrong, and after of twenty Diſſeiſins, all Eſtates be wrong.

21.H.6.41.11.H.4.33. 9.H.7.25.2,E.4.16. 21.E.4.78,12.Aſſ.22. Vide 3.H.6.38.

If A. diſſeiſe B. who infeoffeth C. with warranty, who infeoffeth D. with warranty, and B. diſſeiſeth D. to whom B. the firſt Diſſeiſee releaſeth, this doth defeat all the mean Eſtates and Warranties, becauſe the releaſe of B. is made to a Diſſeiſor, and his Entry is lawful.

## *Sect.* 474.

¶ *Item, ſi mon Diſſeiſor leſſa, &c.* If the Diſſeiſor make a Leaſe for life, and the Leſſee maketh a feoffment in Fee, and the Diſſeiſee releaſeth to the Feoffee, the Diſſeiſor ſhall not Enter upon the Feoffee; for albeit the releaſe to one joynt-Feoffee of a Diſſeiſor, as hath been ſaid, ſhall not exclude the other; yet a Releaſe to the Feoffee of a Tenant for life in this caſe ſhall take away the Entry of the Diſſeiſor for the alienation which was made to his

¶ Item, ſi mon diſſeiſor leſſa l's tenemẽts dont il moy diſſeiſiſt a un auter home pur terme de vie, & puis l' Tenant a terme de vie aliena en fee, & jeo releſſa al alienée, &c. donque mon Diſſeiſor ne poit enter, Cauſa qua ſupra, coment que a un

ALſo, if my Diſſeiſor letteth the tenements whereof hee diſſeiſed me to another for term of life, and after the Tenant for term of life alieneth in fee, and I releaſe to the Alienee, &c. then my Diſſeiſor cannot enter, *Cauſaqua ſupra*, albeit that at one

ſoits

foits lalienation fuit a ſon diſenheritance &c.

time the alienation was to his diſinheritance, &c.

Diſ=enheritance, he having the Inheritance by diſſeiſin, ſo as he could have no warranty annexed to it, and tenant for life hath forfeited his eſtate. But if the entry of the Diſſeiſee were not lawful, it is otherwiſe. As if a man make a Leaſe for life, and the Leſſee for life is diſſeiſed, and that Diſſeiſor is diſſeiſed, and he in the reverſion releaſeth to the ſecond Diſſeiſor, the firſt Diſſeiſor ſhall enter upon the ſecond Diſſeiſor, and his entry is lawful; and if the Leſſee for life re-enter, he ſhall leaſe the reverſion in the firſt Diſſeiſor; and the cauſe is, for that the entry of the Diſſeiſor at the time of the releaſe made was not lawful. And the Book of (m) 9.H.7.25. is to be intended of an Eſtate taile, mutatis mutandis. (m) 9.H.7.25.

If in the caſe aforeſaid, the Diſſeiſor make a Leaſe for life, and the Leſſee infeoffeth two, and the Diſſeiſee releaſe to one of the Feoffees, this ſhall bar the Diſſeiſor, as hath been ſaid; but yet he ſhall not hold out his companion, for the cauſe aforeſaid.

## *Sect.* 475.

¶ ITem, ſi home ſoit diſſeiſie, le ql ad fits deins age & moruſt, & eſteant le fits deins age, le diſſeiſor moruſt ſeiſie, & la terre diſcendiſt a ſõ heir, & un eſtranger abate, & puis le fits le Diſſeiſee quant il vient a ſon plein age, releſſa tout ſon droit a labator, en ceſt caſe l'heire le diſſeiſor navera aſſiſe de Mordancelter envers labator, meſſerra bar, pur ceo que labator ad le droit del fits le diſſeiſee p ſon releas, et lentry le fits fuit congeable, pur ceo que il fuit deins age al temps del diſcent, &c.

ALſo, if a man be diſſeiſed who hath a ſon within age and dyeth, and the ſon being within age the Diſſeiſor dyeth ſeiſed, and the Land diſcend to his Heir, and a ſtranger abate, and after the ſon of the Diſſeiſee when he cometh to his full age releaſeth all his right to the abator; in this caſe the heir of the Diſſeiſor ſhal not have an Aſſiſe of Mordanceſter againſt the abator; but ſhall be barred, becauſe the abator hath the right of the ſon of the Diſſeiſee by his Releaſe, and the entry of the ſon was congeable, for that he was within age at the time of the diſcent, &c.

¶ THe reaſon of this caſe is, for that the entry of the heir is congeable, and the Abator is in the land by wrong.

¶ *Abate*, Is both an Engliſh and French word, and ſignifieth in his proper ſenſe to diminiſh or take away; as here by his entry he diminiſheth and taketh away the Freehold in law deſcended to the heir, and ſo it is ſaid to abate an account, ſignifying ſubtraction or withdrawing, &c. and to abate the courage of a man; In another ſenſe it ſignifieth to proſtrate, beat down, or overthrow; as to abate Caſtles, Houſes, and the like, and to abate a Writ; and hereof cometh a word of Art, Abatamentum, which is an Entry by Interpoſition. Now the difference inter Diſſeiſinam, Abatamentum, Intruſionem, Deforciamentum, & Uſurpationem, & Purpreſturam, is this. Ver.N.B.115.Britton. cap.51. Bracton,lib.4.cap.2. F.N.B,103.f.W.1.c.17.

A Diſſeiſin is a wrongfull putting out of him that is actually ſeiſed of a Freehold.

An Abatement is when a man dyed ſeiſed of an eſtate of Inheritance, and between the death and the entry of the heir, an eſtranger doth interpoſe himſelf and abate.

Intruſion, firſt properly, (n) is when the Anceſtor died ſeiſed of any eſtate of Inheritance expectant upon an eſtate for life, and then tenant for life dyeth, and between the death and the entry of the heir an eſtranger doth interpoſe himſelf and intrude. (n) F.N.B.203.Fleta. li.4.cap.30.

Secondly, (o) he that entreth upon any of the Kings Demeſnes, and taketh the profits, is ſaid to Intrude upon the Kings poſſeſſion. (o) Pl. Com. caſe de mynes.

(p) F.N.B. 141. f. g. h. Thirdly, (p) when the Heir in ward entreth at his full age, without ſatisfaction for his marriage: the writ ſaith, quod injuſte.

Deforciamentum comprehendeth not only theſe aforenamed, but any man that holdeth land whereunto another man hath right, be it by diſcent or purchaſe, is ſaid to be a Deforceor. Uſurpation hath two ſignifications in the Common Law; one, when an eſtranger that no right hath, preſenteth to a Church, and his Clerk is admitted and inſtituted, he is ſaid to be an uſurper, and the wrongful act that he hath done is called an Uſurpation.

Secondly, when any ſubject doth uſe without lawful warrant, Royal Franchiſes, he is ſaid to uſurp upon the King thoſe Franchiſes. Purpreſtura, or Pourpreſture, a Purpreſture; (q) Purpreſtura eſt, &c. generaliter quotiès aliquid fit ad nocumentum regii tenementi, vel regiæ viæ (vel aliquarum publicarum) vel civitatis, &c. And becauſe it is properly when there is a houſe builded, or an Incloſure made of any part of the Kings Demeſnes, or of an high way, or a common ſtreet or publick water, or ſuch like publick things: it is derived of the French word Pourpris, which ſignifieth an Incloſure; but ſpecially applyed, as is aforeſaid, by the Common Law.

(q) Glanvil. l. 9 c. 11. Britton, Fol. 28, 29.

## Sect. 476.

¶ HEre the entry of the Diſſeiſee is congeable, and yet the releaſe doth not avoid the Condition, becauſe the feoffee is in by title, as hath bẽ ſaid, and may have a warranty. And herein our Author expreſſeth a diverſity betwæn a Condition in Law, and a Condition in Deed; for in the caſe before, when the Diſſeiſee releaſeth to the Feoffee of the Tenant for life, the Condition in law is taken away, but otherwiſe it is in this caſe of a Condition in Deed.

9. H. 7. 25.

But if the Feoffee upon Condition make a feoffment in fee ober without any Condition, and the diſſeiſee releaſe to the ſecond Feoffee, the condition is deſtroyed by the releaſe before the Condition broken or after. For the ſtate of the ſecond Feoffee was not upon any expreſs Condition, as Littleton here putteth his caſe, and he may have advantage of the releaſe, becauſe it is not againſt his own proper acceptance, as Littleton ſpeaketh in the next Section.

Lib. 1. f. 147. Mayowes caſe.

¶ MEs ſi home ſoit diſſeiſie, & le diſſeiſor fait feoffment ſur condition, ceſtaſcavoir, de rendre a luy certaine rent, & pur default d payment un re-entre, &c. ſi le diſſeiſee releſſa al feoffee ſur Condition, uncore ceo nemẽdra leſtate le Feoffee ſur condition; car nient obſtant tiel releas, uncore ſon eſtate eſt ſur condition ſicome il fuit devant.

¶ Et cum hoc concordat opinio omnium Juſticiariorum, P. 9. H. 7. ❩

But if a man be diſſeiſed, and the diſſeiſor maketh a feoffment upon condition, *viz.* to render to him a certain rent, and for default of payment a re-entry, *&c.* if the diſſeiſee releaſe to the Feoffee upon condition, yet this ſhall not amend the eſtate of the Feoffee upon condition; for notwithſtanding ſuch releaſe, yet his eſtate is upon condition as it was before.

¶ And with this agreeth the opinion of all the Juſtices, *Paſ. 9. H. 7.*

But if it be a wrongful title, ſuch a title is taken away by a releaſe; as if A. diſſeiſed B. to the uſe of C. B. releaſe to A. this ſhall take away the agreement of C. to the Diſſeiſin, becauſe it ſhould make him a wrong doer; as if the Diſſeiſor be diſſeiſed, the diſſeiſee releaſeth to the ſecond diſſeiſee, this taketh away the right the firſt Diſſeiſor had againſt the ſecond; and a relation of an eſtate gained by wrong ſhall never defeat an eſtate ſubſequent gained by right, againſt a ſingle opinion, not affirmed by any other in one of our Books.

14. H. 8. 18. per port.

## Sect. 477.

¶ ET *le Diſſeiſor grant un Rentcharge, &c.* Here is implyed Commons, or any other

¶ EN meſme le manner eſt, lou home ſoit diſſ. de certeine terre, & le diſſeiſee releſſa al diſſeiſor, ſa

IN the ſame manner it is where a man is Diſſeiſed of certain lands, and the Diſſeiſor, ſo

for graunt un rent charge hors de mesñ la terre, &c. coment que apres le disseisee releasa al disseisor, &c. uncore le rent charge demurt en sa force. Et la cause en ceux deux cases est ceo, q̃ home nabera advantage per tiel releas q̃ serra encounter son proper acceptance, & encounter son grant demesne: & coment q̃ ascuns ont dit que lou lentre d home est congeable sur un tenant sil releasast a mesme le tenant, que ceo availeroit a le tenant, sicome il ust enter sur le Tenant, & puis luy enfeoffa, &c. ceo nest pas voier en chescun cas. Car en le primer cas de ceux deux avauntdits cases, si le disseisee ust enter sur l' feoffee sur Condition, & puis luy enfeoffa, dõques est le Condition tout defeat & avoid. Et isfint en le second case, si le disseisee entrast & enfeoffa celuy que grant a l' rẽt charge, donques est le rent charge anient, & avoyd mes il nest pas voyd per ascun tiel release sans entry fait, &c.

grant a rent-charge out of the same land, &c. albeit the Disseisee doth afterwards Release to the Disseisor, &c. yet the Rent-charge remaineth in force. And the reason in these two cases is this, that a man shall not have advantage by such Release, which shall bee against his proper acceptance, and against his own grant. And albeit some have said, that where the entry of a man is Congeable upon a Tenant if he Releaseth to the same Tenant, that this shall avail the Tenant, as if he had entred upon the Tenant, and after enfeoffed him, &c. this is not true in every case; for in the first case of these two cases aforesaid, if the Disseisee had entred upon the Feoffee upon Condition, and after enfeoffed him, then is the Condition wholly defeated and avoided. And so in the second case, if the disseisee entreth and enfeoffeth him who granted the Rent-charge, then is the Rent-charge taken away and avoided; but it is not void by any such Release without entry made, &c.

profit out of the lands. And the reason is, because he shall not avoid his own grant by a Release he himself hath acquired since the grant; but if the Disseisor in that case be disseised, and the Disseisee release to the second Disseisor, he shall avoid it, as by that which hath been said. Sect. 473. appeareth. So likewise if A. and B. be joynt Disseisors, and B. grant a Rent-charge, and the Disseisee release to A. all his right, A. shal avoid the Rent-charge, because it was not granted by him; and so not within the reason of our Author.

If there be two Femes joynt Disseisors, and the one taketh husband, and the Disseisee releaseth to the other, she is sole seised, and shal hold out the husband and wife.

If two Disseisors be, and they enfeoffe another and take back an Estate for life or in fee, albeit they remain disseisors to the disseisee as to have an Assise against them; yet if he release to one of them, he shall not hold out his companion, because their state in the land is by feoffment.

If there be two Disseisors and they be disseised, and they release to their Disseisor, and after disseise him, and then the disseisee release to one or both of them, yet the second Disseisor shall re-enter; for they shal not hold the land against their own release; for Littleton here saith, that they shall not avoid their own grant, and by like reason they shall not avoid their own release, Et sic de similibus.

¶ *Come sil ust enter sur le tenant & luy enfeoffa.* Here is another kind of Release, viz. a release which enureth by way of entry and feoffment; for if a Disseisee Release to one of the disseisors to some purpose, this shall enure by way of entry and feoffment, viz. as to hold out his companion. But as to a Rent-charge granted

ted by him it shall not enure by way of entry and feoffment; for if the disseisee had entred and enfeoffed him, the Rent-charge had been avoided. But it is a certain rule, that when the entry of a man is congeable, and he reteineth to one that is in by title, (as hereto the feoffee upon condition is) it shall never enure by way of entry and Feoffment, either to avoid a condition (with which he accepted the Land charged, or his own grant) or to hold out his companion.

And where it appeareth by our Author that acts done by the Disseisor shall not be avoided by the Release of the Disseisee; It is to be noted, that acts made to the Disseisor himself shall not be avoided by the alteration of his estate by the release of the Disseisee; as if the Lord before the Release had confirmed the estate of the Disseisor to hold by lesser services, the Disseisor shall enjoy advantage of it, and so of Estoyers to be burnt in the house, and the like law of a warranty made unto him.

If the heir of the Disseisor endow his wife Ex assensu patris, and the Disseisee release to the Disseisor, he shall not avoid the endowment; for that is like the case put by Littleton, of the Rent-charge.

If an alien be a Disseisor and obtain Letters of Denization, and then the Disseisee release unto him, the King shall not have the land, for the release hath altered the estate, and it is as it were a new purchase: otherwise it is, if the Alien had been the Feoffee of the disseisor.

If the Lord disseise the Tenant, and is disseised, the Disseisee release to the second Disseisor, yet the Seigniory is not revived; for between the parties the Release enures by way of Entry and Feoffment as to the land; but not having regard to the Seigniory, and for that the possession was never actually removed or revested from the Disseisor, who claimeth under the Lord, the Seigniory is not revived. But if the Lord and a stranger disseise the tenant, and the Disseisee release to the stranger, there the Seigniory by operation of law is revived, for the whole is vested in the stranger which never claimed under the Lord. And in that case, if the Lord had died, and the land had survived, the Seigniory had been revived. But if the Lord had disseised the Tenant, and been disseised by two, and the Disseisee releaseth to one of them, the Seigniory is not revived, because he claimed (as hath been said) under the Lord.

## Sect. 478.

Vide Sect. 514.

28.E.3.98.9.E.4.4.46. 21.E.4.55.41.E.3.10. 2.H.4.12.

¶ *Que briefe de eux il eſliera, &c.* Note, many times in one case the law both give a man ſeveral remedies, and of ſeveral kinds; as in this case, by action and by entry, by action, either a Writ of right, or Dum fuit infra ætatem.

¶ *Et puis le Diſſeiſor porta briefe de dreit, &c.* Note to appeareth, that there is a great art and knowledge for a man that hath divers remedies to chuse his aptest remedy; as in this case, if he bring his Writ of right, the Disseisor shall be barred; but if he had entred upon the heir of the Alienee, he should have injoyed the land for ever. For in that case the heir of the Alienee after such an Entry shall never have a Writ of right, no more than if the Disseisee entereth upon the heir of the Disseisor, and maketh a feoffment in fee, if the heir of the Disseisee

¶ Item, ſi home ſoit diſſeiſie pur un enfant, le quel aliena en fee, & alienée deby ſeiſie, & ſon heir enter, eſteant le Diſſeiſor deins age, ore eſt en election le Diſſeiſor, ſi aver un briefe ſi Dum fuit infra ætatem, ou briefe ſi droit, envers le heire de l'alienee, & quel briefe de eux que il eſliera, il doiet recover per la ley, &c. Et auxy il poit enter e la terre ſans aſcun recoverie, & en ceſt caſe lentre l'Diſſeiſie eſt toll', &c. mes en ceſt cas ſi le diſſeiſie relessa ſo droit al

ALſo, if a man be diſſeiſed by an infant, who alien in Fee, and the Alinee dyeth ſeiſed, and his heire entreth, the diſſeiſor being within age; now is it in the election of the diſſeiſor to have a writ of *Dum fuit infra ætatem*, or a Writ of right, againſt the heir of the Alienee; and which Writ of them hee ſhall chuſe, hee ought to recover by the law, &c. And alſo he may enter into the land without any recovery; and in this caſe the entry of the Diſſeiſee is taken away,

heire

heire del alienee, & puis l' disseisor porta brē ď dēt envers l'heir dalienee, & il joyne le mise sur l' mere droit, &c. le graunde assise doit trober per la ley que l' tenant ad pluis mere droit que ad le Disseisor, &c. pur ceo que le Tenant ad le droit le disseisee per son release le quel est pluis ancient & pluis mere droit. Car p tiel leas tout le droit le Disseisee passa a l' tenant, & est en le Tenant. Et a ceo q̄dam ont dit, que en tiel case lou home que ad droit al terres ou tenements (mes son entrie nest pas congeable) fil releassa al tenant tout son droit, &c. que tiel release urera per voy dextinguishment: Quant a ceo il poit estre dit, q̄ ceo est boyer quant a celuy que releassa, car p son release il ad luy demise quietmēt de son droit, quant a son person, mes uncore le droit que il a doit bien poit passer a l' tenant per son release: Car encōbenient serroit que tiel ancient droit serroit extinct tout ousterment, &c. Car il est cōmunement dit que &c. But in this case if the disseisee release his right to the heire of the Alienee, and after the Disseisor bringeth a Writ of right against the Heire of the Alienee, and hee joyn the mise upon the meere right, &c. the great assise ought to find by the law that the tenant hath more meer right than the Disseisor, &c. for that the Tenant hath the right of the disseisee by his release, the which is the most ancient and most meer right; for by such release all the right of the Disseisee passeth to the tenant, and is in the Tenant. And to this some have said, that in this case where a man which hath right to lands or tenements (but his entry is not congeable) if he release to the Tenant all the right, &c. that such release shall enure by way of extinguishment. As to this it may be said, that this is true, as to him which releaseth; for by his release he hath dismissed himself quite of his right as to his person; but yet the right which he hath may well pass to the Tenant by his release. For it should be inconvenient that such an ancient right should be extinct altogether; re-enter he shall detaine the land for ever. and the Feoffee shall not maintain any Writ of right, for a bare right shall never be left in the Feoffee, but shall ever follow the possession, as hath been said; but if the Disseisee entreth upon the heir of the Disseisor, and make a Feoffment in Fee upon condition, and entreth for the condition broken before the heir of the Disseisor enter, he is restored to his right again. 38.E.3.16.24.H.8.Re-store all primer action 5- Vide Sect.447.

A man maketh a gift in tail, the remainder in Fee; tenant in tail dieth without issue, an estranger intrudes, & he in the remainder brings a Formedon, and recovereth by default; and maketh a Feoffment in Fee, the Intruder reverse the recovery in a Writ of deceit and entreth, he shall detain the Land for ever. and the Feoffee shall not have a Writ of right. 9.H.7.24. D

And so likewise if a Disseisor die seised, and a stranger abate, and the Disseisee release to him, the Heir of the Disseisor shall enter and retain the Land for ever. For the right to the possession shall draw the right of the land to it, and shall not leave a right in him to whom the Release is made; as hath been said before in the 447. Section. 9.H.7.24.

¶ *Le droit del Disseisee passa al tenants et est en le tenant.* For seeing the Tenant hath the whole Fee simple, he is capable of the whole right of the Disseisee, and as Littleton here saith, the right is in the Tenant.

¶ *Inconvenient serroit.* Here again, as hath been often observed, an argument Ab inconvenienti is forcible in Law, and that Judges, by the authority of our Author, are to judge of inconveniences, as of things unlawful, as hereby and by Vide Sect.87.138,139. 231.269.440.423.

by many other places it appeareth.

¶ *Un droit ne poit pas morier.* Dormit aliquando jus, moritur nunquam. For of such an high estimation is right in the eye of the Law, as the Law preserveth it from death and destruction; trodden down it may be, but never trodden out. For where it hath been said, that a Release of right doth in some cases enure by way of extinguishment, it is so to be understood, either (as Littleton doth here) in respect of him that makes the Release, or in respect that by construction of law it enureth not only to him to whom it is made, but to others also who be strangers to the release, which, as hath been said, is a quality of an inheritance extinguished.

droit ne poit pas morier. &c. for it is commonly said, that a right cannot die.

14.H.8.6.b.1 As if there be Lord and Tenant, and the tenant maketh a Lease for life, the remainder in fee; if the Lord release to the tenant for life, the rent is wholly extinguished, and he in the remainder shall take benefit thereof; even so when the Heir of a Disseisor is disseised, and the Disseisor make a lease for life, the remainder in fee, if the first Disseisee release to the Tenant for life, this is said to enure by way of extinguishment; for that it shall enure to him in the remainder, who is a stranger to the Release, and yet in truth the right is not extinct, but doth follow the possession, viz. The tenant for life hath it during his time, and he in the remainder to him and his heirs, and the right of inheritance is in him in the remainder; for a right to land cannot die or be extinct in Deed; and therefore if after the death of Tenant for life the heir of the Disseisor bring a Writ of right against him in the remainder, and he joyn the mise upon the mere right, it shall be found for him, because in judgement of Law he hath by the said Release the right of the first Disseisee.

## Sect. 479,480.

14.H.8.fol.5.6. 11.H.7.25.30.H.6. tit.bar 39.3S.E.3.10. HEre Littleton putteth a diversity between Releases which enure by way of extinguishment against all persons, and whereof all persons may take advantage, and Releases which in respect of some persons enure by way of extinguishment, and of other persons by way of Mitter le droit. Or between Releases which in Deed enure by extinguishment; for that he to whom the Release is made cannot have the thing released, and Releases which having some quality of such Releases are said to enure by way of extinguishment, but in troth do not; for that he to whom the Release is made may receive and take the thing Released. And here Littleton putteth cases where Releases do absolutely enure by extinguishment without exception, having respect to all persons: and first of the Lord and Tenant. Secondly, of the Rent-charge. Thirdly, of the Common of pasture.

First, of the Lord and Tenant: and the Lord release to the Tenant his Seignory,

"Mes Releases q̄ enuera p voy dextinguishment envers touts persons, sont lou celuy a que le releas est fait, ne poit aver ceo que a luy est releas. Sicome si soyent Sr & Tenant, & le Sr relessa al tenant tout l' droit que il ad en la seigniory, ou tout le droit q̄ il ad en le fre, et. tiel releas va per voy de extinguishmet envers touts persons, pur ceo que le tenant ne poit aver servite p pzender d̄ luy mesme

But Releases which enure by way of extinguishment against all persons, are where he to whom the release is made cannot have that which to him is released. As if there be Lord & tenant, and the Lord release to the tenant all the right which he hath in the Seigniory, or all the right which he hath in the Land, &c. this release goeth by way of extinguishment against all persons, because that the Tenant cannot have service to receive of himself.

*Sect.480.*

"En mesm l' maner est de re-

In the same manner is it of a Release

leas

leas fait al Tenant del terre de un rent charge ou Common de pasture, &c. pur ceo que le tenant ne poit aver ceo que a luy est relesse, &c. issint tiels releases urera per extinguishment en touts voyes.

made to the Tenant of the land of a Rent-charge or common of pasture, &c. because the tenant cannot have that which to him is released, &c. so such releases shall enure by way of extinguishment in all waies.

this must of necessity enure by way of extinguishment to all men, for the Tenant cannot have servitе to be taken of himselfe, nor one man can be both Lord and Tenant. The second is of a Rent-charge, a man cannot have land and a rent issuing out of the same land. Thirdly, a man cannot have land and a common of pasture issuing out of the same land. Et sic de cæteris. For in all these cases, and the like, to whom the release is made cannot have and enjoy the land, the Tenant of the land

thing that is released. But in the case of the right of the land may take and enjoy it for strengthning his estate therein.

The mesne being a Feme entermarries with the Tenant pervaile, if the Lord release to the Feme, the Seigniory only is extinct; but if he release to the husband, both Seigniory and mesnalty are extinct. And in this case, if the Lord release to the husband and wife, it is a question how the release shall enure, but it is no question but that a release may be made to a mesnalty or a Seigniory suspended in part of the estate.

But here observe a diversity where a release enureth by way of extinguishment of an inheritance, which is in possession and may be granted over, and a release of a right or an action to lands which cannot be granted over. (r) For the Lord may release his Seigniory to the Tenant of the land for life or in taile, Et sic de cæteris. But so cannot one release a right or an action, for if he be released but for an houre, it is extinct for ever, as hath been said.

(r) 13. E. 3. tit. Extinguishment. Brook 45. & tit. Voucher. F. 120. 30. E. 3. 13. 19. H. 6. 19. 21. E. 3. 33. 38. Ass. 17. 11. H. 4. tit. Release 21. 18. E. 2. ibid. 5. 26. H. 8. 5. 41. Ass. 6.

And two things are to be observed here, first, that by release of all the right in the Land the Seigniory is extinct, as well as by the release of all the right in the Seigniory, for the Seigniory issueth out of the land. Secondly, that by the release of all his right in the Seigniory or the land, the whole Seigniory is extinct without any words of inheritance. If the Tenancy be given to a Lord and to a stranger, and to the heirs of the stranger, the Lord release to his companion all the right in the land, this release doth not only passe his estate in the tenancy, but extinguisheth all his right in the Seigniory, and so one release enures to extinguish several rights in one and the same land.

If there be Lord and Tenant by Fealty and Rent, the Lord granteth the Seigniory for years, and the Tenant attorneth, the Lord releaseth his Seigniory to the tenant for years, and to the tenant of the land generally, the whole Seigniory is extinct, and the state of the lessee also. But if the release had been to them and their heires, then the lessee had had the Inheritance of the one moity, and the other moity had been extinct. And the reason of this diversity is, because when the release is made generally, it can inure to the lesse but for life, because it enureth by way of enlargement of estate, and being made to the tenant of the land it enureth by way of extinguishment, as Littleton here saith, and then there cannot remaine a particular estate in the seigniory for life. But when the release is made to them and their heires, each one takes a moity, the one by way of increasing of the estate, and the other by extinguishment.

## Sect. 481.

¶ ITem ou prover que le graund Assise doit passer pur l'demandant en le case avauntdit, jeo aye oye sovent la Lecture ou Lestatute

ALso to prove that the graund Assise ought to passe for the demandant, in the case aforesaid, I have often heard the reading of the statute of West. 2.

¶ *Ieo aye oye sovent la Lecture de West. 2.* Here it is to be observed, of what authority ancient lectures or readings upon Statutes were, for that they had five excellent qualities: first, they declared what the Common law was before the ma-

king

king of the Statute, as here it appeareth. Secondly, they opened the true ſenſe and meaning of the Statute. Thirdly, their caſes were briefe, having at the moſt one point at the Common law, and another upon the Statute. Fourthly, Plain and Perſpicuous, for then the honour of the Reader was to excel others in authorities, arguments, and reaſons, for proof of his opinion, and for confutation of the objections againſt it. Fifthly, they read to ſuppreſſe ſubtil inventions to creep out of the Statute. But now readings having loſt the ſaid former qualities, have loſt alſo their former authorities; for now the caſes are long, obſcure, and intricate, full of new conceits, liker rather to Riddles than Lectures, which when they are opened, they vaniſh away like ſmoake; and the Readers are like to lapwings, who ſeem to be neareſt their neſts when they are fartheſt from them, and all their ſtudy is to find nice evaſions out of the Statute. By the authority of Littleton, ancient Readings may be cited for proof of the Law, but new Readings have not that honour, for that they are ſo obſcure and darke.

de Weſtminſter ſecond, que commente, In caſu quo vir amiſerit per defaltam tenementum quod fuit jus uxoris ſuæ, &c. que a le Common Ley devant meſm Le Statut, ſi leaſe ſoit fait a un home pur terme de vie, le remainder outſter en Fee, & un eſtrange per feint Action uſt recover envers le tenant a tme de vie per default, & puis le Tenant moruſt, celuy en le remainder navoit alcū remedie devant le Statute pur ceo que il navoit alcun poſſeſſion del terre.

which begunne thus: *In caſu quo vir amiſerit per defaltam tenementum quod fuit jus uxoris ſuæ*, &c. that at the Common Law before the ſaid Statute, if a leaſe were made to a man for terme of life, the remainder over in fee, and a Stranger by feigned Action recovered againſt the Tenant for life by default, and after the Tenant dieth, he in the remainder had no remedie before the Statute, becauſe he had not any poſſeſſion of the land.

¶ *Leſtatute de W.*2. Which is the third Chapter.

¶ *Le remainder ouſter en fee.* Here is to be obſerved, that although the Statute ſpeaketh of a Reverſion, (a) yet by the authority of Littleton, a remainder is within the Statute.

(a) 24.E.2.35.28.E.3. 96.18.E.2.Entrie 74. 3.E.2.Entrie 76.E.3. 0 c.4.7.E.3.Ent.62 7.E. 3.54.55.15.E.4.15.F. N.B.217.d.Regiſter 241

See the Statute of 14.Eliz.cap.8. which provideth fully for him in the remainder.

¶ *Feint action.* Feint is a Participle of the French word Feindre, which is to feign or falſly pretend; ſo as a feint Action is a falſe Action.

¶ *Navoit alcun remedie devant Leſtatute.* (b) Here it appeareth by Littleton, That if a man maketh a leaſe for life, the remainder in fee, and tenant for life ſuffereth a recovery by default, that he in the remainder ſhould not have a Formedon by the common law: for Littleton ſaith, That he had not any remedy before the Statute. Neither is there any ſuch Writ in that caſe in the Regiſter, albeit in ſome Books mention is made of ſuch a Writ.

(b) W.2.cap.5. Vid.14.E.3. Formedon 31.11.E.3.ibid.31.8.E. 3.36.F.N.B.217.d.7.H. 7.13.

## *Sect.* 435.

38. E. 3.2. Tit. Juris utrum 1.

¶ HEre a Diſſeiſin gotten by wrong, and defeated by the entry of him that right hath, is ſufficient to maintaine a Writ of right againſt the recoveror in this caſe; for albeit

¶ MEs ſi celuy en le remainder uſt enter ſur le tenant a tme de vie, & luy diſſeiſiſt, & aps

But if he in the remainder had entred upon the Tenant for life, and diſſeiſed him, and after the Te-

le

le Tenant entra sur luy; & apres le tenant a terme de vie, per tiel recovery perde per default & mosilt, ore celuy en le remainder bien poit aver briefe de Droit envers celuy que recovera, pur ceo que le mise serre joyn solement sur le mere droit, &c. Uncore en cest case, le seisin de celuy en le remainder fuit defeat per entrie del tenant a terme de vie. Mes peradventure aucuns voilent argue & dire, que il navera brief de Droit en cest case, pur ceo q quant le mise & joyne, il est joyn & tiel mañ, s. si le tenant ad plus mere droit en la terre en le manner come il tyent q le demandant ad en le maner come il demanda & pur ceo que le seisin del droit fuit defeat per entry de le tenant a terme de vie, &c. Donques il ad nul droit en le manner come il demand.

nant enter upon him, & after the tenant for life by such recovery lose by default & die, now he in the remainder may well have a Writ of Right against him which recovers, because the Mise shall be joyned only upon the mere right, &c. Yet in this case the Seisin of him in the remainder was defeated by the entry of the tenant for life. But peradventure some will argue & say, That he shall not have a writ of Right in this case, for that when the Mise is joyned, it is joyned in this manner, (*scilicet,*) if the tenant hath more mere right in the land in the manner as he holdeth, than the demandant hath in the manner as he demandeth, and for that the seisin of the demandant was defeated by the entry of the tenant for terme of life, &c. then he hath no right in the manner is he demandeth.

the Seisin is defeated between the letter for life, and him in the remainder, for being refer'd to the recovery, who is a meer stranger and party to title, it is sufficient against him. But nevertheless it is against the party himself that defeated the Seisin, and the Land is pleadable to give remedy to him their right hath. But where some have thought, that there is no difference in Law to maintain Littletons opinion herein, they are greatly mistaken, for Littleton hath given warrant for all that he hath written. 7.E.3.62. E.3.37. Tit. Jur. utr. 1.

Lands are letten to A. for life, the remainder to B. for life, the remainder to the right heires of A. A. dieth, B. entereth and dieth, a stranger intrudes the heir of A. shall have a writ of right of the seisin only A. had in demain for life.

Lands are letten to A. and B. and to the heires of A. A. dieth, B. recovers by default against the heir of A. shall have a writ of right of the wholes for every Joyntenant is seised per my & per tout.

If lands be given in tayle, the remainder to A. in fee, the Donee dieth without Issue, his wife privement enceint, A. entreth, the Issue is borne and entereth upon him, and dieth without Issue, A. shall have a Writ of Right of the Seisin which he had. 4.E.16,17.

If lands be given in tayle to A. the remainder to his right heires. A. dieth without Issue, the collateral heire of A. shall have a Writ of Right of the seisin of A.

And so note a diversity between a Seisin to take possession, &c. for there it requires a more actual Seisin. 40.E.3.8.42. E.3.20. 37.Ass.4. 24.E.4.24.7. H.5.4.11.H.4.11.

and a Seisin to maintain a Writ of Right. But before all are the (Acc) in this Section explained.

## Sect. 483.

A Ceo poit estre dit, q̄ ceux parols, (modo & forma prour, &c.) in mults des cases sont

TO this it may be said, that those words (*modo & forma prout*, &c.) in many cases are words parols

parols de forme de pleder, & ne my parols de substance. Car si home port brief dentre In casu proviso, del alienation fait per le tenant en dower a son disinheritance, & counta del alienation fait en fee, & le tenant dit, que il ne aliena pas en le manner come le demaundant ad declare, & sur ceo sount a issue, & trove est per verdict, que le tenant alienast en le taile, ou pur terme dauter vie, le demaundant recobera: uncore alienation ne fuit en le manner come le demaundant aboit declare, &c.

of forme of pleading, and not words of substance: for if a man bring a writ of entrie *In casu Proviso*, of the alienation made by the Tenant in Dower to his disinheritance, and counteth of the alienation made in fee, and the tenant saith, that he did not alien in manner as the demandant hath declared, and upon this they are at issue, and it is found by verdict, that the tenant aliened in taile, or for terme of another mans life, the Demandant shall recover: yet the alienation was not in manner as the Demandant hath declared, *&c.*

(c) 9.H.6.1.40.E.3.35. 21.E.4.22.F.N.B.206. E.40.E.3.5.32. H.8. issue, Br.fo. Vid.Sect. 8. sequent.

¶ Where Modo & forma are of the substance of the issue, and where but words of forme, this diversity is to be observed. (c) where the issue taken goeth to the point of the Writ or Action, there Modo & Forma are but words of form, as here in the case of the Writ of Entry, in casu proviso, and so is the (&c.) well explained in this Section. But otherwise it is, when a collateral point in pleading is traversed, as if a feoffment be alledged by two, and this is traversed Modo & Forma, and it found the Feoffment of one, there Modo & Forma is material. So if a feoffment be pleaded by deed, and it is traversed Absque hoc quod feoffavit Modo & Forma, upon this Collateral Issue, Modo & Forma, are so essential, as the Jury cannot find a feoffment without Deed.

12.E.4.4.

## Sect. 484.

Vide Sect. preced.

¶ *Trove est per verdict que il tient per fealtie, tantum.* Here is another diversity to be observed, That albeit the issue be upon a Collateral point, yet if by the finding of part of the issue, it shall appear to the Court that no such action lieth for the plaintife no more than if the whole had been found, there Modo & Forma are but words of forme, as here in the case which Littleton putteth of the Lord and Tenant, appeareth.

10.E.4.7.8.E.4.15. 20.E.4.3.21.E.4.3. Merlebr.cap.3.

¶ *Car le matter del issue est le quel il tient de luy ou nemy*, &c.

Here it appeareth, that

¶ Aury si sopent Sur & f, & le f tient dl Sur per fealtie solement, & le Sur distreine le tenant pur rent, & le tenant porte briefe de Trespas envers son Seignior de les avers illint prises, & le Seignior plede que le tenant tient de luy per fealty & certain rent, & pur l'rent arere il vient a distreiner, &c. & demaunde judgemēt dl briefe port vers luy, Quare vi & armis, *&c.* & lauter dit que il ne tient de luy en le maner come il suppose, & sur

ALso if there be Lord and Tenant, and the Tenant hold of the Lord by fealty only, and the Lord distrein the Tenant for rent, and the Tenant bringeth a Writ of Trespass against his Lord for his cattel so taken, and the Lord plead that the Tenant holds of him by fealtie and certain Rent, and for the Rent behind he came to distreine, *&c.* and demand judgement of the Writ brought against him, *Quare vi & armis*, &c. And the other saith, that he doth not

ceo

ceo sont a issue, et trove est per verdict que il tient de luy per fealtie tantum, en cest case le briefe abatera, et uncore il ne tient de luy en le manner come le seignior avoit dit. Car le matter del issue est, le quel le tenant tient de luy ou nemy; car til tient de luy, coment que le Seignior distreina le Tenant pur auter services que ne doit aver, uncore tiel briefe de Trespasse, Quare vi & armis &c. ne gist envers le Seignior, mes letra abate.

hold of him in the manner, as he suppose, and upon this they are at issue, and it is found by verdict that he holdeth of him by fealty onely. In this case the Writ shall abate, and yet he doth not hold of him in the manner as the Lord hath said, for the matter of the Issue is whether the Tenant holdeth of him or not; or if he holdeth of him, although that the Lord distrein the Tenant for other services which he ought not to have, yet such Writ of trespass, *Quare vi & armis* &c. doth not lie against the Lord, but shall abate.

if the matter of the issue be found it is sufficient. And this rule holds in criminal causes. For if A. be appealed, or indicted of murder, viz. that he of malice prepensed killed I. A. pleadeth that he is not guilty modo & forma, yet the Jury may find the Defendant guilty of Man-slaughter without malice prepensed, because the killing of I. is the matter, and malice prepensed is but a circumstance. Pl.Com.101.

In Assise of Darreine presentment, if the Plaintiff allege the avoidance of the Church by priviation, and the Jury find the voidance by death, the plaintiff shall have judgment, for the manner of voidance is not the title of the Plaintiff, but the voydance is the matter. 6.E.3.41.b.25.E.3.50. 9.H.7.3.13. H.7.14.29. E.3.38.

(d) If a Gardeine of an Hospital bring an Assise against the Ordinary, he pleadeth that in his visitation he deprived him as Ordinary, whereupon issue is taken, and it is found that he deprived him as Patron, the Ordinary shall have judgement, for the deprivation is the substance of the matter. (d) 8.E.3.70.8.Ass.29. & 39.9.E.3.338. 24.E.3.34.5. H.42. 7.H.4.11.Pl.Com. 91. 3.Mar.Dier 116. 40.E.3.35. Dier 2.& 3.Ph. & Mar. 115.b. Trin 2. Eliz.Rot.9.10. Wolmans case.

The Lessee covenants with the Lessor not to cut down any trees, &c. and binds himself in a bond of forty pounds for performance of Covenants, the lessee cuts down ten trees, the lessor bringeth an Action of Debt upon the bond, and assigneth the breach that the lessee cutteth down twenty trees, whereupon issue is joyned, and the Jury find that the Lessee cut down ten, judgement shall be given for the Plaintiff. For sufficient matter of the issue is found for the Plaintiff. 48.E.3.28.34.Ass.3. 30.Ass.5.41.E.3.28. 33.E.3.verdict.47. 22.E.3.1.b.15. *E.* 3.48. 31.E.3. account.58,28. Ass. 48.

## *Sect.* 485.

¶ AUxy en briefe de trespas de batterie, ou des biens emports, si le defendant plede de rien culpable, en le main come le Plaintife suppose, & trove est que le Defendant est culpable en auter ville, ou a auter jour que le Plaintife suppose, uncore il recovera.

ALso in a Writ of Tresp s for batterie, or for goods carried away, if the Defendant plead not guiltie, in mann r as the Plaintiffe suppose, and it is found that the Defendant is guilty in another Town, or at another day than the Plaintiffe suppose, yet he shall recove .

¶ *EN briefe de tresp asse de battery & de biens emports*, &c.

Here Littleton speaketh of Actions brought for things transitory. In which cases the wrong being done in one Towne, the Plaintiff may not only alledge it in another Towne, as Littleton here saith, but also in another County, and the Jurors upon not guilty pleaded are bound to find for the Plaintiff.

Neither can the assault, battery, or taking of goods, &c. alledged in another County, be traversed without speciall cause

cauſe of juſtification which extendeth to ſome certaine place; as if a Conſtable of a Towne in another County arreſt the body of a man that breaketh the peace, there he may traverſe the county (but he muſt not reſt there) but all other places ſaving in the Town, whereof he is Conſtable. And ſo it is of taking of goods, if the Defendant juſtifie for damage feaſant in another County, he muſt traverſe as before. But where the cauſe of the juſtification is not reſtrained to a certain place; that is, ſo local as it cannot be alledged in any other Town, as in the caſes before alledged, and the like, then albeit the Action be brought in a forraine County, yet he muſt allege his juſtification in the County where the Action is brought. As if a man be beaten in the County of Middleſex, and he bringeth his Action in the County of Buck. the Defendant cannot plead that the Plaintiff aſſaulted him in the County of Midd. &c. and traverſe the County, but he muſt plead his juſtification in the County of Buck. for that the cauſe of his juſtification is good in any place. And ſo it is in caſe of batlement of goods, and other caſes for tranſitory things, as for example:

Et iſſint en pluſors auters caſes, ceux parols, ſ. en le maner come le demaundant ou l' plaintife ad ſuppoſe, ne font aſcun matter de ſubſtance del iſſue. Car ẽ briefe de droit, lou le miſe eſt joyne ſur le mere droit, il eſt a tant adire, & a tiel effect, ſ. le quel ad pluis mere droit, le tenent ou le demaundant al choſe en demand.

And ſo in many other caſes theſe words, ſ. in manner as the demandant or the Plaintiffe hath ſuppoſed, doe not make any matter of ſubſtance of the iſſue: for in a Writ of right, where the miſe is joyned upon the meer right, that is as much to ſay, & to ſuch effect, *viz.* whether the tenant or demaundant hath more meer right to the thing in demand.

Trin.30. Eliz. in the Kings Bench, between Inglebert & Jones. And herewith agreeth a Judgment in the Court of Com. Pleas. Paſch. 38.Eliz.Rot.1656.

In an action upon the caſe the Plaintiff declared for ſpeaking of ſlanderous words which is tranſitory, and laid the words to be ſpoken in London, the Defendant pleaded a concord for ſpeaking of words in all the Counties of England, ſaving in London, and traverſed the ſpeaking of the words in London: the Plaintiff in his replication denied the concord, whereupon the Defendant demurred, and judgement was given for the Plaintiff. For the Court ſaid, that if the concord in that caſe ſhould not be traverſed, it would follow, that by a new & ſubtile invention of pleading an ancient principle in law (that for tranſitory cauſes of action the Plaintiff might alledge the ſame in what place or County he would) ſhould be ſubverted, which ought not to be ſuffered; and therefore the Judges of both Courts allowed a traverſe upon a traverſe in that caſe: And the wiſedome of the Judges and Sages of the Law hath alwaies ſuppreſſed new and ſubtile inventions in derogation of the Common Law. And therefore the Judges ſay in one book (e) we will not change the law which alwaies hath been uſed. And another ſaith (f) it is better that it be turned to a default, than the Law ſhould be changed, or any innovation made.

A man did grant a rent, with a new invented clauſe of Diſtreſſe, viz. That the Grantee ſhould hold the diſtreſſe againſt gages and pledges, and yet by the whole Court he ſhall gage deliverance, for otherwiſe by this new invention all Replevin ſhall be taken away.

(*) See many other new inventions in derogation of the Common Law, diſallowed by the Judges, and by the Court of Parliament.

(h) Where the Jury is bound to finde as well local things, in many caſes, as tranſitory in other Counties, ſee at large in my Reports.

By this which hath been ſaid, you ſhall know the Law as it is now in uſe in theſe caſes, and the better underſtand our (i) books when you ſhall read them, concerning as well local as tranſitory things, wherein you ſhall finde great variety of opinions in our books.

(e) 38.E.3.1.
(f) 2. H.4.18. 21.E.3.Gages deliver 5.
(g) 42.Aſſ.12.21.E 3. cap.5.18.E.3.cap.1. & cap.6.4.H.4.cap.2.
(h) Lib.6.fol.46,47. Dowdales caſe 3 E.3. Aſſ.146.27.E.3.86. 1.Aſſ.16.3. Aſſ.4.6.Aſſ. 4.5.Aſſ.7.18. E.3.38. 21.Aſſ.8.29. Aſſ.5. 44.E.3.6.b.14.H.4.35. 5.H.52.10.H.6.13. 21.H.6.51.37.H.6.2. 7.E.4.45.18.E.4.1. 22.E.4.19 13.H.7.17. 2.Mar.Br.attaint. 104 10.Eliz.Dier 171.
(i) 19.H.6.49.11 H.6. 16.43.E.3 23,b.46.E.3. 3.2.9. H.6.62.21. H.6. 27.14.H.8.24.18.E.4.1. 20.H.6.2.34. H.6.42. 14.H.6.21.12.4. H.6. 13.33.H.6.25.12. E.4. 12.28.H.8.Dier.29. 21. E.4.19. 80.27. H.8. 19.12.H.8.1.11.H.4. 65.19.H.8.6.

*Sole defendant plead de rien culpable.* This is a good iſſue, if the Defendant committed no battery at all; but regularly, by the Common law, if the Defendant hath cauſe of juſtification or excuſe, then can he not plead not guilty, for then upon the evidence it ſhall be found againſt him, for that he confeſſeth the battery, and upon that iſſue cannot juſtifie it, but he muſt plead the ſpecial matter, and confeſſe and juſtifie the battery.

The like Law is in other caſes, and therefore this is a learning neceſſary to be known, for that the loſſe of moſt cauſes dependeth thereupon. As if in battery the defendant may juſtifie the ſame to be done of the Plaintiffs own aſſault, he muſt plead it ſpecially, and muſt not plead the general iſſue, and ſo of the like. In treſpaſſe of breaking his cloſe, upon not guilty he

he cannot give in evidence, that the beaſts came through the Plaintiffs hedge, which he ought to keep, nor upon the general iſſue juſtifie by reaſon of a Rent-charge, common or the like. 25.H.8.Br.

In detinue the Defendant pleadeth Non detinet, he cannot give in evidence, that the goods were pawned to him for money, and that it is not paid, but muſt plead it; but he may give in evidence a gift from the Plaintiff, for that proveth, he detaineth not the Plaintiffs goods. 22.H.6.33.

(d) So in an action of waſte, upon the plea Nul waſt fait, he may give in evidence any thing, that proveth it no waſte, as by tempeſt, by lightning, by enemies, and the like; but he cannot give in evidence juſtifiable waſte, as to repair the houſe, or the like. (e) If one doth waſte, and before the action brought the Leſſe repaireth it, and after the Leſſor bringeth an action of waſte, and the Leſſee plead Quod non fecit vaſtum, he cannot give in evidence the ſpecial matter. (d) 12.H.8.1.19.E.3. waſt.30.20.E.3.waſt.32 (e) 10.El. Dyer 276. 2.Mar.Dyer.212.

If two men be bound in a bond jointly, and the one is ſued alone, he may plead this matter in abatement of the Writ, but he cannot plead Non eſt factum, for it is his Deed, though it be not his ſole Deed. (f) See in Whelpdales caſe, where a man may ſafely plead Non eſt factum, and where not, and the former books that treat of that matter well reconciled. (f) Lib.5.f.119. Whelpdales caſe.

(g) Upon Plene adminiſtravit pleaded by an Executor, Et iſſint riens inter maines, if it be proved that he hath goods in his hands which were the Teſtators, he may give in evidence that he hath paid to that value of his own money, and need not plead it ſpecially. 7 E.4.5.7.E.6.Br. Non eſt fact.14.1.H.7.15. 14.H.8.28.Pl.Com. Dive & Man. caſe.

In an Aſſiſe, if the Tenant plead Nul tort, nul diſſeiſin, he cannot give in evidence a releaſe after the Diſſeiſin, but a releaſe before the Diſſeiſin he may, for then there is no Diſſeiſin upon the matter. 36.8.H.Dyer.59.2.Mar. Dier.112.1.El.Dier.267

In a Writ of right, if the Tenant joyn the Miſe upon the meer right, he cannot give in evidence a collateral warranty, for he hath not any right by it; and therefore it ought to have been pleaded. (g)Hill.10.H.8. Rot. 323.in Comm.Banco. Et Mich.6.E.6.in Com.banco.Bendloes. 7.H.5.9.6.H.7,10.

Of this learning you ſhall read plentifully in our books, and in my Reports. This little taſte ſhall here ſuffice, to make the reader capable of the reſt. Regularly, whenſoever a man doth any thing by force of a warrant or authority, he muſt plead it. 34.E.3.Droit.29. 9.E.3.32.8.E.3.24. 33.E.3.Verd.18,H.6.24

But all that hath been ſaid muſt be under two cautions. Firſt, that whenſoever a man cannot have advantage of the ſpecial matter by way of pleading, there he ſhall take advantage of it in the evidence. For example, the rule of Law is, that a man cannot juſtifie in the killing or death of a man; and therefore in that caſe, he ſhall be received to give the eſpecial matter in evidence, as that it was Se defendendo, or in defence of his houſe in the night againſt thieves and robbers, or the like. 36.H.6,38.18.E.3.19. Pl.Com.81.173.21.H.7 76.16.Keilw.21.E.4.11. 22.E.4.45.13.H.7.13. Stanf.Pl.Com.15. 22.Aſſ.55.37.H.6,21.

Secondly, that in any action upon the caſe, Treſpaſs, Battery, or of falſe impriſonment againſt any Juſtice of peace, Mayor, or Bailiff of City or Town corporate, Headborough, Port-reve, Conſtable, Tithingman, Collector of Subſidy or Fifteen, in any his Majeſties, Courts in Weſtminſter, or elſewhere, concerning any thing by any of them done by reaſon of any their offices aforeſaid, and all other in their aid or aſſiſtance, or by their commandment, &c. they may plead the general iſſue, and give the ſpecial matter for their excuſe or Juſtification, in evidence. 7.Ja.ca.5.

In an Action of Treſpaſs or other ſuit againſt any perſon for taking of any diſtreſs, or other act doing by force of the Commiſſion of Sewers, the defendant in any ſuch Action ſhall and may make an Avowry, conuſance, or juſtification generally, that it was done by authority of the Commiſſion of Sewers, for Lot or Tax aſſeſſed by that Commiſſion, &c. and the Plaintiff ſhall reply he did it of his own wrong without ſuch cauſe. And both theſe acts were made for avoiding of prolixity and captiouſneſs of pleading, tending to the great charge and danger of Officers and Miniſters of Juſtice, &c. Evidence, *Evidentia*, This word in legal underſtanding doth not only contain matters of Record, as Letters Patents, Fines, Recoveries, Inrolments, and the like, and writings under Seal, as Charters and Deeds, and other writings without ſeal, as Court Rolls, Accounts, and the like, which are called Evidences, Inſtruments; but in a larger ſenſe it containeth alſo Teſtimonia, the Teſtimony of witneſſes, and other proofs to be produced and given to a Jury, for the finding of any iſſue joyned between the parties. And it is called evidence, becauſe thereby the point in Iſſue is to be made evident to the Jury. Probationes debent eſſe evidentes, (id eſt) perſpicuæ & faciles intelligi. But let us now return to Littleton. 23.H.8.ca.5.

¶ *Ou a auter jour que le Plaintiff ſuppoſe.* (g) As if the Treſpaſs were done the fourth of May, and the Plaintiff alledgeth the ſame to be done the fifth of May, or the firſt of May, when no treſpaſs was done; yet if upon the evidence it falleth out, that the Treſpaſs was done before the Action brought, it ſufficeth: and this is warranted by Littleton, who ſpeaketh indefinitely, that the Jury may find the Defendant guilty at another day then the Plaintiff ſuppoſeth. (g) 19.H.6.47.5.E.4.5, 21.E.4.66.

¶ *Et a tiel effect.* Here is to be obſerved, That the Law of England reſpecteth the

effect and ſubſtance of the matter, and not every nicety of form or circumſtance: Qui hæret in litera, hæret in cortice; & apices juris non ſunt jura.

## Sect. 486.

¶ Item, ſi home ſoit diſſeiſie, & le Diſſeiſor devie ſeiſie, &c. & ſon fits & heire eſt eins per diſcent, & le Diſſeiſee enter ſur l'heire Diſſeiſor, le quel entrie eſt un diſſeiſin, &c. ſi l'heire port Aſſiſe ou Briefe de Entre en nature de Aſſiſe, il recovera.

ALſo, if a man be diſſeiſed, and the diſſeiſor dieth ſeiſed, &c. and his ſon and heir is in by diſcent, and the Diſſeiſee enter upon the heir of the Diſſeiſor, which entrie is a Diſſeiſin, &c. if the heir bring an Aſſiſe or a Writ of Entrie in nature of an Aſſiſe, he ſhall recover.

¶ AND the reaſon hereof is, for that in the Writ of Right mentioned in the next Section, the charge of the grand Aſſiſe upon their Oath is upon the meer right, and not upon the poſſeſſion.

## Sect. 487.

¶ *CAR ſi le heire le Diſſeiſor, &c.* Here is a diverſity to bee obſerved concerning that which hath been ſaid, when the poſſeſſion ſhall draw the right of the land to it, and when not. And therefore when the poſſeſſion is firſt, and then a right cometh thereunto, the entry of him that hath right to the poſſeſſion ſhall gain alſo the right, which, as before it appeareth in thoſe caſes there put, followeth the poſſeſſion, and the right of poſſeſſion draweth the right unto it; but when the right is firſt, and then the poſſeſſion commeth to the right, albeit the poſſeſſion be defeated, (as here in Littletons caſe it is by the heir of the Diſſeiſor) yet the right of the Diſſeiſee remaineth.

10.E.3.7.

Vide Sect.447.

¶ *Briefe Dentrie en le Per.* A. dyeth ſeiſed, and the Land diſcendeth to B. his ſon, before he entreth, an eſtranger abateth and dyeth ſeiſed, B. entreth, againſt whom the heir of the Abator recovereth in an Aſſiſe, B. may have a Writ of Mordanceſter

7.Aſſ.10.Aſſ.16.

¶ MES ſi l'heir port briefe de droit envers le Diſſeiſee, il ſerra barre, pur ceo que quant le grand Aſſiſe eſt jure, lour ſerement eſt ſur le mere droit, & nemy ſur le poſſeſſion. Car ſi l'heire le Diſſeiſor ſuiſt un Aſſiſe de Novel diſſeiſin, ou briefe Dentre en nature daſſiſe, & recoverast vers le Diſſeiſee, & ſuiſt execution, uncore poit le Diſſeiſee aver briefe Dentre en le Per envers luy, de le diſſeiſin fait a luy per ſon pere, ou il poit aver envers l'heire briefe ſi droit.

BUt if the heire bring a Writ of Right againſt the Diſſeiſee, he ſhall be barred, for that when the grand Aſſiſe is ſworn, their Oath is upon the meer right, and not upon the poſſeſſion: For if the Heire of the Diſſeiſor ſue an Aſſiſe of *Novel Diſſeiſin*, or a Writ of *Entrie* in nature of an Aſſiſe, and recovers againſt the Diſſeiſee, and ſueth execution, yet may the Diſſeiſee have a Writ of *Entrie* in the *Per* againſt him, for the Diſſeiſin made to him by his father; or he may have againſt the heir a writ of Right.

danceſter, and recover the land againſt him: And if the Diſſeiſin had been done to A. &c. then after the recovery in the Aſſiſe, B. ſhould have had a Writ of Entrie in the Per, becauſe the heir that is in by diſcent is in the Per.

## *Sect.* 488.

¶ MEs ſ̄i le heire doit recouer envers le Diſſeiſee en le caſe avandit, per bꝛe de Doit, donques tout ſon doit ſerroit clerement ale, pur ceo que judgement fīnal ſerroit done envers luy, que ſerroit encounter reaſon ſou le Diſſeiſee ad l' pluis mere doit, &c.

BUt if the Heir ought to recover againſt the diſſeiſee in the caſe aforeſaid by a Writ of right, then all his right ſhould be clearly taken away, for that judgement final ſhall be given againſt him, which ſhould be againſt reaſon where the diſſeiſee hath the more meer right.

¶ *Judgement final.* The forme whereof you ſhall ſee in the laſt Section of this Chapter.

¶ *Que ſerra encounter reaſon.* Argumentum ab inconvenienti. V. Sect. 87. &c.

## *Sect.* 489.

¶ ET ſaches mon fits que en bꝛiefe de Doit apꝛes ceo q̄ les quater chivaliers ont eſlie le grand Aſſiſe, donques il nad pluis greinder delay que en un bꝛiefe de Formedon, apꝛes ceo q̄ le parties ſont a iſſue, &c. & ſ̄i le miſe ſoit joyn ſur le Battaile, donques il ad meind̄ delay.

AND know (my ſon) that in a Writ of Right, after the four Knights have choſen the grand Aſſiſe, then he hath no greater delay then in a Writ of *Formedon*, after the parties be at iſſue, &c. And if the Miſe be joyned upon battaile, then he hath leſſer delay.

¶ B *Attaile.* See for this word in the laſt Section of this Chapter.

¶ *Iſſue, &c.* Or Demurrer, which is an Iſſue in Law.

## *Sect.* 490. & 491.

¶ ITem, releaſe d̄ tout l' doit, &c. en aſcun caſe eſt bone fait a celuy que eſt ſuppoſe tenāt, en Ley, coment que il nad reins en les Tenements. Sicome en Præcipe quod reddat, ſi le Tenāt aliena la terre pendant le bꝛiefe, & puis le demaundant releſſa a

ALſo, a releaſe of all the right, &c. in ſome caſe is good, made to him which is ſuppoſed Tenant in Law, albeit he hath nothing in the Tenements. As in a *Præcipe quod reddat*, if the Tenant alien the land, hanging the Writ, and after the demandant releaſeth

luy tout ſon droit, &c. cel releaſe eſt bone, pur ceo que il eſt ſuppoſe deſtre tenant per le ſuit del Demandant, & uncore il nad reins en la Terre al temps de Releaſe fait.

to him all his right, &c. this Releaſe is good, for that he is ſuppoſed to be Tenant by the ſuit of the Demandant, and yet he hath nothing in the land at the time of the Releaſe made.

## Sect. 491.

¶ EN meſme le manner eſt, ſi en Pr æcipe quod reddat, le tenant vouche & le Vouchée ent en le Garrantie, ſi apres le Demandant releſſa al vouchee tout ſon droit, ceo eſt aſſets bone, pur ceo que l'vouchée apres ceo que il avoit enter en le Garrantie, eſt Tenant en Ley al Demandant, &c.

IN the ſame manner it is in a *Præcipe quod reddat*, the tenant vouch, and the Vouchee enters into warranty, if afterward the Demand. releaſe to the vouchee all his right, this is good enough, for that the Vouchee after that he hath entred into Warranty is Tenant in Law to the Demandant, &c.

¶ HEre it doth appear, That there is a Tenant in Deed, and a Tenant in Law; and Littleton in this and the next Section putteth two examples of tenants in Law, viz. (h) the tenant to a Præcipe after alienation, and of the Vouchee, whereof ſomewhat hath been ſaid before.

(h) 10.E.4.13.12.Aſſ.41 22.Aſſ.13.23.E.3.21. 25.E.3.40.38.E.3.10.11 7.E.3.6.19.E.2.tit. Reſceit 34.E.3.tit. Reſceit 9.E.4.16. 39.H.6.40.17.Aſſ.24. 8.H.7.5.20.Aſſ.2.14.E. 3.procedendo.4. 9.E.3. 17. 32.E.3.quare Imp.2. Dyer.17.Eliz.341. Sect.447. *Vi.devan.Sect.447.

And it is obſervable, That Littleton ſaith, That in both caſes he is tenant in Law to the Demandant; and yet he hath nothing in the Land. And therefore if after the Vouchee hath entred into warranty, and become Tenant in law, an Anceſtor collateral of the demandant releaſeth to the vouchee with warranty, he ſhall not plead this againſt the demandant; for that the Releaſe by the Eſtranger is void, which beſides the authorities before vouched, appeareth by Littleton himſelf; * for he ſaith, That he is tenant in Law to the Demandant, whereby he excludeth, that he is Tenant in reſpect of any Eſtranger.

## Sect. 492.

Glandi.li.1. ca.1.Bract. l.3.f.101.Brit.f.71.Flet. li.5,ca.15.&.16.

¶ NOta, there be two kind of Actions, viz. one that concerns the Pleas of the Crown, Placita Coronæ, or Placita Criminalia; another that concerns Common Pleas, Placita Communia ſeu Civilia. Of that which concerneth Pleas of the Crown, Littleton ſpeaketh hereafter in this Chapter. Of Actions concerning Common Pleas, Littleton ſpeaketh in this place. And theſe are three-fold (that is to ſay) Real, Perſonal, and Mixt. Placitorum aliud perſonale, aliud reale, aliud mixtum. Of Actionum quædam ſunt in

Mirca.2.Sect.1.Bract. ub.ſup.Flet.li.1.ca.1.

¶ ITem, quant al releaſes dactions reals & perſonals, il eſt icint que aſcuns actions ſont mixt en le realty & en le perſonaltie, ſicome un action de Waſte ſue enders tenant a terme de vie, ceſt action eſt en le realty, pur ceo que le lieu Waſte ſera recover. Et auxy en le

ALſo, as to releaſes of Actions reals and Perſonals, it is thus. Some actions are mixt in the realty and in the perſonalty, as an action of waſte ſued againſt Tenant for life, This action is in the Realty, becauſe the place waſted ſhall be recovered; and alſo in the Perſonaltie, becauſe

per

personaltie, pur ceo que treble damages serront recovers p le tortious Waste fait p le tenant, & pur ceo en cest action, un releas d'actions reals est bon plee en barre, & illint est un releas d'actions personals.

treble damages shall bee recovered for the wrongful waste done by the Tenant. And therefore in this action a release of actions reals is a good plea in barre, and so is a Release of actions personals.

Rem, quædam in Personam, & quædam mixtæ. And generally, Actio is defined. (i) Actio nihil aliud est quam jus prosequendi in judicio quod sibi debetur. Or Action nest autre chose que loisall demande de son droit.

(i) Vide Sect. 444. Bract. lib. 3. fol. 98. Fleta li. 1. cap. 15. Mirror cap. 2. Sect. 1.

(k) And by the release of all Actions, causes of action be released; but within a submission of all actions to arbitrement, causes of action are not contained.

(k) Lib. 8. 113. Althams case 35. H. 8. Dyer. 57. 5. Mar 217. Vide 36 H. 6. 8. Vid. 42. E. 3. 22. 23.

¶ *Tenant pur vie.* And so it is if it be brought against tenant for years, because it agreeth with the reason of Littleton here rendred, viz. that the place wasted shall be recovered; and therefore soundeth in the realty.

¶ *Auxy en le personaltie pur ceo que treble damages serra recovers,* which do sound in the personalty. Wherefore Littleton concludeth, that in an action mixt a release of all actions reals is a good bar, and so is a release of all actions personals.

And here is to be observed a diversity between the act of the party and an act in law; for a man by his own act cannot alter the nature of his action; & therefore if the Lessee for life or Lessee for years do waste, now is an action of waste given to the Lessor, wherein he shall recover two things, viz. the place wasted, and treble damages; in this case if the Lessor release all actions reals, he shall not have an Action of Waste in the personalty only. And if he release all Actions personals, he shall not have an action of waste in the realty only.

(l) And so it is if the Lessee doth waste, and after surrendreth to the Lessor his estate, and the Lessor accept thereof, the Lessor shall have an action of Waste.

(l) 19. H. 6. 66. 14. H. 6. 14. 11. R. 2 Wast. 99. 14. H. 14. 23. H. 8. Br. Wast.

But by an act in Law the nature of the action may be changed: as if a man make a Lease pur terme dauter vie, and the Lessee doth waste; and then Cesty que vie dieth, an Action of Waste shall lie for damages only, because the other is determined by act in Law.

And again, hereupon is another diversity to be observed, that in case when an action is well begun, and part of the Action determineth by act in Law, and yet the like action for the residue is given, there the writ shall not abate, but proceed. But where by the determination of part the like action remaineth not for the residue, there the action well commenced shall abate. As if an action of Waste be brought against tenant pur terme dauter vie, and hanging the Writ, Cesty que vie dieth, the writ shall not abate, but the Plaintiff shall recover damages only; because if Cesty que vie had died before any action brought, the Lessor might have an action of Waste for the damages: So if an Ejectione firmæ be brought, and the term incurreth hanging the Action; yet the action shall proceed for damages only, because an Ejectione doth lie after the term for damages only. But if tenant pur auter vie bring an Assise, and Cesty que vie dieth, hanging the writ, albeit the Writ were well commenced; yet the writ shall abate, because no Assise can be maintainable for damages only.

11. H. 6. 43. 9. E. 4. 50. 24. E. 3. 72. 18. E. 3. 28. 9. H. 6. 30.

So if an Action of Waste be brought by Baron and Feme in remainder, in especial taile, and hanging the Writ the wife dieth without issue, the writ shall abate, because every kind of Action of Waste must be ad exhæredationem.

2. H. 4 22. 6. E. 2. briefe. 807.

If a Writ of Annuity be brought, and the Annuity determineth hanging the Writ, the Writ faileth for ever, because no like Action can be maintained for the Arrerages only, but for the Annuity and Arrerages.

34. H. 6. 10. 9. E. 4. 39. 14. H. 7. 31. 18. E. 3. Scire facias 10.

But where damages only are to be recovered, there albeit by act in law the like action lieth not afterwards, yet the action well commenced shall proceed; (m) as if a Conspiracy be brought against two, and one of them dieth hanging the Writ, it shall proceed.

(m) 22. R. 2 briefe 888. 18. E. 4. 1.

And in an assise of Novel disseisin, a Writ of Annuity, Quare impedit, and other mixt actions, a release of actions reals is a good Plea, and so it is of a release of actions personals.

2. H. 4. 13. 9. H. 6. 57.

But if three Joyntenants be disseised, and they arraign an assise, and one of them release to the Disseisor all actions personals, this shall bar him, but it shall not bar the other Plaintiff; for having regard to them the realty shall be preferred, & omne majus trahit ad se minus dignum. (n) And in a Writ of ward brought by two, the release of the one shall not grieve the other, but shall enure to his benefit; for he shall recover the whole Ward, and hold his companion out.

30. H. 6. Bar 59.

(n) 30. H. 6. ubi supra. 5. E. 3. fol. 6. 18. E. 3. 1. fol. 56. 21. H. 6. 18. a.

But here a diversity is to be observed between real actions, wherein damages are to be reco-

recovered at the Common Law, as in an Aſſiſe, &c. and real actions where damages are not to be recovered by the Common Law; but are given by the (o) Statute; for there a releaſe of all actions perſonals is no bar, as in the Writ of Dower, Entrie ſur diſſeiſin in le per, &c. Mordanc', Aiel. &c.

(o) Merton cap. 1. in dower. Gloc. cap. 1.

## *Sect.* 493.

¶ ET en Quare impedit, un releas dactions perſonals eſt bone pleé, & iſſint eſt un releaſe dactions reals, Per Martin, Qd. fuit conceſſum, Hill. 9. H. 6. 57.*

AND in a *Quare impedit*, a releaſe of actions perſonals is a good plea, and ſo is a releaſe of actions reals, *Per Martin, Quod fuit conceſſum. Hill. 9. H. 6. fol. 57.*

9. H. 6. 57.
22. H. 6. 27. b.

¶ This is an addition to Littleton, which although it be Law, and the Book truly cited, yet I paſs it over. But yet note by the way, That a releaſe of actions perſonals is alſo a good bar in a Quare impedit, becauſe it is an action mixt.

## *Sect.* 494.

¶ LE *diſſeiſor bien poit pleder, &c.* Nota, every man ſhall plead ſuch Pleas as are proper for him, and apt for his defence to be pleaded. (q) As a diſſeiſor that hath nothing in the land may plead a releaſe of Actions perſonals, becauſe damages are to bee recovered againſt him; and therefore for his defence he may plead it, but a releaſe of actions reals he cannot plead, becauſe he hath no eſtate in the land; and none ſhall plead a releaſe of Actions reals in an Aſſiſe, but the tenant of the Land. Et ſic de cæteris. But the Tenant in an Aſſiſe ſhall plead a releaſe of Actions perſonals to the Diſſeiſor, for that Plea proveth that the Plaintiff hath no cauſe of action againſt him.

(q) 11. Aſſ. 9. 18. E. 3. 2. 23. 24. 31. E. 3. quare Imp. 161. 7. E. 3. 5. 9. E. 3. 6. 33. E. 3. 30. 22. E. 3. 2. 13. H. 4. 7. 3. E. 2. quare Imp. 41. 38. E. 3. 30, 31. 5. E. 3. 26. 21. E. 3. 16, 17. 5. H. 7. 34. 8. H. 5. 14. 2. H. 6. 28. 26. 1. H. 7. 34. 27. E. 3. 81. 32. H. 6. 15. b. 17. Aſſ. 25. 2 H. 7. 14. 13 H. 8. 13, 14. 44. E. 3. 12. 46. E. 3. 13. 16. E. 4. 11. 24. E. 3. 34. 4. E. 4. 18. 7 H. 4. 34. 2. R. 3. encombent. 4. 33. E. 3. quare Imp. 194.

13 H. 4 2. 2.

¶ EN meſme le maner eſt en aſſiſe de Novel Diſſeiſin, pur ceo que il eſt mixt en le realtie, & ẽ le perſonalty. Mes ſi un tiel aſſ. ſoit arraigne enter le diſſeiſor & le tenant, le diſſeiſor bien poit plede un releas dactions perſonals, pur barrer laſſ. mes nemy un releas dactions reals, car nul pledera releas dactions reals en aſſ. forſq; l'tenant.

IN the ſame manner it is in an Aſſiſe of *Novel diſſeiſin*, for that it is mixt in the realty and in the perſonalty; but if ſuch an Aſſiſe bee arraigned againſt the Diſſeiſor, and the Tenant, the Diſſeiſor may well plead a releaſe of actions perſonals to barre the Aſſiſe; but not a releaſe of actions reals; for none ſhall plead a Releaſe of Actions reals in an Aſſiſe, but the tenant.

If the Diſſeiſee releaſe to the Diſſeiſor all actions reals, and the diſſeiſor maketh a feoffment in Fee, and an Aſſiſe is brought againſt them, the Feoffee ſhall not plead the releaſe to the Diſſeiſor; for that he is not priby to the releaſe; for a releaſe of actions ſhall only extend to Privies.

If a Diſſeiſor make a leaſe for life, the remainder in fee, and the diſſeiſee releaſe all actions to the Tenant for life, after the death of Tenant for life, he in the remainder ſhall not plead the ſaid releaſe.

If the Diſſeiſee releaſe all actions to the Diſſeiſor, and dis. this doth bar him but for his life; for after his deceaſe his heir ſhall have an action (r) as ſome have ſaid. And hereby may appear a manifeſt diverſity between a releaſe of a Right, and a releaſe of actions.

(r) 19. H. 6. 23. 2.

*Sect.*

## Sect. 495.

¶ ITem, en tiels actions reals q̄ covient destre sue envers le tenant del franktenement, si l' tenant ad un releas d actions reals del demandant fait a luy devant le briefe purchace, & il plede ceo, il est bon plee pur l' demandant a dire, que celuy que pleda le plee n'avoit rien en le franktenement al temps del releas fait, car adonque il n'avoit cause d'aver aſcun action real envers luy.

ALso, in such Actions Reals which ought to be sued against the tenant of the Free-hold, if the tenant hath a release of actions reals from the Demandant made unto him before the Writ purchased, and he plead this, it is a good plea for the Demandant to say, that he which pleaded the Plea had nothing in the free-hold at the time of the release made; for then he had no cause to have an action real against him.

¶ This is evident enough by that which hath been said, that release of all Actions reals must be made to him that is Tenant of the Land, because a real action must be brought against such a Tenant.

## Sect. 496.

¶ ITem, en tiel cas ou home poit enter en Terres ou Tenements, & aury poit aver un Action real de ceo, que est done p la Ley envers le Tenant, si en cest case le demandāt releſſa al tenant touts manners de actions reals, uncore ceo ne tolle le dmandant de son entrie, mes le demandant bien poit enter nient contrestant tiel releas, pur ceo que nul chose est relesse forsq; lation, &c.

ALso, in such case where a man may enter into Lands or Tenements, and also may have an Action real for this, which is given by the Law against the Tenant, if in this case the Demandant releaseth to the tenant all manner of Actions reals; yet this shall not take the Demandant from his entry, but the Demandant may well enter notwithstanding such release, for that nothing is released but the action, &c.

¶ *Poit enter*, here it appeareth That where a man may enter, a Release of all Actions doth not bar him of his Right, because he hath another remedy viz. to enter. And this is agreeable with the authority of our (l) Books. But where his entry is not lawful, there a Release of all actions is by consequence a bar of his right, because he hath released the mean whereby he might recover his right. But if the Disseisee release all actions to the heir of the disseisor, which is in by Discent, he hath no remedy to recover the land; but yet the Disseisee hath a right, for that he hath released his action and not his right, as shall be said hereafter, in the Chapter of remitter, in his proper place. If the heir of the Disseisor make a feoffment in fee to two, and the disseisee releaseth to one of the Feoffees all actions, and he dieth, the Survivor shall not plead this release, for the causes abovesaid. And hereby also again appeareth another diversity between a release of a right, and a release of actions.

(l) 18. E. 3. 34. 19. E. 3. Title 35.

19.Aſſ.3.30.E.3.19.6. 19.H.6.4.6.21.H.7. 23.b.7.H.6.6.

It is to be obſerved when a man hath ſeveral remedies for one and the ſelf ſame thing, be it real, perſonal, or mixt, albeit he releaſeth one of his remedies, he may uſe the other.

## Sect. 497.

¶ EN meſme le maner eſt de choſes perſonals, ſicom home a tort prent mes biens, ſi jeo releſſa a luy touts actions perſonals, uncore jeo puiſſe p̄ le Ley prender mes biens hors de ſon poſſeſſion.

IN the ſame manner is it of things perſonal; as if a man by wrong take away my goods, if I releaſe to him all actions perſonals, yet I may by the Law take my goods out of his poſſeſſion.

This of it ſelf is evident.

## Sect. 498.

Glanvil.lib.10.cap.13. ¶ *Briefe de detinue.* Breve de detentione dicitur à Detinendo, becauſe Detinet is the principal word in the Writ. And it lieth where any man comes to goods either by delivery or by finding. In this Writ the Plaintiff ſhall recover the thing detained; and therefore it muſt be ſo certain as it may be known; and for that cauſe, it lyeth not for money out of a bag, or cheſt, and ſo of corn out of a ſack, and the like. theſe cannot be known from other. (t) A man ſhall have an action of Detinue of Charters which concerne the inheritance of his Land if he know the certainty of them, and what land they concern; or if they be in Bag ſealed, or Cheſt locked, though he knoweth not the certainty of them: and it is good policy (if poſſibly he can) in that caſe to declare of one Charter in eſpecial. (u) and then the Defendant ſhall not wage his law. (x) An action of Detinue for Charters doth ſound in the realty, for therein ſummons and ſeverance lieth, and for the Detinue of goods a Capias doth lye; but for Charters in eſpecial a Capias lyeth not; and yet a Releaſe of actions perſonals in a Writ of Detinue of Charters is a good bar.

41.E.3.2.

(t) 41.E.3.2. 8.H.6.18. 28,29,21.E.3.28. 3.H.6.19.30.H.6.4. 9.H.9.18.

(u) 10.H.6.20.21.H.6.1 14.H.6.4.14.H.4.23. 24.27.

(x) 20.H.6.45.19.E.3. Sewerance 14.3.1.E.3. ib.32.42.E.3.13. 40.E.3.25.

¶ A Uſſi ſi jeo ay aſc. cauſe dañ briefe de Detinue de mes biẽs bẽs un autre coment q̄ jeo releſſa a luy touts actions perſonals, uncor jeo puiſſe per le Ley prendre mes biens hors d̄ ſon poſſeſſion, pur ceo que nul droit d̄ les biens eſt releſſe a luy, mes ſolement laction, &c.

ALſo, if I have any cauſe to have a Writ of Detinue of my goods againſt another, albeit that I releaſe to him all actions perſonals; yet I may by the Law take my goods out of his poſſeſſion, becauſe no right of the goods is releaſed to him, but only the action, &c.

## Sect. 499.

¶ *Per cauſe del Statute.* That is to ſay, the Statute of 4.H.4.c.7. and 11.H.6.c.4.

¶ *Car ſil voet pleder le releaſe generalment.* Here it appeareth, that when the Statute had given the action reall a-

¶ ITem, ſi hom ſoit diſſeiſi & le diſſeiſor fait feoffement a divers perſons & ſon uſe, & le diſſeiſor continualment prift les profits, &c. & le diſſeiſee releſſa a luy

ALſo, if a man bee diſſeiſed, and the diſſeiſor maketh a feoffment to divers perſons to his uſe, and the Diſſeiſor continually taketh the profits, &c. and the diſſeiſee releaſe

touts

touts actions reals, & puis il fuist vers luy bre Dentre en nature dassise p̄ cause de lestatute, pur ceo que il prent les profits, &c. Quære, coment le disseisor serra aide per le dit releas: car sil voile pleder le releas generalment, donques le demandant poit dire q̄ il navoit reins en le Franktenement al temps del releas fait, & sil pleda releas specialment, donques il covient conustr̄ un disseisin, & donques poit le demandant enter en le tre, &c. p̄ son conusans de l' disseisin, &c. Mes peradventure per special pleader il luy poit barr̄ d̄ laction que il suist, &c. coment le demandant poit enter.

to him all actions reals, and after he sueth against him a Writ of entrie in nature of an assise by reason of the statute because he taketh the profits, &c. *Quære*, how the disseisor shall be aided by the said release; for if he will plead the release generally, then the demandant may say that he had nothing in the freehold at the time of the release made; and if he plead the release specially, then he must acknowledge a disseisin, and then may the demandant enter into the land, &c. by his acknowledgement of the disseisin, &c. but peradventure by special pleading he may barre him of the Action which he sueth, &c. though the demandant may enter.

gainst the perour of the profits, it enableth him to take and pleade a Release of all actions reals; and yet he hath neither Jus in re, nor Jus ad rem; which point is worthy of observation, for manifestation of the equity of the Law. 3.H.7.2.

¶ *Donques il covient conustre un disseisin, &c.* In a Writ of Dower the Tenant pleaded that before the Writ purchased A. was seised of the land, &c. until by the tenant himself he was disseised, and that hanging the writ A. recovered against him, &c. judgement of the Writ, and adjudged a good plea; in which Plea the tenant confessed a Disseisin in himself. 15.E.4.4.b.

¶ *Donques poit le demandant enter.* So might he have done in this case that Littleton putteth, albeit the Tenant confessed no disseisin. And therefore it is no prejudice to the Tenant to confesse a disseisin in himself, &c. and then, as Littleton here holdeth, the action shall be barred.

But the Reader is to observe, that now by the Statute of 27. H. 8. cap. 10. which executes the possession to the use, all the Statutes against Cesty que use, or perour of the profits, have lost their force. 28.H.8. *Dyer.32.* 27.H.8.ca. 10.

## *Sect.* 500.

¶ Item, si home suist appeale d̄ felony del mort son ancestor envers un autre, coment que lappellant relessa al defendant touts maners dactions reals & personals, ceo ne aidera my le defendāt, pur ceo que ceo appeal nest pas

ALso, if a man sue an appeal of felony of the death of his ancestor against another, though the appellant release to the defendant all manner of actions real and personal, this shall not aide the defendant, for that this appeal is not

OUr Author having spoken of Common Pleas, now treateth of certaine Pleas Criminall, or Pleas of the Crowne, wherein it is said, (a) Item, criminalium alia majora, alia minora, alia maxima, secundum criminum quantitatem; Sunt enim Crimina Majora, & dicuntur capitalia, eò quod ultimum inducunt supplicium, &c. Minora verò, quæ fustigationem inducant, vel pœnam piloralem, vel tumboralem, vel carceris (a) Bract. lib. 3. f. 107. b.

carceris incluſionem, &c.

(b) Fiet.lib.1.c2p.15. (b) Criminalium quædam ſententialiter mortem inducunt, quædam vero minime, (c) De peche eſt briefe diviſion, car eſt mortal ou venial, ſolonque ceo que appiert es paines. And that crime is called mortal or corporal: mortal, becauſe it deſerveth death; and ſuch crimes are called venial, as may be redeemed or ſatisfied by ſome other puniſhment then by death.

(c) Mir.c.1.Sect.4.&c.4. des paines on divers manners.

¶ *Appeale de Felonie.* (x) Appellum ſignifieth Accuſatio, an Accuſation; and therefore to appeale a man is as much as to accuſe him, and in (y) antient Books he that doth appeal is called Accuſator, and is peculiarly in legal ſignification applied to Appeals of three ſorts. First, of wrong to his Anceſtor, whoſe heir male he is; and that is only of death, whereof our Author here ſpeaketh. The ſecond is of wrong to the husband, and is by the wife only of the death of her husband to be proſecuted. The third is of wrongs done to the Appellants themſelves, as Robbery, Rape, and Maim. The word Appellum is derived of Appeller, to call, becauſe Appellane vocat reum in judicium. He calleth the Defendant to judgement, and the Plaintiff is called the Appellant.

(x) Mir.ca.2.Sect.7. Bract.lib.3.t.137.Brit. ca.22.23.Flet.li.1.c.31, 32,33.

(y) Glanvil.li.7.cap.9. Et lib.14.ca.1.& 3.

¶ *Appeale.* Appellatio is a removing of a cauſe in any Eccleſiaſtical Court to a Superior; but of this there needeth no ſpeech in this place.

24.H.ca.12.1.Eliz.ca.1

¶ *De mort.* Appeal of death is of two ſorts, of Murder and of homicide. Murder is when one is ſlain with a mans will, and with malice prepenſed or forethought; Homicide as it is legally taken, is when one is ſlain with a mans will, but not with malice prepenſed. Chance-medly or Per infortunium, is when one is ſlain caſually, and by miſadventure, without the will of him that doth the act, whereupon death inſueth; but of this no Appeal doth lie. Murder cometh of the Saxon word Mordrue.

Lamb.expoſiverb.Eſtimatio Flet.lib.1.ca. 42. Hoved.f.344.

Were is an old Saxon word, ſometimes written Wera, and ſignifieth the price of the life of a man, Eſtimatio capitis, that is, ſo much as one paid for the killing of a man; by which it appeareth, that ſuch government was in thoſe days, as ſlaughters of men were moſt rarely committed, as Maſter Lambard collecteth. And you ſhall not read of any inſurrection or rebellion before the Conqueſt, when the view of Frankpledge and other antient Laws of this Realm were in their right uſe.

¶ *Mes ſil releaſe al Defendant touts manners d' actions, &c.* And the reaſon is, for that then all Actions, as well criminal as real, perſonal and mixt, be releaſed. But a releaſe of actions real and perſonal cannot bar an appeal of death; becauſe that Releaſe extendeth to common or civil actions, and not to actions criminal: but Releaſes of all actions criminal or mortal, or concerning Pleas of the Crown, are good bars in an Appeal of death, and ſo the (&c.) in the end of this Section is well explained.

21.H.6.16.

action real, entant que l'appellant ne recovera aſcun realtie en tiel appeale: Mes tiel appeale nest pas action perſonal, entant que le tort fuit fait a ſon Auncestor, & nemy a luy. Mes ſil releſſa a le Defendant tout manners Actions, donques il ſerra bone barre en Appeale. Et iſſint home poit veyer que releaſe de touts maners dactions, eſt melior que releas de actions reals & perſonals, &c.

an action real, in as much as the appellant ſhall not recover any Realty in ſuch Appeal; neither is ſuch Appeale an action perſonall, in as much as the wrong was done to his Anceſtor, and not to him. But if he releaſe to the Defendant all manner of Actions, then it ſhall be a good bar in an Appeal. And ſo a man may ſee that a Releaſe of all manner of Actions is better then a Releaſe of Actions reals and perſonals, &c.

Sect.

## *Sect.* 501.

¶ Item, en appeale de Robberie, si l' defendant voil' pleader un releale de lappellant de touts actions personals, ceo semble nul Plee. Car action dl' Appeale, lou lappellee aũa judgement de mort, &c. est pluis hault que action personal est, & nest pas properment dit action personal: Et pur ceo si le defendant voiloit plead un releale del Appellant de barrer luy dappeale, en cest cale il covient daver un releale d touts maũs dappeals, ou touts manners dactions, cõe il semble, &c.

ALso, in an Appeal of Robbery, if the Defendant will plead a releale of the Appellant, of all actions personals, this seemeth no Plea: for an Action of Appeale where the Appellee shall have judgement of death, &c. is higher then any action personal is, and is not properly called an action personal, and there if the Defendant will plead a releale of the Appellant; to barre him of the Appeal, in this case hee must have a releale of all manner of Appeals, or all manner of Actions, as it seemeth, &c.

¶ *Robberie.* Roberia properly is, when there is a felonious taking away of a mans goods from his person: and it is called Robbery, because the goods are taken as it were De la Robe, from the Robe, that is, from the Person: but sometime it is taken in a larger sense. 22.Ass.39. W.1,cap.20.

¶ *Judgement de mort, &c.* By this (&c.) is implied Appeals of Rape, of Arson or Burning, of Felony or Larceny; for therein also is judgement of death, and are within our Authors reason.

¶ *Come il semble, &c.* It is to be understood, That, first, a releale of all Actions criminal, mortal, or concerning Pleas of the Crown. Secondly, a releale of all Actions generally. Thirdly, a releale of all Appeals. And lastly, a releale of all Demands, are good bars in all these kinds of Appeals. Vid.Sect.508.

## *Sect.* 502.

¶ MEs en Appeale de Maihem un releale de touts manners dactions personals est bone plee en Barre, pur ceo que en tiel action il ne recovera forsq; damages, &c.

BUt in Appeal of Maim a releale of all manner of actions personals is a good plea in bar, for that in such an Action he shall recover nothing but damages.

¶ *Mayhem.* Mahemium membri Mutilatio, or Obtruncatio, cometh of the French word Mehaigne, and signifieth a Corporal hurt, whereby he loseth a Member, by reason whereof he is less able to fight; as by putting out his eye, beating out his foretooth, breaking his scull, striking of his arm, hand, or finger, cutting off his leg or foot, or whereby he loseth the use of any of his said members. Mir.ca.1.Sect.9. Glanv. li.14.ca.7. Bract.lib.3. Tract.2.ca.24. Brit. f.48.ca.25. Flet.lib.1.ca.38. Stanf.Pl.Cor. f.38.b. 28.E.3.94. 8.H.4.21.

*Damages, &c.* V. Sect. 194.

¶ *Releale de touts manners Actions Personals est bone Plea, &c.* And the reason is, for that every Action wherein damages only are recovered by the Plaintiff is in Law taken for an Action personal. 23.H.6.16.

Sect.

## *Sect.* 503.

¶ *Briefe de Error.* This Writ lyeth when a man is grieved by any error in the foundation, proceeding, judgment, or execution, and thereupon it is called Breve de errore corrigendo. But without a judgment or an award in nature of a judgement no Writ of Error doth lie, for the words of the Writ be, Si judicium redditum ſit: and that judgment muſt regularly be given by Judges of Record, and in a Court of Record, and not by any other inferiour Judges in baſe Courts, for thereupon a writ of falſe judgement doth lie. In this caſe of Utlawry upon Proceſs the judgment is given (in the County Court, which is no Court of Record) by the Coroners (ſaving in London judgement is given by the Recorder, and not by the Mayor, who is Coroner by the Cuſtom of the City:) for after the Defendant is Quinto exactus, and maketh default, the judgement is, Ideo utlagetur per judicium Coronatorum; and in London, Per judicium Recordatoris: ſo as by the outlawry the Plaintiff recovers nothing, but the King taketh the whole benefit thereof; for the law did intend, that the Defendant would rather appear and anſwer the Plaintiff, &c. than to forfeit all his Goods and Chattels, Debts and Duties to the King, by his default and contumacy. But Littleton is to be intended, That the Sheriff do return the Exigent whereby the Outlawry appears of Record, or that the Outlawry be removed by a Certiorari; for before that time that the Outlawry appear of Record, the Defendant doth not forfeit his goods, nor the Plaintiff can be diſabled, nor any Writ of Error doth lie in that caſe. And this is the cauſe that the goods of Outlaws cannot be claimed by Preſcription, becauſe they are not forfeited until the Outlawry appear of Record. Vid. Sect. 197. where it appeareth by Littleton, That the Plaintiff cannot be diſabled by Outlawry, unleſs it appeareth of record.

V. l. 11. f. 39. 41. in Metcalfes caſe, upon what Judgements and awards a Writ of Error doth lie.

Li. 5. f. 111. Foxleys caſe, Li. 7. f. 11. 12. Jentlemans caſe.

15. El. Dyer 317.

Lib. 9. f. 119. 8. Zanchars caſe.

28. Aſſ. 49. 12. E. 3. Utlage. 3. 38. E. 3. 13. Mich. 4. & 5 El. Dyer f. 222. Vid. Sect. 197.

¶ *Item, ſi home ſoit utlage en Action perſonal per proces ſur le Original, & puis bre Derroz, ſi celuy a que ſuit il fuit utlage, voile pleader envers luy un releas d toutz manners Dactions Perſonals, ceo ſemble nul plee, car per le dit Action il ne recobera rien en perſonaltie, forſque tantſolement de reverſer le Utlagarie: mes un Releaſe de Briefe Derrour eſt bone plea.*

ALſo, if a man be outlawed in an Action perſonal by proceſs upon the Originall, and bringeth a Writ of Errour, if he at whoſe ſuit he was outlawed, will plead againſt him a Releaſe of all manner of Actions perſonals, this ſeemeth no Plea; for by the ſaid Action he ſhall recover nothing in the perſonalty, but only to reverſe the Outlawrie: But a Releaſe of the Writ of Errour is a good plea.

¶ *Car per le dit Action il recovera rien en le perſonaltie.* Hereupon is to be obſerved a diverſity, when by the Writ of Error the Plaintiff ſhall recover, or be reſtored to any perſonal thing, as Debt, Damage, or the like; for then by the reaſon that Littleton here yieldeth, the releaſe of all actions perſonals is a good plea, for that the Plaintiff is to recover, or to be reſtored to ſomething in the perſonalty. And ſo likewiſe when land is to be recovered, or to be reſtored in a Writ of Error, a releaſe of all actions reals is a good bar. But where by a Writ of Error the Plaintiff ſhall not be reſtored to any perſonal or real thing, then a releaſe of all actions real or perſonal, is no bar; and therefore Littleton here putteth his caſe with great caution: If a man (ſaith he) by Proceſs upon the Original be outlawed, there indeed he ſhal be reſtored to nothing in the perſonalty againſt the Plaintiff. But where by the Outlawry he forfeited all his Goods and Chattels to the King, he ſhall be reſtored to them; alſo thereby he ſhal be reſtored to the Law, & to be of ability to ſue, &c. But if the Plaintiff in a perſonal action recover any debt, &c. or damages, and be outlawed after judgment, there in a Writ of Error brought by the Defendant upon the principal judgment, a releaſe of all actions perſonals is a good plea. And ſo it is where a Judgment is given in a real action, a releaſe of all actions reals is a good bar in a Writ of Error brought thereupon.

1. H. 4. 6.

It

If the tenant in a real action releaſe to the Defendant after recovery his right in the land, he ſhall not have a writ of Error, for that he cannot be reſtored to the land. 9.H.9.47.

And ſo it is, if debt, &c. or damages be recovered in a perſonal action by falſe Verdict, and the Defendant bringeth a Writ of Attaint, a (u) releaſe of all actions perſonals is a good bar of the Attaint; for thereby the Plaintiff is to be reſtored to the debt, &c. or damages which he loſt: the like law is, if Judgment be given upon a falſe Verdict in a real action, a releaſe of all actions reals is a good bar in an Attaint. For both the Writ of Error, and the Writ of Attaint, do inſue the nature of the former action, &c. (a) 26.H.8.3.b.13.E.4. 1.2.

And ſo it is, if a Writ of Audita Querela be brought by the defendant in the former action to diſcharge himſelf of an execution, a releaſe of actions perſonals is a good bar, becauſe he is to diſcharge himſelf of a perſonal execution. 34.H.6.31.35.H.6.19. 29.Aſſ.35.47.E.3.6. 24.E.3.37.

¶ *Mes un releaſe de briefe de error eſt bone plea, &c.* So as in this ſpecial caſe here put by Littleton, wherein the Plaintiff is to recover, or be reſtored to nothing againſt the party, yet for that the Plaintiff in the former action is privy to the Record, a releaſe of a Writ of Error to him is ſufficient to bar the Plaintiff in the Writ of Error of the ſuit, and vexation by the Writ of Error. And ſo note, that an action real or perſonal doth imply a recovery of ſomething in the realty or perſonalty, or a reſtitution to the ſame; but a writ implieth neither of them, which is worthy of obſervation.

## *Sect.* 504.

¶ ITem, ſi home recover debt ou damages, & il releſſa al Defendant touts maners dactions, uncore il puit loialment ſuer. execution per Capias ad ſatisfaciendum, ou per Elegit, ou Fieri facias, car execution per tiel briefe, ne poit eſtre dit action.

ALſo, if a man recover debt or damages, and he releaſeth to the Defendant all manner of Actions, yet he may lawfully ſue Execution by *Capias ad ſatisfaciendum*, or by *Elegit*, or *Fieri facias*: For Execution upon ſuch a writ cannot be ſaid an Action.

¶ HEre appeareth a diverſity between an Action and an Execution. For regularly an Action is ſaid in his proper ſenſe to continue until Judgment be given, and after Judgment then doth Proceſs of Execution begin; and therefore a releaſe of all Actions regularly is (b) no bar of execution, for the execution doth begin when the Action doth end. And therefore the foundation of the firſt is an original Writ, and doth determine by the Judgement; and Writs of execution are called Judicial, becauſe they are grounded upon the Judgment. Vide Sect.233. 8.3.7.4.E.3.Attorney 18.33.H.6.49. 34.H.6.51. (b) 13.H.4.Releaſe 53. 19.H.6.3.26. H. 6. Execution 7.

¶ *Per Cap. ad ſatisfaciendum.* This is a judicial Writ for the taking of the body in execution until he hath made ſatisfaction: where a Capias ad ſatisfaciendum lyeth at the Common Law, and where it is given by Statute, you may read at large in my Reports. Sir William Herbert's caſe, lib.3.fol.11,12.

I have read two antient Records touching the taking of the body in execution, whereof to my remembrance, I never read any touch in our Books, yet will I recite them, and leave them to the judicious Reader. William de Welton brought an Action of Treſpaſs of breaking his cloſe againſt John Martin, and upon not guilty pleaded, he was found guilty and damages aſſeſſed, whereupon judgment was given, that the Plaintiff ſhould recover his damages. Et quod prædictus Johannes capiatur. And the Record ſaith, Quod prædictus Johannes venit coram Domino Rege, & reddidit ſe priſonæ, & quia conſtat Curiæ per inſpectionem corporis ipſius Johannis, quod idem Johannes eſt talis ætatis quod pœnam impriſonamenti ſubire non poterit, ideo dictum eſt ei, quod eat inde ſine die. The other Record is, That Ellen Aillot brought an Appeal of Robbery againſt John Boskiſſeleke Clerk, Richard Charra and others, who pleaded not guilty, and were not found guilty: whereupon Judgment was given that they ſhould go quit: Et prædicta Elena pro falſo appello ſuo committatur priſonæ, &c. (for (b) by the Statute ſhe ought to be impriſoned in that caſe, for a year.) But the Record ſaith, Quia eadem Elena prægnans fuit, & in periculo mortis, ipſa dimittitur per manucaptionem, &c. ad habendum corpus uſque Quind. Michaelis, &c. Paſch.14.E.3.Rot.166. coram Rege in Theſaur. Surrey. Mich.41.E.3.Rot.27. coram Rege Cor. in Theſaur. (b) W. 2.cap.12.

There be certain maxims in the Law concerning Executions, as taking ſome in ſtead of many. Et quæ in Curia noſtra rite acta ſunt, debitæ executioni demandari debent. Parum eſt latam eſſe ſententiam niſi mandetur executioni. Executio juris non habet injuriam. Executio eſt fructus & finis legis. Juris effectus in executione conſiſtit. Proſecutio legis eſt gravis vexatio, executio legis coronat opus. Boni Judicis eſt judicium ſine dilatione mandare execution. Favorabiliores ſunt executiones aliis proceſſibus quibuſcunque. But now let us hear what Littleton ſaith.

¶ *Per Elegit.* This is alſo a judicial Writ, and is given by the Statute either upon a recovery for Debt or Dammages, or upon a Recognizance in any Court. And it is called a Writ of Elegit, for that according to the Statute that ſaith, (c) Sit de cætero in electione illius, &c. ſequi breve quod Vicecomes fieri faciat, &c. vel quod liberet ei, &c. The words of the Writ be, Elegit ſibi liberari, &c. And thereupon it is called an Elegit. By this Writ the Sheriff ſhall deliver to the Plaintiff, Omnia catalla debitoris, (exceptis bobus & aſris carucæ) & medietatem terræ. And this muſt be done by an inqueſt to be taken by the Sheriff.

(c) W.2.cap.18.

When Littleton wrote, by force of certain Acts (d) of Parliament, Execution might be had of Lands (beſides by force of the Elegit) upon Statutes Merchant, Statutes Staple, and Recognizances taken in ſome court of Record, and ſince he wrote, upon a Recognizance or Bond taken by force of the Statute * of 23. H. 8. before one of the chief Juſtices, or the Major of the Staple, and Recorder of London out of term, which hath the effect of a Statute Staple. The manner of the Executions upon body, Lands, and goods, appeareth in the Statute quoted in the margent.

(d) 11.*E.*1.Stat. de Acton Burnell.13.*E.*1. de mercatoribus 27.*E.*3. cap.22.Vide Fleta.l.2. cap.57.25.3.*E.*53.
(*) 32.*H.*8.cap.6.

Since Littleton wrote, a profitable Statute hath been made (e) concerning executions of Lands, Tenements, and Hereditaments, whereby it is provided, that if after ſuch Lands, &c. be had and delivered in execution upon a juſt or lawful title, wherewithall the ſaid Lands, &c. were liable, tied, or bound at ſuch time, as they were delivered or taken into execution, ſhall be recovered, deveſted, taken, or evicted out of, or from the poſſeſſion of any ſuch perſon, &c. before ſuch times as the ſaid tenants by execution, their Executors or Aſſigns ſhall have fully levied their debt and damages, for the which the ſaid Lands &c. were taken in Execution, then every ſuch Recoveror, Obligee, and Recognizee, ſhall have a Scire facias out of the ſame Court from whence the former Execution did proceed, againſt ſuch perſon or perſons as the former Execution was purſued, their Heirs, Executors or Aſſigns, to have Execution of other Lands, &c. liable and to be taken in Execution for the reſidue of the debt or dammages; Sed opus eſt interprete.

(e) 32.*H.*8.cap.5.

Lib.4.fol.66.Fulwoods caſe.

Therefore firſt it is to be known, that where the tenant by Execution hath remedy given to him by Law after eviction, there the Statute extendeth not to it, for the act ſaith, by reaſon whereof, the ſaid Recoverors, Obligees, and Recognizees, have been clearly ſet without remedy, &c. and the body referreth to the preamble, and the party ought not to have double ſatisfaction, one by the former Laws, and another by this Statute.

And therefore if part of the land, &c. be evicted from the tenant by execution, this Statute extendeth not to it; becauſe he ſhould hold the reſidue, till he be fully ſatisfied, and he muſt be contented, if all be evicted ſaving one Acre, to hold that, though it be but a poor remedy: for no new execution in that caſe he can have upon this Statute. Therefore if the Conuſee hath remedy in præſenti for part, or in futuro, for all, or part, this Statute extendeth not to it.

Secondly, If a man be bound to A. in a Statute of a thouſand pounds, and by a latter Statute to B. in a hundred pounds, and B firſt extendeth, and then A. extendeth and taketh the land from B. yet B. ſhall have no aid of the Statute, becauſe after the extent of A. B. ſhall re-enjoy the land, by force of his former Execution.

Thirdly, If the wife of the Conuſor recover Dower againſt the tenant by Execution, he ſhall hold over, and ſhall have no aid of this Statute.

Fourthly, if a man put out his Leſſee for years, or diſſeiſe his Leſſee for life, and after knowledge a Statute, and Execution is ſued againſt him, and the Leſſees re-enter, the tenant by Execution after the leaſes ended, ſhall hold over, and have no aid of this Statute.

Fiftly, This Statute muſt not be taken literally, but according to the meaning; therefore where the letter is until he, &c. or his Aſſigns ſhall fully and wholly have levied the whole debt or damages: if he hath aſſigned ſeveral parcels to ſeveral Aſſigns, yet all they ſhall have the land, but till the whole debt be paid.

Sixtly, where the words be, for the which the ſaid lands, &c. were delivered in execution. A Diſſeiſor convey lands to the King, who granteth the ſame over to A. and his heirs to hold by fealty, and twenty pound rent, and after granteth the Seigniory to B. B. knowledgeth a Statute

Statute, and Execution is sued of the Seignory. A. dieth without heir, and the Conusee entereth, and is evicted by the Disseisee, he shall have the aid of this Statute; and yet it is out of the letter of the Law, for the Seignory was delivered in Execution and not the Tenancy, but he was tenant by execution of those lands; and therefore within the Statute. But the perquisite of a Villein being evicted is out of the Statute, for he is tenant in see simple thereof, and not tenant by execution.

Seventhly, where the words be (delivered and taken in execution) yet if after the Liberate the Conusee entereth (as he may) so as the land is never discovered, yet is he within the remedy of this Statute, for he is Tenant by execution.

Eighthly, where the Statute saith, then every such Recoveror, Obligee, and Recognizee, shall, &c. and saith not, their Executors, Administrators or Assignes, but they are omitted in this material place; yet by a benigne interpretation this Statute shall extend to them, because they are mentioned in the next precedent clause of the eviction; and the remedy must by construction be extended to all the persons that appear by the Act to be grieved, a point worthy the observation.

Ninthly, where the Statute giveth a Scire fac' out of the same Court, &c. if the Record be removed by Writ of Error into another Court, and there affirmed, the tenant by Execution that is evicted shall have a Scire fac' by the equity of this Statute out of that Court, because the Scire fac' must be grounded upon the Record, Et sic de similibus.

Tenthly, where the Statute giveth the Scire fac' against such person or persons, &c. that were parties to the first Execution, their Heirs, Executors or Assigns, &c. this must not be taken so generally as the Letter is, for if the first Execution were had against a purchasor, &c. so as nothing was liable in his hands but the Land recovered; if this Land be evicted from Tenant by Execution, no Scire fac' shall be awarded against him, his Heirs, Executors or Assigns; but if he hath other lands subject to the Execution, then a Scire fac' lieth against him or his Assigns, but not against his Executors; neither in that case can he have a Scire fac' upon his Statute against the first Debtor or Recognizor, because it giveth it only against him, &c. that was party to the first Execution, his heirs, Executors or Assigns. But if there be several assigns of several parcels of lands subject to the execution, one Scire fac' upon this Statute shall lie against all the Assigns. Sed vel ſt modus in rebus. This little taste shall give a light to the diligent Reader, not only to see into the secrets of this Statute, but into others also of like nature.

And by the Statute of 23. H. 8. cap. 6. it is provided, that the Obligee, &c. shall have in every point against such Recognisor, &c. like Proces, Execution, commodity and advantage in every behalf, as hath been had or made upon the Statute Staple, & under such manner and form, as is for the same Statute staple provided: by force of which branch, if the tenant by execution by force of the Act of 23. H. 8. be evicted, he shall have the remedy provided for tenants by execution upon a Statute staple, by the Act of 32. H. 8. In like manner by force of that clause of 23 H. 8. if the extendors upon a Statute staple, &c. do extend the Lands, &c. at too high a rate, the Obligee may pray that the Extendors themselves may take the lands, &c. at that rate, &c. by force of the said Statutes of Acton Burnel, and De mercatoribus. Also no execution shall be sued against the heir within age.

But note, that upon a Writ of Elegit the Plaintiff cannot make any such prayer, because those antient Statutes do extend to a Statute Merchant, or a Statute Staple only, and neither to a recovery of debt or damages, nor to a Recognizance in Court, and so hath it been resolved (f).

Note, it appeareth by the Preamble of the said Act of 32. H. 8. and by divers (g) books, that after a full and perfect execution had by extent returned, and of Record, there shall never be any re-extent upon any eviction: but if the extent be insufficient in Law, there may go out a new extent.

(h) If a man have a Judgment given against him for debt or damages, or be bound in a recognizance, and dieth his heir within age; or having two daughters, and the one within age, no execution shall be sued of the lands by Elegit during the minority, albeit the heir is not specially bound but charged as Tenne tenant (i) and so against an heir within age no execution shall be sued upon a Statute Merchant or Staple, nor upon the obligation or recognizance upon the Statute of 23. H. 8. for it is excepted in the Proces against the heir. Neither if the heir within age indow his mother, shall execution be sued against her during his minority.

Note, that by the Statute (k) of 27. E. 3. the Execution of Lands upon a Statute staple is referred to the Statute Merchant; and by the Statute De Mercatoribus no Execution shall be had against the heir so long as he is within age.

Also since Littleton wrote, there is a right profitable Statute (l) made against fraudulent Feoffments, Gifts, Grants, &c. Judgments and Executions, as well of Lands and Tenements,

4. F. 3. 26. b. 34. E. 3. fol. 10. 2. H. 4. 17. 15. H. 7. 15.

(f) Mich. 4. & 5. Ph. & Mar. Bendloes, by all the Justices of the Common Pleas 15. E. 3. Extent. 7.

(g) 15. E. 3. Extent. 7. 21 E. Recovery in value 22. 31. E. 3. Exten. 13. 27. E. 3. 76. 15. E. 3. Scire fac. 115. 7. H. 4. 19. 22. Ass. 44. 22. E. 3. f. ult. 44. E. 3. 10. 9 H. 7. 9. 15. H. 7. 15. 13. El. Dyer. 299. 29. H. 8. Stat. Merchant. Br. 40.

(h) 11. E. 3. age 4. 15. E. 3. age 95. 24. E. 3 28. 29. Ass. 37. 29. E. 3. 50. 47. Ass. 4. 47. E. 3. 7. l. 3. f. 13. Sir. William Herberts case. Brook age 33.

(i) Temp. E. 1. Ass. 102. 147. 16. H. 7. 6. Licure dente, 545. Brook. age, 33.

(k) 27. E. 3. cap. 22.

(l) 13. El. cap. 5. Lib. 3. f. 80. &c. Twynes case: L. b. 5. f. 60. Gooches case.

ments, as of Goods and Chattels, to delay, hinder or defraud Creditors and others of their juſt and lawful Actions, Suits, Debts, Damages, Penalties, Forfeitures, Heriots, Mortuaries, and Releaſes, for the expulſion of which and other Statutes ſee the Authorities quoted in the Margent.

Lib.6.fol. 18. Pakemans caſe.
Lib.10.f. 56.the Chanc. of Oxford caſe.
See the Statutes of 3 H 7.cap.4.& 50 E.3.cap.6
Mich. 12. & 13.El. Dyer 295.18.El.351. Dyer.

And it is to be obſerved, that the words of the ſaid Act of 13. Eliz. are, Be it therefore declared, ordained, and enacted: and therefore like caſes in ſemblable miſchief ſhall be taken within the remedy of this Act, by reaſon of this word (Declared) whereby it appeareth, what the Law was before the making of this Act. But let us now return to Littleton.

W.2.cap.18.

¶ *Fieri facias.* This is a Writ mentioned in the ſaid ſtatute, but is a Writ of Execution at the Common Law. And is called a Fieri facias, becauſe the words of the Writ directed to the Sheriff be Quod fieri facias de bonis & catallis, &c. and of thoſe words the Writ taketh his denomination.

But note, that a Capias ad ſatisfaciendum is not mentioned in the ſaid Statutes, becauſe no Capias ad ſatisfac' did lie at the Common Law upon a judgment for debt, &c. or damages, but only when the original action was Quare vi & armis, &c. But latter Statutes have given a Capias ad ſatisfac' where debt, &c. or damages are recovered, as it appeareth at large (m) in Sir William Herberts caſe, whereunto I refer the Reader.

(m)Lib.3.f.11. Sir William Herberts caſe.

And it is to be obſerved, that theſe three Writs of execution ought to be ſued out within the year and the day after judgment; but if the Plaintiff ſueth out any of them within the year, he may continue the ſame after the year until he hath execution. And to none of theſe Writs of Execution the Defendant can plead; but if he hath any matter ſince the Judgment to diſcharge him of Execution, he may have an Audita querela, and relieve himſelf that way, but plead he cannot. As if the plaintiff after releaſe unto the Defendant all Executions; yet in none of theſe three Writs he ſhall plead it, but is driven to his Audita querela, as hath been ſaid.

## *Sect.* 505.

¶ *Scire facias.* This is a judiciall Writ, and properly lyeth after the year and day after judgement given, and is ſo called, becauſe the words of the Writ to the Sheriff bee, Quod ſcire facias præfat' T. (being the Defendant) Quod ſit coram, &c. oſtenſurus ſi quid pro ſe habeat aut dicere ſciat, quare, &c. So as by the Writ it appeareth, that the Defendant is to be warned to plead any matter in Barre of Execution; and therefore albeit it bee a judiciall Writ, yet becauſe the Defendant may thereupon pleade, this Scire facias is accounted in Law to be in nature of an action; and therefore (n) a Releaſe of all actions is a good Barre of the ſame, and likewiſe a Releaſe of Executions is a good barre in a Scire facias, this Writ was gi-

(n) 19.H.6.3.18.E.4.7.

¶ Mes ſi apres lan & jour le plaintife voit ſuer un Scire facias, a ſacher ſi le defendant poit rien dire pur que le plaintife naberа execution, donques il ſemble q̄ tiel releas de touts actions ſerra bon plée en barr: Mes aſcuns ont ſemble contrary, entant que le briefe de Scire facias eſt un bꝛe de execution, & eſt dauter execution, &c. Mes uncore entant q̄ ſur un l' briefe l' defendant poit pleader divers matꝛs puis l'judgement rendue de luy ouſter de execution, coñ utlagary, &c. & divers autres matters

But if after the year and day the plaintiff will ſue a *Scire facias*, to know if the defendant can ſay any thing why the plaintiff ſhould not have execution, then it ſeemeth that ſuch releaſe of all actions ſhall be a good plea in barre. But to ſome ſeems the contrary, in as much as the writ of *Scire facias* is a writ of Execution, and is to have Execution, &c. But yet in as much as upon the ſame writ the Defendant may plead divers matters after judgement given to ouſt him of execution, as outlawry, &c. and divers other matters, this

matters

matters, ceo bien poit estre dit action, &c. may be well said an action, &c. ben in this case by the Statute of W. 2. for at the Common Law, if the Plaintiff had surceased to sue Execution by Fieri facias, or Levari facias, a year and a day, he had been driven to his new original. W.2. ca.45. 8.E.3.297, 298. 18.E.3.33.l.3.fol.12. Sir William Herberts case Flet.l.2.cap.12.

¶ *Ceo bien poit estre dit action.* Here is to be observed, that every Writ whereunto Defendant may plead, be it original or judicial is in Law an action.

## *Sect.* 506.

¶ Et jeo croy, que en un Scire facias hors dun fine, un releas de touts manners dactions, est bon plee en barre.

And I take it, that in a *Scire facias* upon a fine, a release of all manner of actions is a good plea in bar.

This upon that which hath been said, is evident of it self.

## *Sect.* 507.

¶ Mes lou home recobera debt ou damages, & est accord̃ perenter eux, que le plaintife ne suet execution, donqz il covient q̃ le plaintife fait un releas a luy de touts maners dexecutions.

But where a man recovereth debt or damages, and it is agreed between them that the plaintiff shall not sue execution, then it behoveth that the plaintiff make a release to him of all manner of executions.

¶ *Il covient.* Albeit Littleton here saith, he ought or must, &c. yet there be other words which will release an Execution, without express words of a release of Execution.

As if a man release all suits, the execution is gone; for no man can have Execution without prayer and suit, but the King only, and therefore if the King release all suits, it is no bar of his Execution, because in the Kings case the Judges ought to award Execution Ex officio without any suit, but a release of Executions doth bar the King in that case. And so note a diversity between a release of all actions, and a release of all suits. 19 H.6.4.26.H.6. Execution 4.li.8. f.153. Ed. Althams case. Vid. Brook, tit. Releases 87.

So if the body of a man be taken in execution, and the Plaintiff release all actions, yet shall he remain in Execution; but if he release all debts or duties, he is to be discharged of the Execution, because the debt or duty in it self is discharged. 26.H.3.tit.Execution 7

In the same manner, if Execution be sued upon a recognizance, by Elegit, and the Conusee by Deed make a Defeasance, that if the Conusor doth such an act, that then the recognizance shall be void, by this the Execution is discharged. 20.Ass.p.7.

So it is if judgement be given in an action of debt, and the body of the Defendant is taken in Execution by a Capias ad satisfac', and after the Plaintiff releaseth the judgement, by this the body shall be discharged of the Execution. 26.H.6. ubi supra.

If the Plaintiff after Judgement release all demands, the Execution is discharged, as shall appear by that which next hereafter shall be said.

If A. be accountable to B. and B. release to him all his duties, this is no bar in an action of account, for duties extend to things certain, and what shall fall out upon the account is incertain; and albeit the Latine word is Debita, yet the duties do extend to all things due, that is certain; and therefore dischargeth Judgements in personal Actions, and Executions also. 2.H.6.6. per Paston.

## *Sect.* 508.

¶ *Touts manners de Demand.*

¶ *Demand*, Demandum is a word of Art, and in the understanding of the Common Law is of so large an extent, as no other one word in the Law is, unless it be Clameum, whereof Littleton maketh mention, Sect. 445. And here is to be observed; that there be two kinds of demands or claims, viz. a demand or claim in Deed, and a demand or claim in Law; or an express, and an implied demand or claim. Littleton here putteth examples of both: and first he speaketh of real actions, wherein he that bringeth his action maketh his demand: and therefore he is properly called a Demandant, and he that defendeth is called Tenant, because he is Tenant of the Freehold of the land.

Lit. Sect. 445. Bract. li 1. cap. 10. Pl. Com. Steills case 359. &c.

¶ Item, si home relessa a un autre touts manners de demands, ceo est le plus melior release a luy a que le release est fait que il poit aver, & plus urera a son advantage. Car per tiel release de touts manners de demands, touts manners dactions reals, personals, & actions dappeale sont ales & extincts, & touts manners de executions sont ales & extincts.

ALso, if a man release to another all manner of demands, this is the best release to him to whom the Release is made, that he can have, and shall enure most to his advantage. For by such release of all manner of demands, all manner of actions reals, personals, and Actions of Appeal, are taken away and extinct, and all manner of executions are taken away and extinct.

38. H. 8. tit. Release. Br. 9. 8. H. 7. 15. 19. H. 6. 3. 4. 26. Ass. Pl. 5. 40. E. 5. 22. 49. E. 3. b. 50. Ass. Pl. 6. 14. H. 4. 8. 13. R. 2. tit. Avow. 89. lib. 8. f. 153. Ed. Althams case. Lit. 170. Sect. 748. Dyer 5. El. 227.

Of demands implied, or in Law, Littleton putteth examples: First, of all Actions personals. Secondly, of appeals; for in both those cases he that bringeth the suit is called Plaintiff, and not Defendant; and he that defendeth is called Defendant. Thirdly, of Executions. Fourthly, of title or right of the entry, either by force of a Condition, or by any former right, which meerly is a demand or claim in law, but otherwise it is in the Kings case. Fifthly, of a Rent service, Rent charge, Common of pasture, &c. which also are meer demands or claims in Law. All which Littleton here and in the two next Sections following, putteth but for examples; for by the release of all demands other things also be released, as Rents seck, all mixt Actions, a warranty which is a Covenant real, and all other Covenants real and personal, Estovers, all manner of Commons and profits apprender, Conditions before they be broken or performed, or after, Annuities, Recognizances, Statutes Merchant, or of the Staple, Obligations, Contracts, &c. are released and discharged.

## *Sect.* 509.

¶ Et si home ad title de entry en aucuns terres ou tenements, per tiel Release son title est ale.

¶ Sed quære de hoc; car Fitz-James chiefe Justice de Engleterre tient le contrary, pur ceo que entre ne poit proprement estre dit demande, P. 19. H. 8. *

¶ AND if a man hath Title of entry into any lands or tenements, by such a Release his title is taken away.

¶ *Sed quære de hoc*; for *Fitz-James* chiefe Justice of England holdeth the contrary, because an Entry cannot be properly said a Demand.

¶ *Title*

¶ *Title.* Here Title is taken in the largeſt ſenſe, including Right alſo. 34 H.8.tit.Releaſe B.6. Chaunceys caſe,lib 8. f.153.Ed.Althams caſe.

¶ * Sed quære &c. This is an addition, and no part of Littleton,and the opinion here cited clarly againſt Law.

## *Sect.* 510.

¶ ET ſi home ad Rent ſerbice ou Rent charge, ou Common de Paſture, &c. per tiel Releaſe de touts manners de demaunds fait al Tenaunts de la Terre, dont le ſerbice ou le rent eſt iſſuant, ou en que le Common eſt, le ſerbice, le Rent, & le Common eſt ale extinct, &c.

AND if a man hath a Rent ſervice or Rent charge,or Common of Paſture, &c. by ſuch a Releaſe of all manner of demands made to the Tenants of the Land out of which the ſervice or the rent is iſſuing, or in which the Common is, the ſervice, the Rent, and the Common is taken away and extinct, &c.

This upon that hath bæn ſaid, nædeth no further explication.

## *Sect.* 511.

¶ ITem, ſi home releſſa a un auter touts maners de quarrels, ou touts controverſies, ou debates enter eux, &c. Quære a quel matter & a quel effect tiels parols ſoy extendont, &c.

ALſo,if a man releaſe to another all manner of quarrels,or all controverſies or debates between them,&c. *Quære* to what matter and to what effect ſuch words ſhall extend themſelves, &c.

¶ *Quarrels.* Querela, à querendo, this property concerneth Perſonall actions, or mixt, at the higheſt, for the Plaintiffe in them is called Querens, and in moſt of the Writes it is ſaid Queritur. And yet if a man releaſe all Quereles (a mans Deed being taken moſt ſtrongly againſt himſelfe) it is as beneficial as all actions, for by it all actions real and perſonal are releaſed. And by the releaſe of all quarrels, all cauſes of actions are releaſed thereby, albeit no action be then depending for the ſame. 40.E.3.47. b. Ed. Althams caſe ubi ſupra. 35.H.8. Dyer 57. 9.E.4.44. 39.H.6.9.

¶ *Quarrels*, Controverſies and Debates are Synonyma, and of one ſignification. Litis nomen omnem Actionem ſignificat, ſive in rem, ſive in perſonam ſit. If a man releaſe omnes loquelas, it is as large as omnes Actiones, for omnis Actio eſt loquela; and it extendeth as well to Actions in Courts of Record,as baſe Courts; for the Writ of Error ſaith, In Recordo & Proceſſu, &c. loquela quæ fuit inter &c. and ſo the Writ of falſe Judgement ſaith, Recordari facias loquelam, where the Judgement was given in the County Court. Omnes exactiones ſeem to be large words, for Exactio deriveatur ab exigendo, and Exigere ſignifieth to enquire or demand. Lib.8.fol.153. Althams caſe.21.H.6.16.a. F.N.B.23.18. 50.Aſſ.6.42.E.22. 13.R.2.Avowrie 89.

## *Sect.* 512.

¶ ITem, ſi home ſon fait ſoit obligé a un auter en

ALſo, if a man by his Deede bee bound to another in a

¶ *Releſſa al Obligor touts Actions, &c.* The reaſon of

11.H.4.41.43. of this caſe is, For that the debt is a thing conſiſting meerely in action; and therefore albeit no action lyeth for the debt, becauſe it is debitum in præſenti, quamvis ſit ſolvendum in futuro; yet becauſe the right of action is in him, the releaſe of all actions is a diſcharge of the debt it ſelf.

(o) Trin.2.Ja. in Com. Banco.inter Middleton & Rinnot.18.H.6.23.b. Pl.Com.277, 278. In Cresbroke, caſe per Weſton. (o) And ſo may an executor before Probate releaſe an action, and yet before Probate he can have no action, becauſe the right of the action is in him, and ſo it was adjudged. And ſome ſay, that an Ordinary may releaſe an action, and yet he can have none.

5.Eliz.Dyer.217. But if a man by Deed doth covenant to build an houſe or make an eſtate, and before the Covenant broken, the Covenantee releaſeth to him Actions, Suits, and Quarrels, this doth not diſcharge the Covenant it ſelf, becauſe at the time of the Releaſe, nihil fuit debitum, there was no debt or duty, or cauſe of action in being. But in that caſe a releaſe of all Covenants is a good diſcharge of the Covenant before it be broken.

Althams caſe, ubi ſupra

certaine ſumme de money a payer al Feaſt de S. Michael prochein enſuant, ſi le obligee devant le dit Feaſt releſſa al Obligor touts Actions, il ſerra barre del dutie ſi touts temps, & uncore il ne puiſſoit aver Action al temps de Releaſe fait.

certaine ſumme of money, to pay at the Feaſt of Saint Michael next enſuing, if the Obligee before the ſaid Feaſt releaſe to the Obligor all Actions, he ſhall be barred of the duty for ever, and yet he could not have an Action at the time of the Releaſe made.

## *Sect.* 513.

7.H.5.2. ¶ *Releaſe touts Actions.* This releaſe ſhall not bar the Leſſor of his Rent, becauſe it was neither debitum nor ſolvendum at the time of the releaſe made: for if the land be evicted from the Leſſee before the Rent become due, the Rent is avoided, for it is to be paid out of the profits of the land; and it is a thing not meerly in action, becauſe it may be granted over. But the Leſſor before the day may acquite or releaſe the Rent.

45.E.3.8.17.H.6.26. 13.H.4.Avowrie 240.

30.E.3.13.b.47.E.3.24. But if a man be bound in a Bond or by contract to another to pay a hundred pounds at five ſeveral days, he ſhall not have an action of Debt before the laſt day be paſt; and ſo note a diverſity between Duties which touch the realty, and the meer perſonalty. But if a man be bound in a recognizance to pay a hundred pounds at five ſeveral days, preſently after the firſt day of payment, he ſhall have execution upon the recognizance for that ſum, and ſhall not tarry till the laſt be paſt, for that it is in the nature of ſeveral Judgements. And ſo note a diverſity between a debt due by recognizance, and a debt due by Bond or contract. And ſo it is of a Covenant or Promiſe, after the firſt default, an action of Covenant, or an action upon the Caſe doth lie, for they are ſeveral in their nature. Laſtly, note a diverſity between Debts and Covenants, or Promiſes.

10.E.2. Execution 137. 16.E.2.ib.138.16.E.3. Scire Fac.F.N.B.267. 9.E.3.7.

5.Mar.Action ſur le caſe Br.108.3.Mar. Dyer 113.lib.4.fol.94. Slades caſe l.5.f.81.b. Fordes caſe.

¶ Mes ſi home leſſa terra a un auter p terme dun an, rendant a luy al feaſt de S. Michael prochein enſuant 40. s. & puis devāt meſm̄ le feaſt il releſſa al leſſee touts act, unc̄ apres meſm̄ l' feaſt il avera act de Debt pur non payment de les 40. s. nient obſtant le dit releas. Sṫude cauſam diverſitatis enter les deux caſes.

But if a man letteth Land to another for a year, to yield to him at the Feaſt of S. Mich. next enſuing 40. s. and afterwards before the ſame Feaſt he releaſeth to the Leſſee all actions, yet after the ſame Feaſt he ſhall have an action of debt for the non payment of the 40. s. notwithſtanding the ſaid Releaſe. *Sṫude cauſam diverſitatis* between theſe two caſes.

39 H.6.28.b.5.E.4.45. 2.H.13.12.R.2. Releaſe 29. If a man hath an Annuity for term of years, or for life, or in fee, and he before it be behind doth releaſe all actions, this ſhall not releaſe the Annuity, for it is not meerly in action, becauſe it may be granted over.

*Sect.*

## Sect. 514.

ITem, ou home voile suer briefe de Droit, il covient que il counta del seisin de luy, ou de ses ancestres, & aury q̄ l' seisin fuit en temps de mesme le Roy come il counta en son count: Car cest un ancient ley use, come appiert per l' Report dun plee en le Eire de Nottingham, titulo droit en Fitzherbert, cap. 26. en tiel forme q̄ ensuist. John Barre port son briefe de Droit envers Reynold de Assington, & demanda certaine tenements, &c. ou le mise est joyne en le bank, & original & le Proces fueront demandes devant Justices errants, ou les parties vindront, & les 12. Chivaliers sieront lour serement sans challenge des parties deure allowes, pur ceo que election fuit fait per assents des parties, oue les quater Chivaliers, & le serement fuit tiel, Mue jeo verity dire, &c. le quel R. de A. ad plus mere droit a tener les tenements que John Barre demanda vers luy per son briefe de Droit, ou John de

ALso, where a man will sue a Writ of Right, it behoveth that he counteth of the seisin of himself, or of his ancestors, and also that the seisin was in the same Kings time, as he pleadeth in his plea. For this is an antient Law used, as appeareth by the report of a plea in the Eire of *Nottingham, tit. droit. in Fitzherbert, cap. 26.* in this form following. *John Barre* brought his Writ of Right against *Reynold* of *Assington*, and demanded certain Lands, &c. where the mise is joyned in bank, and the original and the Processe were sent before the Justices errants, where the parties came, and the twelve Knights were sworne without challenge of the parties, to be allowed, because that choice was made by assent of the parties, with the four Knights, and the Oath was this: That I shall say the truth, &c. whether *R.* of *A.* hath more meer right to hold the tenements which *John Barre* demandeth against him by his Writ of Right, or *John* to have

¶ *IL Covient que il counta del seisin de luy ou de ses auncestors.* For it neither he nor any of his Ancestors were seised of the Land, &c. within the time of limitation, he cannot maintain a Writ of Right, for the seisin of him of whom the Demandant himself purchased the Land, &c. availeth not.

For the time of limitation, See the Statute of 32. H. 8. cap. 2. Vide Sect. 170.

And so it is in a Writ of right of Advowson. F.N.B. 30. a. 2. E. 3. 27. Littleton 112. 2.

¶ *Auxy que le seisin fuit en temps de mesme le roy come il counta.* Hereby it appeareth, that not only a seisin (as hath been said) is requisite, but also that the seisin he had in the time of the same King according to his Count.

¶ *Report* commeth of the French word Reporter, i. gerere, & porto, is sit, referre, i. re, & fero. And in the Common Law, it signifieth a publike relation, or a bringing again to memory cases judicially argued, debated, resolved, or adjudged in any of the Kings Courts of Justice, together with such causes and reasons as were delivered by the Judges of the same. And in this sense Littleton useth the word in this place.

¶ *En le Eire de Nottingham.* Eire, Iter. And it signifieth the Court of the Justices in Eire, and thereupon they were called Justiciarii Itinerantes, in respect that the Justices residing at West-

Weſtminſter were called Juſticiarii reſidentes, and were much like in this reſpect to the Juſtices of Aſſiſe at this day, although for authority and manner of proceeding (whereof you ſhall read (q) in the antient Authors of the Law) farre different. And as the power of the Juſtices of Aſſiſes by many Acts of Parliament, and other Commiſſions increaſed, ſo theſe Juſtices Itinerant by little and little vaniſhed away. And it is certain, that the authority of Juſtices of Aſſiſes Itinerant through the whole Realm, and the Inſtitution of Juſtices of Peace in every County being duely perfourmed, are the moſt excellent meanes for the preſervation of the Kings peace, and quiet of the Realm, of any other in the Chriſtian World.

(q) Mirror. c. 2. Sect. 3. & Sect. 15. & ca. 4. le office des Juſtices in Eire. Glanv. l. 9. cap. 11. l. 8. cap. primo. Britton fol. a. b. 7. &c. Bract. lib. 3. fol. 115. &c. Flet. l. 1. ca. 15. &c. 4. E. 3. 32. 6. E. 3. 35. 23. E. 3. 21. 15. H. 7. 5. Vid. Sect. 442, 233, 234.

¶ *De Nottingham.* This ſhould be Northampton, according to the Original.

This report whereof Littleton here maketh mention, you ſhall finde an abridgement of it in 3. E. 3. ſince Littletons time, put in print by Fitzherbert when he was Serjeant in 11. H. 8. and is not in the Reports or Books at large. And yet here it appeareth that they be of great authority, and vouched by Littleton himſelf, for the proof of a maine point in Law. And hereby it alſo appeareth, how neceſſary it is to read Records and Pleas reported or Recorded, though they were never printed. For thoſe and the like Records are Veritatis & Veruſtatis veſtigia.

3. E. 3. Tit. Droit. F. 26.

¶ *Tit. droit. in* Fitzherbert 26. is

aver eur, ſicome il demaund, & pur rien lerra que le verity ne dirra, ſicome moy ayde Dieu, &c. ſans dire a lour eſcient. Et tiel ſerement ſerra fait en attaint, & en Battail, & en ley gager, car eux mittont cheſcun chaſe a fine. Wes John Barre coũta del ſeiſin dun Raſe ſon anceſter, en temps le Roy Henry, & Reynolde ſur le miſe joyne tendiſt demy mark pur le temps &c. Et ſur ceo Herle Juſtice dit al grand aſſiſe, apres ceo que ils fueront charges ſur le mere Droit, Vous gentes, Reynold donaſt demy marke al Roy pur le temps, al entent que ſi vous troves q̃ launceſter John ne fuit pas ſeiſe en le temps que le demaundant ad count, vous nenquires plus avont del droit, & p̃ ceo vous nous dires, le quel laũceſter John, Raſe per noſme, fuit ſeiſie en temps le Roy Henry, come il ad count, ou non. Et ſi vous troves que il ne fuit ſeiſie en cel temps, vous nenquires neient pluis, & ſi vous troves que il fuit ſeiſie, donques enquirrs ouſter del briefe. Et puis le

them as he demandeth, and for nothing to let to ſay the truth, ſo help me God, &c. without ſaying, to their knowledge. And the like oath ſhall be made in an Attaint, and in battail, and in wager of Law, for theſe doe bring every thing to an end. But *John Barre* counted of the ſeiſin of one *Ralfe* his Anceſtor in the time of King *Henry*, and *Reynold* upon the miſe joyned tendred halfe a marke for the time, &c. And hereupon *Herle* Juſtice ſaid to the grand aſſiſe after that they were charged upon the meere right, You good men, *Reynold* gave halfe a Mark to the King for the time, to the intent that if you find that the anceſtor of *John* was not ſeiſed in the time that the demandant hath pleaded, you ſhall enquire no further upon the right, and for this, you ſhall tell us whether the anceſtor of *John*, (*Ralfe* by name) were ſeiſed in K. *Henries* time, as he hath pleaded, or nor. And if you find that he was not ſeiſed in this time, you ſhall enquire no more; and if you find that he was ſeiſed, then you ſhall enquire further of the writ. And after the grand Aſſiſe came in with their

graund

graund Aſſiſe reviendroit oue lour Verdit, & disdont que Raſe ne fuit pas ſeiſie ẽ temps le Roy H. per que fuit agard, que Reynold tiendroit les tenements vers luy demandes, a luy & ſes heirs quites de John Barre & ſes heires a remnant. Et ſohn en le mercie, &c. Et le cauſe pur que jeo aye monſtre icy a toy, mon fits, ceſt plée, eſt pur prover le matter pretedent que eſt dit en briefe de Droit, &c. car il ſemble per ceſt plee, que ſi Reynold navoit pas tendue demy mark pur enquirer del temps, &c. donques le graund Aſſiſe duiſſoit eſtre charga tantſolemẽt del mere droit, & nemy del poſſeſſion, &c. Et iſſint q̃ touts ſoits en briefe de Droit, ſi le poſſeſſion dont le demandant counta ſoit en temps le Roy, com il avoit coũt, donques le charge del grande aſſiſe ſerra tãtſolement ſur le mere droit, coment que le poſſeſſion fuit encounter le ley, come il eſt dit adevant en ceſt Chapter, &c.

verdict, and ſaid, that *Ralfe* was not ſeiſed in the time of King *Henry*, whereby it was awarded that *Reynold* ſhould hold the tenements demanded againſt him, to him and his heires quite of *John Barre* and his heires to the remnant. And *John* in mercy, &c. And the reaſon why I have ſhewed to thee, my Son, this Plea, is, to prove the matter precedent which is ſaid in a writ of right; for it ſeemeth by this Plea, that if *Reynold* had not tendred the half mark to enquire of the time, &c. then the grand Aſſiſe ought to bee charged only to enquire of the meer right, and not of the poſſeſſion, &c. And ſo always in a Writ of Right, if the poſſeſſion whereof the demandant counteth bee in the Kings time, as he hath pleaded, then the charge of the grand aſſiſe ſhall be only upon the meer right, although that the poſſeſſion were againſt the Law, as it is ſaid before in this Chapter, &c.

of a new addition; and therefore though it bee true; yet not to bee allowed.

¶ *Et le originall & le proces fuer' demande devant Juſtices Itinerants.* For it is to be underſtood, that all Pleas either in the realty or perſonalty that were begunne and not determined before Juſtices in Etre, were adjorned by them into the Court of Common Pleas. 4.E.41. Peverals caſe. Mirror. Glanvil. Bracton. Britton. Fleta. } ubi ſupra.

¶ *Les 12. chivaliers fieront lour ſerement ſauns challenge, &c. pur ceo que le election fuit fait per aſſent des parties oue les 4. chivaliers.*

Here are four things to be obſerved. 30.E.1.tit. challenge 172.

Firſt, That omnis conſenſus tollit errorem, and againſt his own conſent he cannot challenge the twelve. 21.E.4.77.39.E.3.1. 44.E.3.6.11.H.6.13.

Secondly, That the four Knights Electors of the grand Aſſiſe are not to be challenged, for that in Law they be Judges to that purpoſe, and Judges or Juſtices cannot bee challenged. And that is the reaſon that Noblemen that in caſe of high Treaſon are to paſs upon a Peer of the Realm cannot be challenged, becauſe they are Judges of the fact, and the Magna Charta, ſaith, per judicium parium ſuorum. 4.E.3.13. Magna Charta cap. 29.

Thirdly, That the twelve before any aſſent may be challenged before the four Knights electors, but after aſſent or return of the pannel before the Juſtices, there ſhall be no challenge to the pannel, nor to the polles. 39.E.32.7.H.4.20.

Fourthly, If there be not four Knights for Electors in that County, the next to them in that County ſhall be taken. Ne curia Regis deficeret in juſtitia exhibenda. 7.H.4.20.

¶ *Sauns dire a lour eſcient.* And here it appeareth, that where the Judgment is final, there the Oath of the grand Aſſiſe or Jury is abſolute, and not to their knowledge, as here

here in the Writ of Right, in the Attaint, and in wager of Law; for the judgment in every of these three is final.

Eide Sect.193.

Regiſtrum.

¶ *Le miſe eſt joyne.* Miſe is a word of art appropriated only to a writ of Right, ſo called becauſe both parties have put themſelves upon the meer right to be tried by grand Aſſiſe or by Battail: ſo as that which in all other actions is called an Iſſue, in a writ of right in that caſe is called a miſe. And in this ſenſe Littleton taketh it here. But in a writ of right if a Collateral point is to be tried, there it is called an Iſſue, and is derived of this word (Miſum) becauſe the whole cauſe is put upon this point. It is alſo taken for expences, as Miſæ & Cuſtegia. And ſometime it ſignifieth a cuſtomary grant to the King, or Lords Marchers of Wales by their Tenants at their firſt coming to their Lands.

33.H.8.cap.13.3.E.6. ca.36.

10.E.20.31.E.3 droit. 11,22.E.3.17,18.H.3. droit.62.33.E.3.ib.39. Lamb, Explicat. verborum, verbo Mancula.

¶ *Tender di marke al Roy.* Maſter Lambard ſaith, that Mancuſa & Marca Saxonice Mancup. 7. Mearc' Nummus 30. valens denarios. And this Mearc now called a Mark, being an old Saxon word, is the cauſe that England moſt commonly reckoned by Marks. Libra Saxonice is a pund, à penſo, which is called ſo until this day. Solidus qui apud nos eſt pars libræ viceſima, denarios per id temporis continebat quinque, nunc duodecim, and Scilling is a Saxon word, and with us uſed to this day. Penſ Saxonice pennig, Latine Denarius, but the value of theſe have not been always one.

F.N.B.31.c.31 E.3. droit.15.6.E.3.ib.24.

In a Writ of Right of Advowſon brought by the King, the Tenant ſhall not tender the Di. mark, becauſe Nullum tempus occurrit Regi; and therefore the King ſhall alledge, that he or his Progenitor was ſeiſed, without ſhewing any time.

Mirror.ca.1.Sect.17.ca. 3.de Attaint.ca.5 Sect. 1.Bract.f.288, 289, &c. 292.Brit.f.241.245. 246.&c.Flet.l.5. ch.21. & 34.Fortescue.ca,26.

¶ *En attaint.* Attincta, is a Writ that lieth where a falſe Verdict in Court of Record, upon an Iſſue joyned by the parties, is given. And of antient Writers it is called Breve de convictione; And is derived of the participle Tinctus, or Attinctus; for that if the petty Jury be attainted of a falſe Oath, they are ſtained with perjury, and become infamous for ever; for the judgment at the Common Law in the Attaint importeth eight great and grievous puniſhments. 1. Quod amittant liberã legem imperpetuum, that is, he ſhall be ſo infamous, as he ſhall never be received to be a Witneſs, or of any Jury. 2. Quod fori faciant omnia bona & catalla ſua. 3. Quod terræ & tenementa in manus Domini Regis capiantur. 4. Quod uxores & liberi extra domus ſuas ejicerentur. 5. Quod domus ſuæ proſtrentur. 6. Quod arbores ſuæ extirpentur. 7. Quod prata ſua arentur, Et 8. Quod corpora ſua carceri mancipentur. So odious is perjury in this caſe in the eye of the Common Law, and the ſeverity of this puniſhment is to this end. Ut pœna ad paucos, metus ad omnes perveniat, for there is Miſericordia puniens, and there is Crudelitas parcens. And ſeeing all tryals of real, perſonal, and mixt actions, depend upon the oath of 12. men, prudent Antiquity inflicted a ſtrange and ſevere puniſhment upon them, if they were attainted of perjury.

But ſince Littleton wrote, a Statute hath been made in mitigation of the ſeverity of the Common Law, in caſe when the petty Jury is attainted: & therefore it is taken by equity. For where the Statute ſaith, that the party grieved ſhal have an Attaint againſt the party which ſhall have judgment upon the Verdict; yet an Attaint ſhall be maintained upon that Statute againſt the Executors of the party, Et ſic de ſimilibus. (a) But ſee the Statute and Authorities quoted in the Margent. Only I thought good to obſerve three things.

(a)23.H.8.ca.3. 3.El.Dyer 201. 7.E.6.ib.81. 3.Mar.ib.129. 7.El.ib.235. 24.H.8.Br.Attaint.96. 4.Mar.ib.127.20.H.7. 5.42.E.3.26.F.N.B. 107.D. Mirror,c.1.Sect.3.c.3. Sect.ca.5,Sect.1.Brac.l.3. 141.b.& l.320.331. Glanvil.l.2.ca.3,4,5. Lib.8.ca,9.Lib.4.ca.1. Brit.f.40,42 43.81. 175.190 Flera.lib.1. ca.32. & lib. 2. cap 48.

First, that no Attaint can be maintained upon this Statute, but between party and party.

Secondly, that no Conuſance can be granted upon any Attaint, becauſe all Attaints are to be taken either before the King in his bench, or before the Juſtices of the common place, and in another Courts, &c.

Thirdly, conſider what Pleas may be pleaded in an Attaint by force of this Act, and what not.

(b) 4.E.3.46.17.E.3. 19.H.6.35.1.H.4.3. 30.E.3.20.29.E.3.12. 13.H.4.4 Stan.173.178. 17.El.Dyer 3.E.4.35. 1.H 6.6.3.H.6.53. Vid.l.9.f.32.b.&.33.b. Mirror ca. 4.Del. office des Juſtices, &c. Glanvil.l.1.cap.9. lib.8.cap.8.

¶ *En battaile.* Duellum, Monomachia, and it ſignifieth in the Common Law a tryal by ſingle fight, by battle or combate, Monomachia. (b) And in the Writ of Right neither the Tenant or Demandant ſhal fight for themſelves, but find a Champion to fight for them: becauſe if either the Demandant or Tenant ſhould be ſlain, no judgment could be given for the Lands or Tenements in queſtion. But in an appeal the Defendant ſhall fight for himſelf, and ſo ſhall the Plaintiff alſo; for there if the Defendant be ſlain, the Plaintiff hath the effect of his ſuit, that is, the death of the Defendant; the order and ſolemnity whereof you may read in our antient and later books. And this the Law did inſtitute, when the Tenant failed of his Witneſſes, or Evidences, or other proofs; and the preſumption of Law is, that God will give victory to him that hath right.

¶ *Leyger.* Vadiare Legem, and there is alſo facere Legem, by making of his Law. That is, to take an oath, (for example) that he oweth not the debt demanded of him upon a ſimple contract, nor any peny thereof. And it is called Wager of Law, becauſe of antient time

time he put in surety to make his Law at such a day, and it is called making of his Law, because the Law doth give such a special benefit to the Defendant to bar the Plaintiff for ever in that suit. (r) But he ought to bring with him eleven persons of his neighbours that will avow upon their oath, that in their consciences he saith truth, so as he himself must be sworn De fidelitate, and the eleven De credulitate. Lib.10.cap.5. Bract.li.3.tract.2.ca.37. & lib.3.f.4.10. Britton.fol.56. Fleta,lib.2.ca.56.63. (r) Magna Charta,ca.28 Bracton lib.5.f.410. Fleta,lib.2.ca.63. Diversities des Courts. 33.H.6.8.

And this Wager of law lieth not when there is a speciality, or Deed to charge the Defendant, but when it proceeds by word, so as he may put or latitate the party in secret, whereof the Defendant having no testimony of witnesses may make his Law, and thereby the Plaintiff is perpetually barred, as Littleton here saith, for the law presumeth that no man will forswear himself for any worldly thing; but mens consciences be grown so large (specially in this case passing with impunity) as they choose rather to bring an Action upon the case upon his promise, wherein (because it is Trespasse sur le case) he cannot wage his Law, then an action of Debt.

A man Outlawed or attained in an Attaint, or upon an Inditement of conspiracy, or of perjury, or otherwise, whereby he become infamous, shall not wage his law. 33.H.6.32.

A man under the age of 21. years shall not wage his Law, but a Feme covert together with her husband shall wage her law. 11.H.6.40.15.E.4.2.

When the suite is for the King, or for his benefit, as in a Quo minus, the Defendant shall not wage his Law. 32.H.6.24.8.H.5.Ley.66 35.H.8.Ley.Br.102.

If an Infant be Plaintiff, the Defendant shall not wage his Law. An Alien shall wage his law in that language he can speak. 26.E.3.63.b. 21.H.6.42.

In no case where a contempt, trespasse, deceit, or injury is supposed in the Defendant, he shall wage his law, because the law will not trust him with an oath to discharge himself in those cases, onely in some cases in Debt, Detinue, Accompt, the Defendant is allowed by law to wage his Law. 44.E.3.32.18.E.3.4. 24.E.3.39.

In an action of account against a Receivor upon a receipt of money by the hand of another person for account render (unlesse it be by the hands of his wife, or his Commoigne) the Defendant shall not wage his law, because the receipt is the ground of the action, which lyeth not in privity between the Plaintiff and Defendant, but in the notice of a third person, and such a receipt is traverſable. (d) But in an action of Debt upon an Arbitrement, or in an action of Detinue by the bailment of anothers hand, the Defendant shall wage his Law, because the Debt and the Detinet is the ground of those actions; and the contract or Bailment though it be by another hand, is but the conveyance, and not traverſable. In an action of account against a Bayliff of a Manor, the Defendant cannot wage his law, because it sounds in the realty. In an action of Debt which concerns the realty, as for rent for a Rent upon a lease for years, or an action of Detinue for detaining an Indenture of a lease for years, the Defendant shall not wage his Law; much lesse for Charters or Deeds which concern inheritance. 15.E.4.16.10.E.4.5. (d) 33.H.6.24. 13.H.7. 3.2.22.H.6.41. 1.H.6.1. b 8.H.6.11.18.H.8.3. 3.E.3.28.11.H.4.54. 5.H.5.13.21.H.6.30. 24.E.3.Ley.63.30.E.3. 19.9.E.4.1. 24.H.8.Ley Gager Br. 97.

In action of Debt for a Fine or Amerciament in a Leet, the Defendant shall not wage his law, because the Leet is a court of Record; but in an action of Debt for an Amerciament in a Court Baron the Defendant shall wage his law, for that it is no court of Record. 10.H.6.7.1.H.7.15. 6.El.Bendloes.

In Debt upon an account before Auditors the Defendant shall not wage his law, and this by construction of the Statute of W. 2. cap. 11. which giveth them great authority, and saith, Coram Auditoribus; and therefore of an account before one Auditor the law lieth. So if the Lord before Auditors be found in surpluſage, in an action of Debt brought by the Accomptant, the Lord shall not wage his law by construction also upon this Statute, as an incident rising upon the account. 9.H.5.3.8.H.6.15. 22.H.6.35.38.H.6.6. 14.H.6.62.38.H.6.6.

In an action of Debt by a Gaoler against the Prisoner for his victuals, the Defendant shall not wage his law, for he cannot refuse the Prisoner, and ought not to suffer him to die for default of sustenance, otherwise it is for taking of a man at large. 28.H.6.4.19.H.6.20. 21.H.6.6.19.39.H.6.18.

In an action of debt brought by an Attorney for his Fees, the Defendant shall not wage his law, because he is compellable to be his Attorney. And so if a servant be retained according to the Statute of labourers, in an action of Debt for his Salary, his Master shall not wage his Law, because he was compellable to serve; otherwise it is, if he be not retained according to the Statute. 21.H.6.4. 33.H.6.22.32.H.6.18.

Likewise where a man is charged as Executor or Administrator, he shall not wage his Law, for no man shall wage his law of another mans Deed; but in case of a Successor of an Abbot, for that the house never dieth. 5.H.6.38.1.H.7.25. 13.H.7.

In Debt upon a penalty given by Statute, the Defendant shall not wage his law. There is another kind of wager of law in a real action, of Non summons, but thereof Littleton speaketh not. 10.H.7.18.

¶ *Et sur ceo* Herle *Justice dit, &c.* Hereby it appeareth that it is the office

See of

of the Judges to inſtruct the grand Aſſiſe or Jury in points of Law, for as the grand Aſſiſe or other Jurors are triers of the matters of fact, Ad quæſtionem facti non reſpondent Judices, ſo Ad quæſtionem juris non reſpondent Juratores. And accordingly to the Judge in this caſe directed the grand Aſſiſe, viz. if they found that, &c.

Glanv.li.12.cap.1.&c. Bracton.li.5.fol.328.

¶ *Per que fuit agard.* Here are two things to be obſerved. Firſt, the form of a Judgment final. Secondly, that a Judgment final is here to be given in this particular caſe: For the form of the final judgment for the tenant is here expreſſed, that the Tenant ſhall hold the Tenements demanded againſt him, to him and his heirs quite of the Demandant and his heirs for ever, and the Demandant in the mercy. Quod tenens teneat terram illam ſibi & hæredibus ſuis in pace verſus petentem, & hæredes ſuos in perpetuum.

Lib.5.f.85.Penrins caſe

34.E.3.Judgm.256.ad-judge accord. 13.H.4. Judgm.245.10.H.6.8. 20.H.5.38.b.21.H.6. 34.b.26.H.8.8.b. 1.Mar.Dy.98.li.5.fo 85. Penrins caſe,F.N.B.5. 11.31.

For the ſecond point ſeeing the miſe is joyned upon the mere right, albeit the verdict of the grand Aſſiſe be given upon another point, yet judgment final ſhall be given. And ſo it is if the Tenant after the miſe is joyned make default, or confeſſe the action, or if the Demandant be Non-ſuite, and yet in none of theſe caſes they of the grand Aſſiſe gave their verdict upon the mere right.

¶ *Comceſt avantdit*, Vid. Sect. 478.

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# CHAP. 9. Of Confirmation: Sect.515.

Bract.li.2.fol.32.b. & 58.49.Brit.235.

¶ HEre firſt our Author ſhews what a Confirmation is.

*Confirmation.* Confirmatio commeth of the verbe * Confirmare, quod eſt firmum facere; and therefore it is ſaid, That Confirmatio omnes ſupplet defectus, licet id quod actum eſt ab initio, non valuit. ❡ Confirmation is a conveyance of an eſtate or right in eſſe, whereby a voidable eſtate is made ſure and unavoidable, or whereby a particular Eſtate is encreaſed.

* Lit.pag.ſequen.

Bract.li.2.38.

¶ FAit de Confirmation & communement en tiel form, ou a tiel effect, Noverint univerſi, &c. me A. de B. ratificaſſe, approbaſſe, & confirmaſſe, C. de D. ſtatum & poſſeſſionem, quos habeo, de, & in uno meſſuagio, &c. cum pertin' in F. &c.

A Deed of confirmation is commonly in this form, or to this effect: *Know all men, &c. That I. A. of B. have ratified, approved, and confirmed to C. of D. the eſtate and poſſeſſion which I have, of, and in one Meſſuage, &c. with the Appurtenances in F. &c.*

Bract.li.2.fol.27.58. 38.H.6.34.37.Pl.Com. Count.de Leiceſters caſe.

❡ Confirmaſſe. Confirmatio eſt nulla ubi donum præcedens eſt inualidum, & ubi donatio nulla omnino nec valebit confirmatio, for a confirmation may make a voidable or defeaſible eſtate good, but it cannot work upon an eſtate that is void in law. Non valet confirmatio niſi ille qui confirmat ſit in poſſeſſione rei, vel juris unde fieri debet confirmatio, & eodem modo niſi ille cui confirmatio fit, ſit in poſſeſſione. And another ſaith, (c) Confirmare eſt id quod prius infirmum fuit firmare. Et donationum aliæ incepta, & defectiva, & poſt tempus confirmata, confirmatio enim omnem ſupplet defectum, poterit enim eſſe in pendenti donec per ratihabitionem hæredis cum ad ætatem perveneris roboretur.

10.E.2.Confirm.24. 32.E.3.9. (c) Fleta lib.3.cap.14. & lib.3.c.3.

44.Aſſ.3.

¶ Ratificaſſe. Ratificare eſt ratum facere, and is equi valent to Confirmare, which as hath been ſaid, is firmum facere.

¶ Approbaſſe cometh of Ad and Probo, which is to make perfect and good.

¶ Confirmaſſe. Here is to be obſerved, That there be two kinds of Confirmations, viz. Confirmations expreſſe or in Deed, whereof Littleton hath here put three examples, and Confirmations implied, or in Law, whereof Littleton hereafter ſpeaketh in this Chapter. Quælibet confirmatio, aut eſt perficiens, creſcens, aut diminuens, and of all theſe Littleton putteth examples in this Chapter. And hereof Fleta ſaith, Charta autem de confirmatione eſt illa quæ alterius factum conſolidat & confirmat, & nihil novi attribuit, quandoque tamen confirmat & addit.

Lib.9.f.142.Beamonds caſe. Flet.li.3.cap.14.

Sect.

## *Sect.* 516.

¶ ET en alcũ caſe un fait de Confirmation eſt bone et availeable, lou en tiel caſe un fait de Releaſe neſt paſſe bone, ne availeable. Sitõe jeo leſſa Terre a un home pur terme d'ſa vie, l' quel leſſa meſm̃ la terre a un auter p terme de xl. ans, per force de quel il eſt en poſſeſſion. Si jeo p mon fait confirme leſtate del Tenant a terme dans, e pais le tenant a terme de vie morust durant le terme des ans, jeo ne puis enter en la Terre durant le dit terme.

AND in ſome caſe a Deed of Confirmation is good and availeable, where in the ſame caſe a Deed of Releaſe is not good nor availeable. As if I let land to a man for terme of his life, who letteth the ſame to another for terme of forty years, by force of which he is in poſſeſſion: if I by my Deed confirme the Eſtate of the tenant for yeares, and after the Tenant for life dieth during the terme of years, I cannot enter into the Land during the ſaid term.

¶ Littleton in this Chapter putteth eight diverſities between a Confirmation and a Releaſe, and thereof for illuſtration here he putteth two caſes in this and the next Section, which upon that which hath been ſaid in the precedent Chapters, is ſufficiently explained. Only in both theſe caſes this is to be obſerved, That where a Confirmation ſhall enlarge an eſtate, there 9. H. 6. Tit. Releaſe 44. privity is required, as well as in the caſe of the releaſe, as by many examples which Littleton puts in this Chapter appeareth. And note, here is the firſt caſe wherein a releaſe and a Confirmation do differ. 49. E. 3. 32.

Leſſee for life made a Leaſe for thirty years, and after the Leſſor and Leſſee for life made a Leaſe for ſixty years to another, which Leaſe for ſixty yeers the Leſſor did firſt confirme, and after the Leſſee confirmed the Leaſe for thirty years, and after Tenant for life died within thirty yeers, and it was adjudged, (d) That the leaſe for thirty years was determined by the death of Leſſee for life, and that the leſſee for ſixty years might enter; for that albeit the leaſe for ſixty years was the latter in time, yet was it of greater force in law, for that the leſſor who hath power to confirm which of them he would, did firſt confirm the ſecond leaſe. (d) Inter Vowel & Lodge, temp. Reg. Eliz.

In this Chapter is alſo to be obſerved eight Caſes, wherein a releaſe and a Confirmation have the like operation in Law.

## *Sect.* 517.

¶ UNcore ſi jeo per mon fait de Releaſe a voy releas al tenant a terme dans en la vie le tenant a terme de vie, cel releaſe ſerra void, pur ceo que adonques ne fuit a ceſtuy privity perent moy e le tenant a terme dans, car releaſe neſt availeable al tenant a terme dans, mes lou eſt un privitie perent luy e celuy q̃ releaſaſt.

YEt if I by my deed of releaſe had releaſed to the Tenant for years in the life time of the tenant for life, this releaſe ſhall be void, for that then there was not any privity between me and the tenant for years: for a releaſe is not availeable to the Tenant for years, but where there is a privity between him and him that releaſeth.

This belongeth to the firſt diverſity between a Releaſe and a Confirmation.

## Sect. 518.

HEre is the second diuersity betweene a Release and a Confirmation. But if the Disseisor make a lease for yeares to begin at Michaelmas, and the Disseisee confirme his estate, this is void, because he hath but interesse termini, and no Estate in him whereupon a Confirmation may enure.

4.H.10.by Read. 22.E.36.

EN meisme l'manner est, si jeo soy disseisie, & le Disseisor fait un Lease a un auk pur terme dans, si jeo release al termor, ceo est voyde, mes si jeo confirma lestate l'termor, ceo est bone & effectual.

AN the same manner it is, if I be disseised, and the disseisor make a Lease to another for term of years, if I release to the Termor, this is void: but if I confirm the Estate of the Termor, this is good and effectual.

## Sect. 519.

ITem, si jeo soy disseisie, & jeo confirma lestate le Disseisor, il ad bone & droiturel estate en fee simple, coment que en le fait de confirmation nul mention est fait de ses heires, pur ceo que il avoit Fee simple al temps de Confirmation. Car en tiel case, si l'disseisee confirma lestate le disseisor, A aver & tener a luy & a ses heires de son corps engendres, ou a aver & tener a luy pur l'terme de sa vie, unque le disseisor ad fee simple, & est seisie en son demesne come de fee, pur ceo que quand ceo estate fuit confirm, donque il avoit fee simple, & tiel fait ne poit changer son Estate, sans entry fait sur luy, &c.

ALso, if I be disseised, and I confirme the estate of the Disseisor, he hath a good and rightfull estate in Fee simple, albeit in the Deed of Confirmation no mention be made of his heirs, because he had Fee simple at the time of the Confirmation. For in such case, if the Disseisee confirme the state of the Disseisor, To have and to hold to him and his heirs of his body engendred, or to have and to hold to him for term of his life, yet the Disseisor hath a fee simple, and is seised in his Demesne as of Fee, because when his estate was confirmed he had then a Fee simple, and such Deed cannot change his estate, without entry made upon him, &c.

19.H.6.22.6.E.3. Confirm.4.

HEre is the first case wherein the release and Confirmation doth agree, viz. a Confirmation to a Disseisor in taile, or for any particular estate is of the like force as a release to a Disseisor, during such estate, which in both cases is good for ever. In the same manner it is, if the Disseisor make a gift in tail, and the Disseisee confirme the Estate of the donee for the life of the donee, this confirmation makes to the whole estate tail; for a Confirmation can make no fraction of any estate, to extend but to part of the Estate only: Et sic de cæteris.

Sect.

## *Sect.* 520.

EN meisme le maner est, si son estate soit confirme pur terme de un jour, ou pur terme dun heure, il ad bon estate en fee simple pur ceo que son estate en Fee simple fuit un foits confirm. Quia confirmare, idem est, quod firmum facere, &c.

IN the same manner it is, if his estate be confirmed for terme of a day, or for terme of an hour, he hath a good estate in fee simple, for this, that his estate in fee simple was once confirmed. *Quia confirmare, idem est, quod firmum facere*, &c.

THere is the second case wherein the release and Confirmation do agree. The reason of this is, for that the Disseisor hath a Fee simple; and therefore if his estate be confirmed but for an hour, it is good for ever, because (saith Littleton) Confirmare, idem est quod firmum facere.

Note, a diversity between a bare assent without any right or interest, and an assent coupled with a right or interest; and therefore an Attornment cannot be made for a time, nor upon Condition; but if the Parson make a lease for a hundred Lib. 5. fol. 81. Fords case

years, the Patron and the Ordinary may confirm fifty of the years, for they have an interest, and may charge in time of vacation. And so if a Disseisor make a Lease for an hundred years, the Disseisee may confirm parcel of those years; but then it must be by apt words, for he must not confirme the lease, or demise, or the estate of the Lessee, for then the addition for parcel of the term should be repugnant when the whole was confirmed before, but the Confirmation must be of the land for part of the term. So may the Confirmation be of part of the land, as if it be of forty acres, he may confirm twenty, &c. So if tenant for life make a lease for a hundred years, the Lessor may confirme either for part of the term, or for part of the Land. But an estate of Free-hold cannot be confirmed for part of the estate, for that the estate is intire, and not several, as years be.

## *Sect.* 521.

ITem, si mon Disseisor fait un leas a terme de vie, le remainder ouster en fee, si jeo releas al tenant a terme de vie, ceo urera a celuy en le remainder. Mes si jeo confirm lestate d le tenant a terme de vie, uncore apres son decease jeo puis bien enter, pur ceo que riens est confirme forsque lestate le tenant a term de vie, issint que apres son decease, jeo puis enter. Mes quand jeo releas a

ALso, if my Disseisor maketh a lease for life, the remainder over in fee, if I Release to the Tenant for life, this shall enure to him in the remainder. But if I Confirme the Estate of the Tenant for terme of life, yet after his decease I may well enter, because nothing is confirmed but the Estate of the Tenant for life, so that after his de-

THere is the third case wherein the release and confirmation differ; for the Confirmation to the Tenant for life doth not enure to him in the remainder.

And so it is when the several estates be in one person, as if the Disseisor make a gift in taile, the remainder to the right Heires of Tenant in taile, if the Disseisee confirme the Estate in taile, it shall not extend to the Fee simple, no more then if the Disseisor had made a gift in taile, the Remainder for life, the Remainder to the right Heires of tenant in taile, this extendeth onely to the estate taile, and not

to the remainder for life, nor to the remainder in fee. But if the Disseisor make a lease for life to A. and B. and the Disseisee confirme the estate of A. B. shall take advantage thereof, for the estate of A. which was confirmed was joynt with B. and in that case the Disseisee shall not enter into the Land, and devest the moity of B.

If the Disseisor infeoffe A. and B. and the heires of B. if the Disseisee confirme the estate of B. for his life, this shall not onely extend to his companion, as hath been said, but to his whole fee simple, because to many purposes he had the whole fee simple in him, and the confirmation shall be taken most strong against him that made it.

Tenant in taile discontinueth in Fee and dieth, the Discontinuee maketh a lease for life, & granteth the Reversion to the Issue, he shall not have a Formedon against Tenant for life, for by his Formedon he must recover estate of Inheritance, and the Lessee for life hath not the Inheritance, but the issue in taile himself hath it.

tout mon droit al Tenant a terme de vie, ceo urera a celuy en le remainder, ou en l' reversion, pur ceo que tout mon droit est ale per tiel releas. Mes en cest cas, si le Disseisee confirme lestate & le title celuy en le remainder sans aucun confirmation fait a tenant a terme de vie, le disseisee ne poit enter sur le Tenant a term de vie, pur ceo que l' remainder est dependant sur lestate le tenant a terme de vie; & si son estate serroit defeate, le remainder serroit defeate, per lentrie le disseisee, & ceo ne serra reason que il per son entre defeateroit le remainder encounter son Confirmation, &c.

cease I may enter. But when I release all my right to the tenant for life, this shall enure to him in the remainder or in the reversion, because all my right is gone by such release. But in this case if the Disseisee confirme the estate and title of him in the remainder without any confirmation made to Tenant for life, the Disseisee cannot enter upon the Tenant for term of life, for that the remainder is depending upon the state for life; and if his Estate should be defeated, the remainder should be defeated by the entry of the Disseisee; and it is no reason that he by his entry should defeat the remainder against his Confirmation, &c.

If feoffee upon condition make a lease for life, or a gift in taile, and the feoffor release the Condition to the feoffee, he shall not enter upon the Lessee or Donee, because he cannot regain his antient estate.

If the Feoffee upon condition make a lease for life, the remainder in fee, if the Feoffor release the condition to the Lessee for life, it shall enure to him in the remainder, as well as in the case of the Right, or of a Rent, &c.

If a Feme Disseisoresse make a feoffment in fee to the use of A. for life, and after to the use of her self in taile, and the remainder to the use of B. in fee, and then taketh husband the Disseisee, and he releaseth to A. all his right, this shall enure to B. and to his own wife also, for by the rule of Littleton it must enure to all in the remainder.

But if A. letteth to B. for life, and B. maketh a lease to . for his life, the remainder to A. in fee, A. releaseth to C. all his right, this is good to perfect the estate of C. for his life. But when C. dieth, A. shall be in of his old estate, for his release could not enure to himself to perfect his defeasible remainder, but his antient right remaineth. And note, that in these two cases the fee is divested, and vested all at one instant, in the same manner, as if tenant in tail make a lease for life, at the same instant the estate tail is devested out of the Donee, and the reversion in fee out of the Donor, & a new fee vested in tenant in tail. And so if the husband make a lease for life of his wifes Land, he devesteth his own estate that he hath in her right, and the inheritance of his wife, and at the same instant vesteth a new reversion in fee in himself.

Vid. 29. Ass. 17. 30. H. 8. Recov. en value Br. 30. 13. E. 3. Entre cong. Br. 127.

¶ *Mes en cest case, si le disseisee confirme lestate et title celuy en le remainder.* Here is the third case wherein the Release and Confirmation do agree, for

for the Confirmation made to him in the remainder shall avail the tenant for life as much as the Release shall. Pl. Com. Delamers case Vid. Sect. 374.

¶ *Pur ceo que le remainder est dependant, &c.* By this some have gathered, that if a Disseisor make a lease for life, reserving the reversion to himself, and the Disseisee confirmeth the estate of the Disseisor, that he may enter upon the Lessee, because the estate of him in the Reversion dependeth not upon the estate for life as the Remainder: but all is one, for by the Confirmation made to him in the reversion, all the right of him that confirmeth is gone, as well as when he maketh it to him in remainder, and he cannot by his entry avoid the estate of the Lessee for life, but he must avoid the estate of the Lessor, which against his own Confirmation he cannot do, and it hath been adjudged, that if a Disseisor make a lease for life, and after levie a Fine of the Reversion with Proclamations, and the five years passe, so as the Disseisee is for the Reversion barred, he shall not enter upon the lessee for life. Reported by Sir John Popham chief Justice.

¶ *Le remainder serra defeat.* It is regularly true, that when the particular estate is defeated, that the remainder thereby shall be also defeated; but it faileth in divers cases.

For where the particular estate and the remainder depend upon one title, there the defeating of the particular estate is a defeating of the remainder. But where the particular estate is defeasible, and remainder by good title, there though the particular estate be defeated, the remainder is good. As if the Lessor disseise A. Lessee for life, and make a lease to *B.* for the life of A. the remainder to C. in fee, albeit A. re-enter, and defeat the estate for life; yet the remainder to C. being once vested by good title shall not be avoided; for it were against reason, that the Lessor should have the remainder again against his own livery, and this is well warranted by the reason of Littleton in this case. So it is, if a lease be made to an Infant for life, the remainder in fee, the Infant at his full age disagree to the estate for life, yet the remainder is good, for that it was once vested by good title; for in both these cases there was a particular estate at the time of the remainder created. Vid. Pl. Com. Colthirsts case.

If a lease be made to A. for the life of *B.* the remainder to C. in Fee, A. dieth before any occupant entereth, here is a remainder without a particular estate, and yet the remainder continueth good. 17. E. 3. 48.

A Rent is granted to the tenant of the land for life, the remainder in fee, this is a good remainder, albeit the particular estate continued not, for so instans that he took the particular estate. So instante the remainder vested; and the suspension in Judgment of law grew after the taking of the particular estate. 3. E. 3. Abb. Assi.

If a man grant a Rent to *B.* for the life of Alice, the remainder to the heirs of the body of Alice, this is a good remainder, and yet it must vest upon an instant. 7. H. 4. 6.

## *Sect.* 522.

¶ Item, si sont deux disseisors, & le disseisee relessa a un de eux, il tiendra son compagnion hors de la terre. Mes si le disseisee confirma lestate de lun, sans pluis dire en le fait, ascuns dient q̄ il ne tiendra son compagnion dehors, Mes tiendra joyntment oue luy pur ceo que riens fuit confirme forsque

ALso, if there be two disseisors, and the disseisee releaseth to one of them, he shall hold his companion out of the land; but if the disseisee confirme the estate of the one without more saying in the Deed, some say that he shall not hold his companion out, but shall hold joyntly with him, for that nothing was con-

¶ This is the fourth case wherein the Release and the Confirmation seem to differ, being made unto one of the Disseisors.

¶ *Confirme forsque son estate, &c.* Hereby it appeareth, that if the Disseisee confirme the estate of the one Disseisor in the lands, To have and to hold the Lands or Tenements, or the right of the Disseisee, to him and his heires, he shall hold out the other Disseisor; and that appeareth by Littleton, first upon these words (Confirme the state of one) without more saying in the Deed

Deed, viz. To have and to hold the lands &c. Secondly, the reason of Littleton in expresse words is, for that nothing was confirmed but his estate which was joynt. Thirdly, the next two Sections make it plain where the Habendum is added.

Hereby also it appeareth that a Release is more forcible in law then a Confirmation. If the Disseisee and a stranger disseise the heir of the Disseisor, and the Disseisee confirm the estate of his companion, this shall not extinguish his right that was suspended: so as if the heir of the Disseisor re-enter, the right of the disseisee is revived. And so it is, if the Grantee of a Rent-charge and an estranger Disseise the tenant of the Land, and the Grantee confirm the estate of his companion, the tenant of the land re-enter, the rent is revived; for the Confirmation extended not to the Rent suspended, otherwise it is of a Release in both cases.

## Sect. 523.

¶ ET pur ceo alcuns ont dit, que si deux Joyntenants sont, & lun confirme lestate lauter que il nad forsque joint estat, sicome il avoit avedant. Mes sil ad tiels parols en le fait de confirmation, a aver & tener a luy & a ses heires touts les Tenements dont mention est fait en le confirmation, donques il ad estate sole en les tenements, &c. Et pur ceo il est bon & sure chose en chescun Confirmation daver ceux parolx; A aver & tener les tenements, &c. en fee, ou en fee taile, ou pur terme de vie, ou pur terme dans, solonque ceo que le cas est, ou le matter gist.

AND for this some have said, that if two Joyntenants be, and the one confirme the estate of the other, that he hath but a joynt estate as he had before; but if he hath such words in the Deed of confirmation, to have and to hold to him and to his heirs all the tenements whereof mention is made in the Confirmation, then he hath a sole estate in the tenements, &c. And therefore it is a good and sure thing in every Confirmation to have these words; To have and to hold the tenements, &c. in fee, or in Fee tail, or for terme of life, or for term of years, according as the case is, or the matter lieth.

¶ AND this Confirmation leaveth the state as it was, and doth not amount to any severance of the joynture, as some have said.

34. E. 3. tit. Confirm. Pl. 15.

¶ *Mes sil ad tiel parols en le fait, &c.* This is plain and evident enough.

¶ *Et pur ceo il est bone et sure chose, &c.* This is good counsel, and worthy to be observed.

## Sect. 524.

¶ HEre the diversity is apparent between a Confirmation of the estate for life in the land, to have and to hold the said state in the land to him and his heirs, this cannot en-

¶ CAr al entent dalcuns, si hõe lessa terre a un auter pur terme de vie, & puis confirma son e-

FOr to the intent of some, if a man letteth land to another for life, and after confirme his estate which

state

eſtate que il ad en ſa terre a aver & tener ſon eſtate a luy et a ſes heires, ceſt confirmation quant a ſes heires eſt void, car ſes heires ne poient aver ſon eſtate que ne fuit ſolſque pur terme de ſon vie. Mes ſi confirma ſon eſtate p ceux parolx a aver meſme le terre a luy & a ſes heires, ceſt confirmation fait fee ſimple en ceſt caſe a luy en la terre, pur ceo que les parolx a aver & tener, &c. ba a le terre & nemy al eſtate que il ad, &c.

he hath in the ſame land, to have and to hold his eſtate to him and to his heirs, this confirmation as to his heirs is void, for his heirs cannot have his eſtate which was not but for terms of his life. But if he confirme his Eſtate by theſe words, to have the ſame land to him and to his heirs, this confirmation maketh a fee ſimple in this caſe to him in the land, for that the words to have and to hold, &c. goeth to the land and not to the Eſtate which he hath, &c.

## Sect. 525.

¶ ITem, ſi jeo leſſa certaine terre a un feſm ſole pur terme d'ſa vie, la quel prent baron, & puis jeo confirma leſtate le baron & ſa feme a aver & tener pur terme de lour deux vies, en ceſt caſe le baron ne tient joyntment oue ſa feſm, mes tient en droit de ſa feme pur terme de ſa vie. Mes ceſt confirmation urera a le baron per hop de remainder p terme de ſa vie, ſi ſurvequiſt ſa feme.

ALſo, if I let certain land to a feme ſole for term of her life, who taketh husband, & after I confirme the Eſtate of the husband & wife, to have and to hold for term of their two lives, in this caſe the husband doth not hold joyntly with his wife, but holdeth in right of his wife for term of her life. But this confirmation ſhall enure to the husband by way of remainder for term of his life if he ſurviveth his wife.

large his eſtate, for his eſtate being but for life, that eſtate cannot be extended to his heirs. But in that caſe if he confirms the ſtate for life in the land in the premiſes of the Deed, and the Habendum is in this ſore, To have and to hold the land to him and his heirs, this ſhall enlarge his eſtate and create in him a fee ſimple. 18.E.3.40.

Wherein is to be noted (e) that the Habendum and the premiſes do in ſubſtance well agree together, and that the Habendum may enlarge the premiſes, but not abridge the ſame. (e) Vid. Pl. Com. in Throgmortons caſe, fol. Wortesleys caſe, 197.

And ſeeing that in conveyances, limitations of remainders are uſual and common aſſurances, it is dangerous by conceipts or nice diſtinctions to bring them in queſtion, as hath in latter time been attempted.

¶ *Son eſtate*, Vide Sect. 650.

¶ HEre is the fourth caſe wherein the releaſe and Confirmation do agree, and in this caſe it is to be obſerved, that the Baron hath ſuch an eſtate in the Land in the right of his Wife as is capable of a Confirmation to enlarge his Eſtate; and therefore if the Confirmation had been made of his Eſtate to him alone, to have and to hold the Land to him and to his heirs, this had been good to have conveyed the fee ſimple to him after the deceaſe of his Wife; for if in this caſe a releaſe be made to the Husband and his heirs, this is ſufficient to convey the Inheritance of the Land to the Husband. Vid. Sect. 573. 16.H.6.tit. Releaſe 45. 22.E.3.tit. Releaſe. Statham.

¶ *Ne tient joyntment que ſa feme*. For two cauſes, Firſt, becauſe the

the wife hath the whole for her life. Secondly, Joyntenants must (as hath been before said the Chapter of Joyntenants) come in by one title. But in this case, if the Confirmation had been made to the Husband and Wife, To have and to hold the land to them two and to their heirs, they had been Joyntenants of the Fee simple, and the husband seised in the right of his wife for her life; for the husband and the wife cannot take by moities during the Coverture.

18 E3.20.

If a man letteth land to the husband and wife, to have & to hold the one moity to the husband for term of his life, and the other moity to the wife for her life, and the lessor confirme the estate of them both in the land, To have and to hold to them and to their heirs, by this Confirmation, as to the moity of the husband, it enureth only to the husband & his heirs; for the wife had nothing in that moity; but as to the moity of the wife, they are Joyntenants, as hath been said; for the husband hath such an estate in his wives moity, in her right, as is capable of a Confirmation. But if such a lease for life be made to two men by several moities, and the Lessor confirme their estates in the land, To have and to hold to them and to their heirs, they are tenants in common of the inheritance; for regularly the Confirmation shall enure according to the quality and nature of the Estate which it doth enlarge and increase.

18.Ass.p.3.18 E.3. Comm.17.17.E.3.68. 28.E.3.94.40.40.E.3. 8.Ass 20.

If a lease for life be made to A. the remainder to B for life, and the Lessor confirme their Estates in the land, To have and to hold to them and their heirs, A. taketh one moity to him and his heir; and therefore of the one moity he is seised for life, the remainder to B. for life, and then to him and his heirs: Of the other moity A. is seised for life, the immediate inheritance to B and his heirs, because as to the moity which B takes, the same is executed; as if the Reversion be granted to tenant for life, and to a stranger, it is executed for one moity (as hath been said before) and therefore in this case they are tenants in common.

39 H.6.9.

If lands be given to two men, and to the heirs of their two bodies begotten, and the Donor confirmeth their two estates in the land, To have and to hold the land to them two and to their heirs: In this case some are of opinion, That they shall be Joyntenants of the Fee simple, because the Donees were Joynetenants for life; and (say they) the Confirmation must enure according to the estate which they have in possession, and that was joynt. But others hold the contrary; for first they say, That the Donees have to some purposes several Inheritances executed, though between the Donees survivor shall hold for their lives. Secondly they say, That when the whole estate which comprehendeth several Inheritances, is confirmed, the Confirmation must enure according to the several Inheritances, which is the greater and most perdurable estate; and therefore that the Donees shall be tenants in common of the Inheritance in this case.

Vid.Sect.573.

¶ *Per voy de remainder, &c.* Here some question hath been made of this term Remainder, without any cause at all, because in law it is in nature of a Remainder. For in case of a fine, when a reversion expectant upon an estate for life in A. is granted to *B.* Et quæ ad ipsum reverti debet post mortem A. præfato B. & hæredibus suis remaneant, &c. and a more colourable exception might be taken against this word Remaneant there, then in the case of Littleton.

Pl.Com, Colthirsts case Doct.& Stud.ca.21,

*16.H.6.tit.Release 45 (o) 9.E.4.18. (p)6.E.3.9. (q)17.E.3.68.b.

It is true, That in * 16.H.6. it is called a reversion: in (o) 9.E.4. it is called a Remainder: in (p) 6.E.3. it is said, That by the Confirmation an estate accrued to the husband for term of his life. In (q) 17.H.E.3. the husband, living the wife, shall have nothing but in abeyance after the death of his wife. But lest there should be pugna verborum, which learned and wise men ever avoid, all do resolve, That the estate of the husband is good, and that it doth enure by way of increase and inlargement of his estate. And albeit in this case of Littleton, the husband by the Confirmation gaineth an estate for life in remainder (as Littleton termeth it) yet if the husband doth waste, an action of waste shall lie against him and his wife, notwithstanding the mean remainder, because the husband himself committeth the waste, and doth the wrong; and therefore shall not excuse himself for his committing of waste, in respect he himself hath the remainder: no more, then if a man lesseth to A during the life of B the remainder to him during the life of C. if he commit waste, an action of waste shall lie against him.

17.E.3.68.b. Vi. Sir Ed. Caries case, li.5. f.76.b.

## Sect. 526.

5.E.3.17.b.Pl.Com. 418.b.3.H.6.23. 140.H.4.12.38.E.3.35. Pl.Com.Dame Holes case,50.Ass.p.15. 4.H.6.5.7.H.9.1. 9.H.6.52.37.Li.Ass. 21.H.7.29.21.E.4.40. 26.H.8.7.

¶ This is the fifth Case wherein the Release and confirmation do agree: and it is to be observed, That Chattels reals, as Leases for yeares, Wardships, Annuities, Rents, Commons, Estovers, and the like, are not inheritances, nor yet Freehold, but Chattels reals, and go to the Executors and Administrators, and not to the Heir.

¶ Mes si jeo lessa al Feme sole terre pur terme dans, le quel prent

But if I let land to a Feme sole for terme of yeares, who taketh husband, and afterwards

baron

baron, & puis feo ter I confirm the eſtate of the husband and his wife, to have and to hold the land for term of their two lives: In this case they have a joynt Eſtate in the Freehold of the Land, for that the wife had no Freehold before, &c.

baron & la feme, a aber & tener la terre pur terme d lour dur dies: en ceſt caſe ils ont joynt eſtate en le Franketenement de la terre, pur ceo que la feſm navoit Franktenement adevāt, &c.

mation in this case to the Husband and Wife for their lives, life, because a chattel of a Feme covert may be drowned: and so note a diversity between a lease for life, and a lease for years, made to a Feme covert; for her eſtate of Freehold cannot be altered by the Confirmation made to her husband and her, as the term for yeers may, wherof her Husband may make diſpoſition at his pleaſure.

## *Sect.* 527.

¶ ITem, ſi mon diſſeiſor granta a un vent charge hors de la terre dont il mon diſſeiſit it feo reherſant le dit grāt confirma meſme le grant, & tout ceo que eſt compriſe deins meſme le graunt, & puis feo enter ſur le Diſſeiſor, Quære, en ceſt caſe, ſi le Terre ſoit diſcharge de le Rent ou nemy.

ALſo, if my Diſſeiſor granteth to one a Rent-charge out of the Land whereof he diſſeiſed me, and I rehearſing the ſaid Grant, confirm the ſame Grant, and all that which is compriſed within the ſame Grant, and after I enter upon the Diſſeiſor, *Quære* in this caſe, if the land be diſcharged of the Rent or no.

the heir of the Diſſeiſor grant a rent-charge, and the Diſſeiſee confirmeth it, and after recover the Land, he ſhall not avoid the Rent: and yet in neither of theſe caſes his entry was congeable at the time of the Confirmation.

¶ THis is the ſixth caſe wherein the Releaſe and Confirmation do differ; for a Releaſe to the Grantee in this caſe (a) were void. It is holden by ſome authority ſince Littleton wrote, That the Diſſeiſee after his re-entry ſhall not avoid the Rent charge againſt his own Confirmation: and there a general rule is taken, that ſuch a thing as I may defeat by my entry, I may make good by my Confirmation.

(a) 11. H. 7. 28. Lib. 1. fol. 147. Anne Mayowes caſe, 3. H. 4. 10.

If the Feoffee upon condition grant a Rent-charge in Fee, and the Feoffor confirmeth it, and after the condition is broken, and the Feoffor enter, he ſhall not avoid the Rent-charge. And ſo it is if

Lib. 1 fol. 147, 148. Anne Mayowes caſe.

## *Sect.* 528.

¶ ITem, ſi un parſon dun Eſgliſe charge le glebe de ſon Eſgliſe per ſon fait, & puis l'Patron & Ordinarie

ALſo, if a Parſon of a Church charge the Glebe land of his Church by his deed, and after the Patron and ordinary con-

¶ *Parſon.* Perſona in the Legall ſignification, it is taken for the Rector of a Church parochial, and is called Perſona Eccleſiæ, because he aſſumeth and taketh upon him the perſon of the Church, and is ſaid

Glanv. l. 13. ca. 23, 24, 25. Bract. li 4. ca. 285. &c. Brit. fo. 234. b. &c. Flet. li 5 ca 19, 20. & lib. 6. ca. 18. Reg. F. N.

ſaid to be ſeiſed in jure Eccleſiæ, and the law had an excellens end herein, viz. That in his perſon the Church might ſue for and defend her right, and alſo be ſued by one that had an Elder and better right; and when the Church is full, it is ſaid to be plena & conſulta of ſuch a one Parſon thereof, that is full and endued of a Parſon, that may vicem ſeu perſonam ejus gerere.

Brit. ubi ſupra.

Perſona imperſonata. Parſon Imparſonat is the Rector that is in poſſeſſion of the Church Parochial, be it preſentative, or impropriate, and of whom the Church is full.

8.E.3.26.43.38.E 3.4. 3.Mar.Dier.123.

Here are diuers things to be noted: Firſt, That the Confirmation is of the grant which in Deed is but a mere aſſent by Deed to the Grant. And therefore it is holden, That if there be Parſon, Patron, and Ordinary, and the Patron and Ordinary give license by Deed to the Parſon to grant a Rent charge out of the glebe, and the Parſon granteth the Rent charge accordingly, this is good, and ſhall bind the Succeſſor; and yet here is no Confirmation ſubſequent, but a License precedent.

7.H.4.15.

Secondly, the Ordinary alone, without the Dean and Chapter, may agree thereunto, either by license precedent, or Confirmation ſubſequent, for that the Dean and Chapter hath nothing to do with that which the Biſhop doth as Ordinary, in the life time of the Biſhop.

Thirdly, (b) but if the Biſhop be Patron, there the Biſhop cannot confirm alone, but the Dean and Chapter muſt confirm alſo, for the advowſon or Patronage is parcel of the poſſeſſion of the Biſhoprick; and therefore the Biſhop without the Dean and Chapter cannot make the grant good, but only during his own life, after the deceaſe of the Incumbent, either by license precedent, or Confirmation ſubſequent.

(b) 19.El.Dy.356,357. 11.H.6.9.33.H.8.tit. Charge Br.58.

See more of theſe kinds of Confirmations in my reports. Lib 2.39.& 24.Li.1.153. Lib.4.13.24.Lib.5. fol.31.81.li.10.6.lib.11. 19.Lib.6.34.

A. Parſon of D. is Patron of the Church of D. as belonging to his Church, and preſents B. who by conſent of A. and of the Ordinary grants a Rent-charge out of the Glebe; this is not good to make the Rent-charge perpetual, without the aſſent of the Patron of A. no more then the aſſent of the Biſhop who is Patron, without the Dean and Chapter, or no more then the aſſent of the Patron, being tenant in tail or for life, as Littleton ſaith. And Littleton here ſaith, that the Patron that confirms muſt have a Fee ſimple, meaning to make the charge perpetual. And Littleton after ſaith, that in the caſe of the Parſon the fee is in abeyance, and ſuing the conſent of the Patron is reſpect of his intereſt as heir, it appeareth by Littleton he may conſent upon condition; otherwiſe it is of an Attornment, becauſe that is a bare aſſent. Alſo if the eſtate of the Patron be conditional, and he confirmeth, and after the Condition is broken, his Confirmation is void.

31.E.3.Grant.61.26. Aſſ.38.1.El D.252. Vid lib.fol.Le caſe, de Dean & Chapter. de Norwich.

Fourthly, he that is Patron muſt be Patron in Fee ſimple; for if he be Tenant in tail, or tenant for life, his Confirmation or agreement is not good to bind any Succeſſor, but ſuch as come into the Church during his life. But if the Patron be Tenant in tail, and diſcontinue the eſtate in Tail, the Leaſe ſhall ſtand good during the diſcontinuance; or if the eſtate tail be barred it ſhall ſtand good for ever.

12.H.4.11.19.E.3.7. 7.El.Dyer.238. 11.H.6.9.10.El.By. 6.E.3.10.1.E.3.25. 9 E.4.6 2.H.4.11. 38.E.3.19.25.E.3.54.

But here is to be obſerved a diverſity between a ſole Corporation, as Parſon, Prebend, Vicar, and the like, that have not the abſolute Fee in them, for to their Grants the Patron muſt give his conſent. But if there be a Corporation aggregate of many, as Dean and Chapter, Maſter, Fellows, and Scholars of a College, Abbot or Prior, and convent, and the like, or any ſole Corporation that hath the abſolute Fee, as a Biſhop with conſent of the Dean and Chapter, they may by the Common Law make any grant of or out of their poſſeſſions, without their Founder or Patron, albeit the Abbot or Prior, &c. where preſentable: and ſo it is of a Biſhop, becauſe the whole eſtate and right of the Land was in them, and they may reſpectively maintain a Writ of Right.

confirmont meſme le grant, & tout ceo que ē compriſe deins ſi le grant, donques le grant eſtoyera en ſa force, ſolonq; l' purport de meſme le graunt. Mes en tiel caſe covient que le Patron eit Fee ſimple en laſowſon, car ſi nad eſtate en Laſowſon forſque pur terme de vie, ou en le taile, donque l' grant ne eſtoyera forſque durant ſa vie, & ſa vie l' Parſon q̄ grantaſt, &c.

firme the ſame Grant, and all that is compriſed in the ſame Grant, then the Grant ſhall ſtand in his force, according to the purport of the ſame Grant. But in this caſe it behoveth, that the Patron hath a Fee ſimple in the Advowſon; for if he hath but an Eſtate for life or in taile in the advowſon, then the Grant ſhall not ſtand, but during his life, and the life of the Parſon which granted, &c.

If a Bishop hath two Chapters, and he maketh a grant, both Chapters must confirm it, or else the Successor shall avoid it. But if one of the Chapters be dissolved, then the confirmation of the other sufficeth, but it needeth not the confirmation of the King who is founder and patron of all Bishoprickes. Temps R. 2. tit. grants 104. 50. E. 3. tit. Assise Statham. 11. Eliz. Dyer 282.

And note a diuersity betweene a confirmation of an Estate, and a Confirmation of a Deed, for if the Disseisor make a Charter of feoffment to A. with a Letter of Attorney, and before Liuery the Disseisee confirme the estate of A. or the Deed made to A. this is cleerly void, though liuery be made after. But if a Bishop had made a Charter of feoffment with a letter of Attorney, and the deane and Chapter before liuery confirm the deed, this is a good confirmation, and liuery made afterwards is good. And so it hath been adjudged.

The like law is of a confirmation of a Deed of grant of a Reuersion before Attornment.

In the same manner it is, if a Bishop at the common law had granted lands to the King in fee by Deed, and the Dean and Chapter by their Deed confirme the deed of the Bishop, and after the deed of the Bishop is inrolled, this is good, albeit the confirmation of the Dean and Chapter be not inrolled, for the assent upon the matter is made to the Bishop.

But this confirmation that Littleton here speaketh of must be made in the life, and during the incumbency of the person, and so in the life of the Bishop, or of any other sole corporation. But it is to be known, that Grants made by parsons, prebends, Vicars, Bishops, Master and Fellowes of any Colledge, Deane and Chapter, Maister or Gardeine of any Hospitall, or any having any Spirituall or Ecclesiasticall liuing are restrained by (c) diuers Acts of parliament, so as they cannot grant any rent charge, or to make any alienation, or to make any leases other then such as are mentioned in those acts, which you may read at large. And the expositions upon the same, in my * Commentaries. 33. E. 3. Confirm. 22. 31. E. 3. Abb. 10 21. H. 7. 1. Vide Sect. 393. & 643. (c) 13. Eliz. cap. 10. 1. Eliz cap. 18. Eli. c. 11. 1. Jac. cap. 3. Vide Sect. 593. & 648. * Lib. 2. fol. 46. l. 4. 76. & 120. li. 5. 9. 6. 14. lib. 6. 37. lib. 7. 8. lib. 11. 67.

## Sect. 529.

¶ Item si home lessa terre pur terme de vie, le quel tenant a terme de vie charge la terre ode un rent en fee, & celuy en le reuersion confirma mesme le grant, le charge est assets bone & effectual.

ALso if a man letteth land for term of life, the which Tenant made for life charge the land with a rent in fee, and he in the reversion confirme the same grant, the charge is good enough and effectual.

THere is a diversity to be observed where the determination of the rent is expressed in the Deed, and when it is implied in Law. For when a Tenant for life granteth a rent in fee, this by law is determined by his death, and yet a confirmation of the grant by him in the reversion makes that grant good for ever without words of inlargement or clause of distress, which would amount to a new grant. And yet if the Tenant for life had granted a Rent to another and his heires by expresse words during the life of the Grantor, and the Lessor had confirmed that grant, that grant should determine by the death of tenant for life. 26. Ass. Pl. 38. 45. Ass. Pl. 13. Lib. 1. fol. 147. Anne Mayowes case. 14. Ass. Pl. 14.

Tenant for life upon a condition grants a Rent in fee, the lessor confirmes the grant, and after the condition is broken, the Lessor re-enters, he shall not avoid the grant.

## Sect. 530.

¶ Item si soit un perpetual chanterie, dont lordinarie nad rien a medler ne affaire, Quære si le Patron del chaunte-

ALso if there be a perpetual Chanterie wherewith the ordinary hath nothing to doe or meddle, Quære if the Patron of

THis is meant of a Chauntery Donative wherewith the Ordinary hath not to deale; and by this grant, when Littleton wrote, the Chantery should have been charged for ever, because no other had any interest in this Chantery

Vide Sect. 468.

ſave onely the Patron and Chauntery Priest, and the grant is made Concurrentibus iis quæ in jure requiruntur. But ſince Littleton wrote all, and all manner of free Chappels and Chanteries perpetual, whereof Littleton here ſpeakes, are by (a) Acts of parliament given to the Crown, and the bodies politike thereof diſſolved. See hereafter, Section 648. more at large of all this preſent Section.

(a) 37.H.8.cap.4. 1.E.6.cap.14.

ry, & le Chapleine de meſme le chauntery poient charge le chantery ove un Rent charge en perpetuitie.

the Chantery, and the Chapleine of the ſame Chantery may charge the Chantery with a rent charge in perpetuitie.

## *Sect.* 531.

¶ HEre Littleton proceedeth according to the former diviſion, to ſhew words that in Law doe amount to a Confirmation. And here is to be obſerved, that ſome words are large and have a general extent, and ſome have a proper and particular application. The former ſort may containe the latter, as Dedi, or Conceſſi may amount to a grant, a feoffement, a gift, a leaſe, a Releaſe, a Confirmation, a Surrender, &c. and it is in the Election of the party to uſe to which of theſe purpoſes he will.

Bra.l.2.fo.59.b.21.H.6. feoffments & faits 103. 22.H.6.42.14.H.4.36. 19.H.6.44.7.H.7.16. 32.E.3.briefe 291. Brooke tit.Confirm.20. 14.H.7.2.27.H.6.17. Dyer 8. Eliz.4.H.7.10. 22.E.4.36.40.E.3.41.

¶ ITem en aſcun cas teſt verbe Dedi ou teſt verbe Conceſſi, ad meſme leffect en ſubſtãce, & urera a meſm lentẽt come teſt verbe Confirmavi. Sicome jeo ſue diſſeiſie dun carbe de terre, & jeo face tiel fait; Sciant præſentes, &c. quod dedi a le diſſeiſor, &c. vel quod conceſſi a le dit diſſeiſor le dit carbe, &c. & jeo deliver tantſolement le fait a luy ſauns aſcun livery de ſeiſin del terre, teſt un bone Confirmation, & auxy fort en ley, ſicome il avoit en le fait teſt verbe confirmavi, &c.

ALſo in ſome caſe this Verbe *Dedi*, or this Verbe *Conceſſi* hath the ſame effect in ſubſtance, and ſhall enure to the ſame intent, as this Verbe *Confirmavi*. As if I be diſſeiſed of a Carve of Land, and I make ſuch a deed, *Sciant præſentes*, &c. *quod dedi* to the Diſſeiſor, &c. or *quod conceſſi* to the ſaid Diſſeiſor, the ſaid Carve, &c. and I deliver onely the Deed to him without any livery of ſeiſin of the land, this is a good confirmation, & as ſtrong in Law, as if there had been in the Deed this verbe *Confirmavi*, &c.

Bracton lib.3.fo.59.b.

Eſt autem Confirmatio quaſi quædam ratihabitio, ſufficit tamen quandoque per ſe, ſi etiam in ſe contineat donationem, ut ſi dicat quis, dedi & confirmavi, licet juvari poſſit ex aliqua donatione præcedente.

But a Releaſe, confirmation, or Surrender, &c. cannot amount to a grant, &c. nor a Surrender to a confirmation, or to a releaſe, &c. becauſe theſe be proper and peculiar manner of conveyances, and are deſtined to a ſpecial end.

¶ *Dedi & Conceſſi*, &c. Here is implied that there be more words then Dedi and Conceſſi, that will amount to a confirmation, as dimiſi, (e) In ancient Statutes and in original Writs, as in the Writ of Entry in caſu proviſo, in conſimili caſu ad Communem legem, and many others, this word dimiſi is not applied onely to a leaſe for life, but to a gift in tayle, and to a State in fee. (f) Alſo if a man make a leaſe to A. for years, and after by his Deed the leſſor Voluit quod haberet & teneret terram pro termino vitæ ſuæ: This is adjudged by this Verbe (Volo) to be a good confirmation for terme of his life. Benigne enim faciendæ ſunt interpretationes cartarum propter ſimplicitatem laicorum, ut res magis valeat quam pereat.

(e)32.E.3.briefe 291. Brooke tit.Confirm.20. Vid.leſtat.de Glouc.c.4. (f)7.E.3.9.

Bracton.

14.H.4.36. Lib.5.fo.15. in Newcomens caſe.

And he to whom ſuch a Deed comprehending Dedi, &c. is made may plead it as a Grant, as a releaſe, or as a confirmation, at his election.

If a Parſon and Ordinary make a Leaſe for years of the Glebe, to the Patron, and the

Pa-

Patron by his Deed granteth it over, or if the Diſſeiſor granteth a Rent to the Diſſeiſee, and he by his deed granteth it over, and after re-enter, in both theſe caſes one and the ſame words doe amount both to a grant and to a confirmation, in judgment in law, of one and the ſame thing, *ne res pereat*. And ſo it is if a Diſſeiſor make a Leaſe for life, or a gift in taile, the remainder to the Diſſeiſee in fee, the Diſſeiſee by his Deed granteth over the remainder, the particular Tenant attorneth, the Diſſeiſee ſhall not enter upon the tenant for life, or in taile, for then he ſhould avoide his own grant, which amounteth to a grant of the eſtate, and a confirmation alſo.

## *Sect.* 532.

¶ Item ũ jeo leſſa terre a un home pur terme dans, per force de quel il eſt en poſſeſſion, &c. Et puis jeo face un fait a luy, &c. Quod dedi & conceſſi, &c. le dit terre a aver put terme de ſa vie, & deliver a luy le fait, &c. donqz maintenant il ad eſtate en le terre pur terme de ſa vie.

ALſo if I let land to a man for terme of years, by force whereof he is in poſſeſſion, *&c.* and after I make a Deed to him, *&c. Quod dedi & conceſſi*, &c. the ſaid land to have for term of his life, and I deliver to him the Deed, *&c.* then preſently he hath an eſtate in the Land for terme of his life.

HEre is the firſt Caſe, wherein the Confirmation and the releaſe do agree: And is evident and needeth no explication.

## *Sect.* 533.

¶ Et ũ jeo die en le fait, a aver & tener a luy et a ſes heires de ſon corps engendres, il ad eſtate en fee taile, & ũ jeo die en le fait, a aver & tener a luy & a ſes heires, il ad eſtate en fee ſimple, car ceo urera a luy per force de confirmation denlarger ſon eſtate.

AND if I ſay in the Deed, to have and to hold to him and to his heires of his body ingendred, he hath an eſtate in fee taile. And if I ſay in the deed, to have and to hold to him and to his heires, he hath an eſtate in fee ſimple. For this ſhall enure to him by force of the confirmation to enlarge his eſtate.

¶ THis alſo is evident and needeth no explication, ſaving that whenſoever a Confirmation doth enlarge and give an eſtate of inheritance, there ought to be apt words (as Littleton here expreſſeth them) uſed for the ſame.

## *Sect.* 534.

¶ Item ũ home ſoit diſſeiſie, et le diſſeiſor debie ſeiſie, et ſon heire eſt eins per

ALſo if a man be diſſeiſed, and the diſſeiſor die ſeiſed, and his heire is in by diſcent,

¶ *Quant al heir del diſſeiſor &c. les tenements paſſont per voy de feoffment*, For the

the land ſhall ever paſſe from him that hath the eſtate of the land in him. As if Ceſty que uſe and his feoffees after the Statute of 1. R. 3. and before the Statute of 3. H.8.cap.10. had joyned in a feoffment, it ſhall be the feoffment of the Feoffees, becauſe the eſtate of the land was in him.

21.H.7 31.b.pl.Com. 59.a.in Wimbiſhes caſe.

So it is, if the Tenant for life, and he in the remainder or reverſion in Fee joyn in a feoffment by Deed; The Livery of the freehold ſhall move from the leſſee, and the inheritance from him in the reverſion or remainder, from each of them according to his eſtate. For it cannot be adjudged by law, that the feoffment of Tenant for life doth draw the reverſion or remainder out of the leſſor or him in remainder, or doth work a wrong, becauſe they joyned together.

Pl.Com.59.a. Pl.Com 140.in Brownings caſe 2.H.5.7. 17.H.7.14.13. E.4.4.a. 27.H.8.13. M.16.& 17. Eliz.339.

If there be Tenant for life, the remainder in taile, &c. and Tenant for life and he in the remainder in taile levie a Fine, this is no diſcontinuance or diveſting of any eſtate in remainder, but each of them paſſe that which they have power and authority to paſſe.

Lib.1.fo.76. Bredons caſe.

A. Tenant for life, the remainder to B. for life, the remainder in taile, the remainder to the right heires of B. A. and B. joyne in a Feoffement by Deed, albeit it may be ſaid that this is the Feoffement of A. and the confirmation of B. and conſequently he in the remainder in taile cannot enter for the forfeiture during the life of B. But becauſe B. joyned in the Feoffment which was tortious to him in the remainder in taile, and is Particeps criminis, therefore they forfeited both their eſtates, and he in the remainder in taile might enter for the forfeiture. But if he in the reverſion in fee and tenant for life joyne in a Feoffment by parol, this ſhall be (as ſome hold) firſt a ſurrender of the eſtate of Tenant for life, and then the feoffment of him in the Reverſion; for otherwiſe if the whole ſhould paſſe from the Leſſee, then he in the reverſion might enter for the forfeiture, and every mans act (Ubi res magis valeat) ſhall be conſtrued moſt ſtrongly againſt himſelf.

17.Eliz.Dier 339.

Diſcent, et puis le diſſeiſee & heire le diſſeiſor ſont joyntment un fait a un auter en fee, et livery de ſeiſin ſur ceo eſt fait (quant al heire le diſſeiſor, que enſealaſt le fait) les tenemẽts paſſont et uront per meſme le fait p voy de feoffement, et quant al diſſeiſee que enſealaſt meſme le fait, ceo ne urera ſinon p voy de confirmation. Mes ſi le diſſeiſee en ceſt cas port briefe dentre en le Per & Cui envers la lienee del heir le diſſeiſor: Quære coment il pledra cel fait envers l'demandant per voy de confirmation, &c. Et ſaches, mon fits, que eſt un des pluis honorables, laudables, & profitables choſes en noſtre ley, de aver le ſcience de bien pleder en actions reals et perſonals, et pur ceo jeo toy counſaile eſpecialment de mitter ton courage et cure a ceo apprender.

and after the diſſeiſee, and the heire of the diſſeiſor make joyntly a Deed to another in fee, and livery of ſeiſin is made upon this, (as to the heire of the Diſſeiſor that ſealed the deed) the tenements doe paſſe and enure by the ſame deed by way of Feoffment; and as to the Diſſeiſee who ſealed the ſame Deed, this ſhall enure but by way of Confirmation. But if the Diſſeiſee in this caſe brings a Writ of entrie in the *Per* and *Cui* againſt the alienee of the heire of the Diſſeiſor: *Quere* how he ſhall plead this Deed againſt the Demandant by way of confirmation, *&c.* And know, my ſon, that it is one of the moſt honorable, laudable, and profitable things in our Law, to have the ſcience of well pleading in actions reals and perſonals; and therefore I counſaile thee eſpecially to imploy thy courage and care to learn this.

And it is to be obſerved, that Littleton here putteth a diſcent, ſo as the entry of the diſſeiſee is not lawful: for if the diſſeiſor and diſſeiſee joyne in a Charter of feoffment, and enter into the land, and make livery, it ſhall be accounted the feoffment of the Diſſeiſee, and the confirmation of the Diſſeiſor.

Quere

¶ *Quære coment il pledera ceſt fait*, &c. He may pleade the feoffment of the heire of the Diſſeiſor, and the confirmation of the Diſſeiſee as it hath been pleaded, and allowed. Llb.1.fo.146,147. Mayowes caſe.

¶ *Et ſaches, mon fils, que eſt un de pluis honorable*, &c. Here is to be obſerved the excellency of good pleading; and Littletons graue advice, that the Student ſhould imploy his courage and care for the attaining thereof: which he ſhall attaine unto by three meanes: Firſt by reading, ſecondly by obſervation, and thirdly by uſe and exerciſe. For in ancient time the Serjeants and Apprentices of Law did draw their own pleadings, which made them good pleaders. And in this ſenſe Placitum may be derived a Placendo, quia omnibus placet. See my preface to the 9th Book of my Reports.

Now ſeeing good pleading is ſo honourable and excellent, and that many a good cauſe is daily loſt for want of good and orderly pleading, it is neceſſary to ſet down ſome few rules (amongſt many) of the ſame, to facilitate this learning, that is ſo highly commended to the ſtudious Reader. For when I diligently conſider the courſe of our books of yeares & terms from the beginning of the raigne of Edw.3. I obſerve, that more jangling and queſtions grow upon the manner of pleading, and exceptions to forme, than upon the matter it ſelfe, and infinite Cauſes loſt or delayed for want of good pleading. Therefore it is a neceſſary part of a good common Lawyer to be a good Prothonotary. And now we will performe our promiſe.

The order of good pleading is to be obſerved, which being inverted, great prejudice may grow to the party, tending to the ſubverſion of Law. Ordine placitandi ſervato, ſervatur & jus, &c. (a) Bracton li.5.fo.400. Britton fo.41.2.& 122. Fleta l.6.cap.35,36,&c. 40.E.9.b.17. E.3.74. 8 E.3.5.& 9.35.H.6.12. (b) Pl.Com.fo.121,122. 3.E.4.21. Vid.lib.5.fo.120,121. (c) Bracton li.2.fo.140.

First in good order of pleading, a man muſt plead to the juriſdiction of the Court. Secondly to the perſon, and therein firſt to the perſon of the Plaintiff, and then to the perſon of the Defendant. Thirdly to the Count. Fourthly to the Writ. Fifthly to the Action, &c. (a) which order and forme of pleading you ſhall read in the ancient Authors agreeable to the Law at this day; and if the Defendant miſorder any of theſe, he loſeth the benefit of the former. (d) Lib.5.120.121. Lombs caſe Pl.Com.56. Wimbiſhes caſe. (e) 7.H.6.17.32.H.6. 12,15.Pl.Com.33.b. (f) 34.H.6.48.8.H.5. 4.b.21.E.4.52.5.E.3. 15.39.H.6.3.10. H.6.2. 21.H.7.26.

The Count muſt be agreeable and conforme to the Writ, the bar to the Count, &c. and the judgments to the Count, for none of them muſt be narrower or broader then the other. (g) 18.E.3.8.2. H.4.13. 6.H.4.2.b.10.E.4.2. F.N.B.156.c.

A Count or Declaration, which anciently and yet is called Narratio, ought to containe two things (b) viz. Certainty and verity, for that it is the foundation of the ſuite, whereunto the adverſe party muſt anſwer, and whereupon the court is to give its judgement. (c) Certa debet eſſe intentio & narratio, & certum fundamentum, & certa res quæ deducitur in judicium. But it muſt be underſtood, that there be three kind of certainties: Firſt to a common intent, and that is ſufficient in bar, which is to defend the party and to excuſe him. (d) Secondly a certaine intent in general, as in Counts, Replications, and other pleadings of the Plaintiff, that is, to convince the Defendant, and ſo in Indictments, &c. Thirdly a certaine intent in in every particular, as in Eſtoppels. 11.E.3.Aide 32.9. H.6. 53.10.E.4.4. (h) Pl.Com. Brets caſe. 342.27 *H.*8.27. 27.H.6.9.H.7. (i) 40.E.3.31,32,33. 41.E.3 11.9.H.6.46. 27.E.3.81,44.E.3.23. 45.E.3. *Double plea.*39. 43.E.3.21.36.H.6.29. 37 H.6.23.33.*H.*6.51. 15.E.4.25.7.*H.*4.12. 4.E.3. *Double plea.*78.

(e) He that pleadeth a in abatement of the Writ (which of antient times was, and yet is called Breve) or a plea after the latter continuance, ought to plead it certainly.

(f) The ancient formes of counts are to be duely obſerved, as Cum demiſit, or Cum dedit, and not to ſay that he was ſeiſed and demiſed, &c. (And yet if he ſay too it maketh not the count vicious) (g) but in a barre, replication, or other kind of pleading, the party muſt allledge a ſeiſin in the leſſor or Donor, and ancient formes of pleading are alſo to be obſerved. (k) Pl.Com.81.11. *H.*4. 89.34.*H.*6.48.19.R.2. Action ſur le caſe 52. 22.E.3.19.30.E.3.9.

(h) Counts, or ſuch as be in nature of counts (as an Avowry, wherein the Defendant is an actor) need not to be averred, but all other pleas in the Affirmative ought to be averred. Et hoc paratum eſt verificare, &c. but pleas meerly in the Negative oughe to be averred, becauſe a Negative cannot be proved. (l) 5.H.7.8.6.E.4.2. 21.*E.*4.44.27.H.8.4. 22.H.6.17.E.4.7. 22.H.4.8.

(i) Where there is but one Tenant, or one defendant, he cannot have two ſuch pleas, as each of them do goe to the whole; but where there are divers, each of them may plead ſeveral pleas which extend to the whole. (m) Pl.Com.65 a.b. & 100,376.& 410. 22.*H.*6.38.19 *H.*6.49. 37.H.6.14.36 H.6.5.

(k) That which is alledged by way of conveyance or inducement to the ſubſtance of the matter need not to be ſo certainly alledged, as that which is the ſubſtance it ſelfe. 21.*E.*2.54.11.H.6.15. 38.H.6.23.42. Aſſ.3. 48.E.3.11.4 E.4.12.

( ) Every plea muſt be direct, and not by way of argument, or rehearſal. 9.E.3.46.21.E.4.52.

(m) Where a matter of Record is the foundation or ground of the ſuit of the Plaintiff, or of the ſubſtance of the plea, there it ought to be certainly and truly alledged, otherwiſe it is where it is but conveyance. But the proceedings and ſentences in the Eccleſiaſtical courts may be alledged ſummarily, as that a Divorce was had between ſuch parties, for ſuch a cauſe, and before ſuch a Judg, and Concurrentibus his quæ in jure requiruntur, for the Judge muſt be alledged, to the intent the Court may write to him if it be denied. 35.H.6.35.10. H.7.9. 5.11.H.7.8. 22.E.3 2.34. *H.*6.27. 12 H.6.5.6.7.E.4.32. 9.E.4.24.8.E.4 31. 3.Aſſ.29.5.E.4.7.2.3.E. 4.1.

Good matter muſt be pleaded in good forme, in apt time, and in due order, or otherwiſe great advantages may be loſt.

(n) Generall eſtates in Fee ſimple may be generally alledged, but the commencement of Eſtates taile, and other particular eſtates, regularly muſt be ſhewed, unleſſe in ſome caſes where they are alledged by way of inducement; and the life of tenant in taile, or for life, ought to be averred.

(o) When any ſpecial and ſubſtantial matter is alledged by either party, That ought to be eſpecially anſwered: and not to be paſſed over by a general pleading.

(p) The Plea of every man ſhall be conſtrued ſtrongly againſt him that pleadeth it, for every man is preſumed to make the beſt of his own caſe: Ambiguum placitum interpretari debet contra proferentem.

(q) Every plea that a man pleadeth ought to be triable; for without triall the cauſe can receive no end: Et expedit reipublicæ ut ſit finis litium.

(r) The tenant before his default ſaved, may plead all Pleas, which prove the Writ abated, as death, &c. or matters apparent in the Writ; but no Plea, which proves it abatable, as taking of husband, &c.

(s) When a man is authorized to doe any thing by the Common law, by Grant, Commiſſion, Act of Parliament, or by cuſtome, he ought to purſue the ſubſtance and effect of the ſame accordingly.

(t) All neceſſary circumſtances implied by Law in the Plea need not to be expreſſed: as in the Plea of a feoffment of a Mannor, livery and Attornement are implied.

(u) When a Count, Barre, Replication, &c. is defective in reſpect of omiſſion of ſome circumſtance, as time, place, &c. there it may be made good by the Plea of the adverſe party, but if it be inſufficient in matter, it cannot be ſalved.

(w) Every man ſhall plead ſuch pleas as are pertinent for him, according to the quality of his cauſe, eſtate, or intereſt, as Diſſeiſors, Tenant, Incumbents, Ordinaries and the like.

(x) Surpluſage ſhall never make the Plea vicious, but where it is contrariant to the matter before.

(y) That which is apparent to the Court by neceſſary collection out of the Record need not to be averred.

(a) A man is bound to perform all the covenants in an Indenture: if all the covenants be in the affirmative, he may generally plead performance of all; but if any be in the negative, to ſo many he muſt plead ſpecially (for a negative cannot be performed,) & to the reſt generally.

(b) So if any be in the disjunctive, he muſt ſhew which of them he hath performed. So if any are to be done of record, he muſt ſhew that ſpecially, & cannot involve that in general pleading.

(c) In many caſes the Law doth allow general pleading, for avoiding of prolixity and tediouſneſſe, and that the particular ſhall come on the other ſide.

(d) Pleadings which amount to the general iſſue are not to be allowed, but the general iſſue is to be entered. Vid. Sect. 10.485.489.

(e) Every plea ought to have his proper Concluſion; as a plea to the Writ to conclude to the writ; a plea in Barre to conclude to the Action; an Eſtoppel to relie upon the Eſtoppels. Et ſic de ſimilibus.

(f) When the Concluſion of a plea, Et iſſint, Et ſic, is in the affirmative, it ſhall not wave the ſpecial matter, for there the ſpecial matter is the ſubſtance and foundation of the Concluſion, and affirmed by the ſame. But where the concluſion is in the negative, there the ſpecial matter regularly is waved.

(g) Whenſoever ſpecial matter is pleaded, and the concluſion (Et ſic) is to the point of the writ or Action, the ſpecial matter is waved.

The names of legal Records are, a Writ, a Count, a Barre, a Replication, a Rejoynder, a Rebutter, a Surrebutter, &c.

(h) New and ſubtil devices and inventions of pleading ought not to alter any principle of Law, whereof you have heard plentifully before.

The Count or Declaration is an expoſition of the writ, and addeth time, place, and other neceſſary circumſtances, that the ſame may be triable, and any imperfection in the Count doth abate the writ.

Pleadings are divided into Barres, Replications, Rejoynders, Surrejoynders, Rebutters & Surrebutters, &c. They are words of Art, & are called Barres, Barræ, ſo called becauſe it barreth the Plaintiff of his action. Replicationes, a Replicando; Rejunctiones, a Rejungendo; Rebutter, of the French word Rabouter, i.a. Repellendo, To put back or avoid; and ſo of Surrebutter.

But each party muſt take heed of the ordering of the matter of his pleading, leſt his Replication depart from his Count, or his Rejoynder from his Barre; Et ſic de cæteris.

(i) In ancient writers a Barre is called Exceptio peremptoria, a Replication was then called Replicatio, as now it is: a Rejoynder, Triplicatio; a Surrejoynder, Quadruplicatio; & ſic ulterius in infinitum.

(n) 35.H.6,35.21. E 4. 5 1.9 H.4.5.19. H 6.73 5 E 4 12.10.E.4.18. 18 H.7.18.36.H.8. Pleading 8.150.

(o) V.Sect.193.3.H.6. 47.41.E.3 22 9 Aſſ.9. 22.Aſſ.45.2.E 3.42. 13.E.3. Anc.Demeſne 15 20.E.3.ib.45.7 H.7. 8.1.10.fo,91.l.11.f 10.

(p) 3.H.7.3.26. Aſſ.10. 14.H.4.4.b.27. H.6.8.b. 21.H.6.Debt 43.7.H.6. 24.31.35. H.6.43. 47.E.3.14.Pl.Com. 46 a Lib.3.fo.59.Linc.Col. caſe.

(q) 22.E.4.40.2,3. 20 E.4.10.21.E.4.36. 22.H.6.50.

(r) 40.E.3.40.43.46. 41.E.2.18.E.3 16. 26.E.3.68.42.E.3.3. 10.46.6.E.3.37. 8.E.3.20.10.E.3.60. 14.H.4.15.12.E.4.1. 38.E.3.28.7.H.7.3.

(s) 10.E.4.3 28. H.6.8. H.7.13.9.H.7.26. 37.H.6.1.27. H.8 13. 21.H.7.25.11.H.4.33. Pl.Com.79.16.E.4.10. 1.H.7.33.20.H.7.1. 6.E.4.4,5.21. E.4.54. 22.H.6.47.11.H.6.8. 25.E.3.50 b.23.Aſſ.7. 2.Ellz. Dyer 184.

(t) Pl.Com.149.b.& 10.22.37.H.6.38.

(u) 18.E.4.16.b. 22.E.4.2.76.5,H.7.13. 38.H.6.17,18.19. 18.E.3.34. Pl. Com. 229.b.Lib.8.133. Turners caſe.

(w) 5.H.7.34.5.E.3.26. 22.H.6.28.

(x) 19. H.6 30,32.Pl. Com.232.b.& fo.502. per Dyer & 503.

(y) 13.H.4.17.10. E 4. 18.33.H.6.54,35.H.6. 30.21.H.7.32. Bract. lib.3.fol.154. Pl.Com. 87.b.26.H.6.Gard.58.

(a) 2H.7.15.4.H.7.12 10.H.7.12.13.H.7.19. 26.H.8.5.b.

(b) Li.8.fo.133.Turners caſe & fo.120.Benhams caſe Lib.9.25.61. Li 10. 100.

(c) 12.H.8.6.7.2.R.3. 17.14.E.4.7.9.E.4.19.

(d) 44.E.3.2.34. H.6.3. 10.H.6.6.& 17.12.E.4 11.14.14.H.8.24. 7.E.3.12.17.E.3.41.

(e) 18.H 6 33.22.H.6. 53.36.H.6.17.38.H 6. 18.25.5.E.3 15,16. 22.Aſſ.33.2.El.Di.184.

(f) Pl.Com.14,15 2.E. 4.18.39 E 3.14.32.33. 8.E.3.57.Qu. Imp.25. 18.H 6.30.7.4.18.38. Aſſ. 14.24 E.34.48.22. E.3.13.38. H.6.25 32. H.6,14.19.H.8.7.27.H.8.13.b.

(g) 7.E.4.26.11.H.7.4.12.H.7.6,33,H.6,9.37.43. (h) Vid.Sect.485. (i) Bract.li.3.fol.400. Flet. li.6. cap.37.

A departure in pleading is ſaid to be when the ſecond Plea containeth matter not purſuant to his former, and which fortifieth not the ſame, and thereupon it is called Deceptio, becauſe he departeth from his former Plea; and therefore whenſoever the Rejoynder (taking one example for all) containeth matter ſubſequent to the matter of the bar, & not fortifying the ſame, this is regularly a departure, becauſe it leaveth the former, & goeth to another matter. As if in an aſſiſe the tenant plead a diſcent from his father, and giveth a colour, the Demandant intituleth himſelf by a Feoffment from the tenant himſelf, the plaintiff cannot ſay, That that Feoffment was upon Condition, and to ſhew the condition broken, for that ſhould be a cleer departure from his Bar, becauſe it containeth matter ſubſequent. But in an Aſſiſe, if the tenant pleadeth in Bar, That I.S. was ſeiſed and infeoffed him, &c. and the plaintiffe ſheweth, That he himſelfe was ſeiſed in Fee, until by I.S. diſſeiſed, who infeoffed the tenant, and he reentred, the Defendant may plead a releaſe of the plaintiff to I.S. for this doth fortifie the Bar.

39.E.3.13.b.39.H.6.15. 6.H.7.8.21.H.6.32. Pl.Com.105.1. Mar. Dier 95.28. H.8. lib.31. 6.H.7.8.3.H.6. Departure 2.

If a man plead performance of covenant, and the plaintiff reply, That he did not ſuch an act according to his covenant, the defendant ſaith, That he offered to do it, and the plaintiff refuſed it, this is a departure, becauſe the matter is not purſuant: for it is one thing to doe a thing, and another to offer to doe it, and the other refuſed to do it: therefore that ſhould have been pleaded in the former plea, Vide & Cave in a Quare impedit, what Plea ſhall be ſafely pleaded in pri no placito.

8.El.Dy.253.23.El.Dy. 271.6.E.3.3.40.E.3.32. 43.E.3.11.1.E.4.4. 18.E.3.24.5. H.7.27.8. H.6.11.33.H.6.14.

When a man in his former Plea pleadeth an eſtate made by the Common law, in the ſecond plea regularly he ſhall not make it good by an Act of parliament. So when in his former plea he intituleth himſelf generally by the common Law, in his ſecond plea he ſhall not inable himſelf by a cuſtome, but ſhould have pleaded it firſt.

Pl.Com.105.b. Fulmerſtones caſe 21.H.7.25. 27 H.8.3.21. H.7.17. 37.H.6.5.38. H.6.25.

If a man plead an eſtate generally, as for example (a Feoffment in Fee) he in his ſecond plea ſhall not maintain it by other matter tant amount in law, as by a Diſſeiſin and releaſe, or by a leaſe and releaſe, or a gift in taile in War, and in the ſecond plea a Recovery in value, for this is a departure: but he in that caſe ſhall come of a gift, and maintaine it in his Replication by a Recovery in value, becauſe he could have no other count.

21.H.7.25.1.E.4.4.3.H. 7.5.7.H.7.2.

See more of this matter, where the plaintiff varying from time or place alledged in the count of Actions tranſitory, ſhall commit no departure.

Vide Sect.485.

The plea that contains duplicity or multiplicity of diſtinct matter to one & the ſame thing, whereunto ſeveral anſwers (admitting each of them to be good) are requited, is not allowable in law. And this rule, you ſee, extendeth to pleas perpetual or peremptory, and not to Pleas dilatory: for in their time & place a man may uſe divers of them, and hereof ancient writers * ſpeak notably: Sicut Actor una Actione debet experiri ſaltem illa durante, ſic oportet tenentem una exceptione, dum tamen peremptoria, (quod de dilatoriis non eſt tenendum) quia ſi liceret pluribus uti exceptionibus peremptoriis ſimul & ſemel, ſicut fieri poterit in dilatoriis, ſic ſequeretur, quod ſi improbatione unius defeceris, ad aliam probandam poſſit habere recurſum, quod non eſt permiſſibile, non magis quàm aliquem ſe defendere duobus baculis in duello, cum unus tantùm ſufficiat.

Pl.Com.139.142. * Fleta.lib.6.cap.35. Bracton li.1.fo.400.

But where the tenant or defendant may plead a general Iſſue, there upon the general iſſue pleaded, he may give in evidence as many diſtinct matters, to bar the Action of right of the Demandant or Plaintiff, as he can.

A ſpecial Verdict may contain double or treble matter, and therefore in thoſe caſes the tenant or defendant may either take choice of one matter, and to plead it to bar the Demandant or Plaintiff, or to plead the general iſſue, and to make advantage of all: for he may plead to part one of the Pleas in bar, and to another part another Plea: and his concluſion of his plea ſhall avoid doubleneſſe, and hereby neither the Court nor the Jury is ſo much inveigled, as if one plea ſhould contain divers diſtinct matters. And if the Tenant make choice of one plea in War, and that be found againſt him, yet he may reſort to an action of an higher nature, and take advantage of any other matter. And the Law in this points by them that underſtand not the reaſon thereof miſliked, ſaying, Nemo prohibetur pluribus defenſionibus uti.

17.E.37. 39.H.6.27.

And it is worthy of obſervation, That in the reignes of Edward the ſecond, Edward the firſt, and upwards, the pleadings were plain & ſenſible, but nothing curious, evermore having chiefe reſpect to matter, and not to formes of words, and were often holpen with a Queſitum eſt, and then the queſtions moved by the Court, and the anſwers by the parties, were alſo entred into the Rolle. But even in thoſe daies the formes of the Regiſter of original writs were then punctually obſerved, and matters in law excellently debated and reſolved, and where any great difficulty was, then it was reſolved by all the Judges & Sages of the law (who were for matters in law called Concilium Regis) and their aſſembly and reſolution was entred into the Roll. As for example, In the great caſe in a Quare impedit, between the King and the prior of Worceſter, concerning an Appropriation, whether it were a Mortmaine, the Record ſaith, Ad quem diem venit prædictus Prior per Attornatum ſuum, &c. Et examina-

H.1.32.E.1. Cor.Reg. in fine Rotul.

examinatis & intellectis recordo & proceſſu coram toto Concilio tàm Theſaurario & Baronibus de Scaccario, quàm Cancellario, ac etiam Juſticiariis de utroque Banco inſpectis cauſis, pro quâ, pro Domino Rege dicunt, quod ad ipſum Regem pertinet præſentare, &c. conſideratum eſt &c. For in thoſe dates though the Chancellor and Treaſurer were for the moſt part men of the Church, yet were they expert and learned in the Lawes of the Realm.

As for example, in the time of the Conqueror, Egelricus, Epiſcopus Ciceſtrenſis, vir antiquiſſimus, & in Legibus ſapientiſſimus, as elſewhere I have ſaid.

(a) Ockam. f. 17.

(a) Nigellus Epiſcopus Eliensis, Hen. 1. Theſaurarius, in temporibus ſuis incomparabilem habuit Scaccarii Scientiam, & de eadem ſcripſit optimè.

(b) Paſch. 5. R. 1. Cor. Rege.

(b) Henricus Cant. Epiſcopus, H. Dunelm' Epiſcopus, Williemus Elienſis Epiſcopus. G. Roffenſ. Epiſcopus.

(c) 11. H. 3. Rot pat. Bract. ſæpe.

(c) Martinus de Pariſhul, Clericus, Decanus divi Pauli London', conſtitutus fuit capitalis Juſtic' de Banco, quia in legibus hujus Regni peritiſſimus.

(d) Bract. ſæpe.

(d) Will'us de Raleigh, Clericus, Juſticiarius Domini Regis.

(e) 8. E. 3 31.

(e) Johannes Epiſcopus Carlienſis, tempore H. 3.

Robertus Paſſelewe Epiſcopus Ciceſtrenſis tempore H. 3.

(f) Rot. pat. 24 H. 3.

(f) Robertus de Lexinton'o Clericus, conſtitutus capitalis Juſtic' de Banco.

(g) Liber ejus de Legibus extat ſcript. temp. E. 1.

(g) Johannes Britton, Epi copus Hereford.

(h) Rot. pat. 17. E. 2.

(h) Henricus de Stanton, Clericus, conſtitutus fuit capitalis Juſticiarius ad placita; with many others. And ſo were diuers and many of the Nobility, who when matters of great difficultie were brought into the upper Houſe of Parliament by Writ of Error, Adjournment, or other Parliamentary courſe, did by the aſſiſtance of the reverend Judges, whoeber attended in that Court, judge and determine the ſame, as by former and ancient Records, eſpecially by the ſaid Record of 5. R. 1. doth manifeſtly appear; and therefore the Lords of Parliament were called for thoſe purpoſes, Concilium regis, and like to the aforementioned Record there be very many.

In the raign of Edward the third, Pleadings grew to perfection both without lameneſſe & curioſity; for then the Judges and profeſſors of the Law were excellently learned, and then knowledge of the Law flouriſhed, the Serjeants of the Law, &c. drew their own pleadings, and therefore truly ſaid that reverend Juſtice Thirning, in the reign of H. 4. that in the time of *E.* 3. the Law was in an higher degree than it had been any time before; for (ſaith he) before that time the manner of Pleading was but feeble, in compariſon of that it was afterward in the reigne of the ſame King.

12. H. 4. 3.

In the time of Hen. the Sixt the Judges gave a quicker care to exceptions to Pleadings, than either their Predeceſſors did, or the Judges in the reign of Edward the fourth, when our Author flouriſhed, or ſince that time have done, giving no way to nice exceptions, ſo long as the ſubſtance of the matter were ſufficiently ſhewed. As in the raigne of King Edward the Third, by an act of Parliament * it is provided, That Counts or Declarations ſhould not abate ſo long as the matter of the Action be fully ſhewed in the Declaration a writ; ſo ſince our Author wrote, in the raigne of Queen Elizabeth, proviſion is made, That after Demurrer the Judges ſhall give judgment according to the right of the cauſe and matter in Law, without regarding any imperfection, defect, or want of form in any writ, Returne, Plaint, Declaration, or other pleading or courſe of proceeding whatſoever, except ſuch as the party demurring ſhall ſpecially ſhew. In which act, Appeals and Indictments of Felony, Murder, or Treaſon, concerning mans life, and the forfeiture of his lands and goods are excepted. An excellent & profitable law concurring with the wiſdome and judgment of ancient and latter times, that have diſallowed curious and nice exceptions tending to the overthrow or delay of Juſtice; apices juris non ſunt jura: yet it is good for a learned profeſſor to make all things plain & perfect, and not to truſt to the after aid or amendment by force of any Stat. leſt his Clients cauſe matcheth not therewith, as it is in Phyſick, for the health of a mans body, ſo it is in remedies for the ſafety of a mans cauſe. In Law, Præſtat cautela quàm medela.

(*) 36. E. 3. c. 15. 46. E. 3. 21. *Di.* 299. l. 8. fo. 161. Lib. 10. fol. 131.

Lib. 10 fo. 88. Pl. Com. 421.

But now let us return to our Author.

## *Sect.* 535, 536, 537.

¶ Item ſi ſoyent Seignior & tenant, meſque le ſeignior confirma leſtate que l' tenãt ad en les tenements, uncore le Seigniorie entierment demurt

ALſo if there be Lord and tenant, albeit the Lord confirme the eſtate which the Tenant hath in the Tenements, yet the Seigniorie remaineth entire to the

a le Sñr come il fuit adebant. Lord as it was before.

## *Sect.* 536.

¶ EN meſme le manner eſt, ſi home ad un rent charge hors de certaine terre, & il confirma leſtate que le tenant ad en la terre, uncore demurt a le confirmor le rent charge.

IN the ſame manner is it, if a man hath a Rent charge out of certaine Land, and he confirme the eſtate which the Tenant hath in the land, yet the rent charge remaineth to the Confirmor.

## *Sect.* 537.

¶ EN meſme le manner eſt, ſi un home ad common de paſture en auter terre, ſil confirma eſtate de le tenant de la terre, rien departeſt de luy de ſon common, mes ceo nient obſtant le common demurt a luy come fuit adebant.

IN the ſame manner it is, if a man hath common of paſture in other land, if he confirme the eſtate of the Tenant of the Land, nothing ſhall paſſe from him of his Common; but notwithſtanding this, the Common ſhall remaine to him as it was before.

¶ Here ends the firſt caſe, wherein the Releaſe and Confirmation do differ, for by the Releaſe of the Seigniory, rent charge or common are extinct. And to theſe three Sections be evident, and need no explication; ſaving that ſome do gather upon theſe two laſt Sections, and the next enſuing, that a man cannot abridge a rent charge or common of Paſture by a confirmation, as he may do a rent ſervice, in reſpect of the privity between the lord and Tenant; ſo as (ſay they) a tenure may be abridged by a Confirmation, but not a rent charge or common: and therefore Littleton beginneth the next Section with an Adverbe adverſative, viz. (mes but) &c. But a man may releaſe part of his rent charge, or common, &c.

## *Sect.* 538.

¶ MEs ſi ſoient Seigniors & tenant, le quel tenãt tient de ſon Seignior per le ſervice de fealtie & 20. ſ. ð rent, ſi le Seignior per ſon fait confirma leſtate le tenant, a tener per 12 ð. ou per un denier, ou per un maile: en ceſt caſe le tenant eſt diſcharge

BUt if there be Lord and tenant, which tenant holdeth of his Lord by the ſervice of fealtie and 20. ſhillings rent, if the Lord by his Deed confirme the eſtate of the Tenant to hold by 12. pence or by a penny, or by a half peny: In this caſe the Tenant is diſcharged of all the

¶ AND the reaſon where-fore no ſervice or another cannot be reſerved upon the Confirmation is, becauſe as long as the eſtate of the land continueth it cannot by the Confirmation of the lord be charged with any new ſervice. So as it is evident that the lord by his Confirmation may diminiſh and abridge the ſervices, but to reſerve upon the Confirmation new ſervices he cannot, ſo long as the former eſtate in the Tenancie continueth. And as where a Confirmation doth inlarge

28.E.3.92.93.26.Aſſ. 37.6.Eliz. Dyer 230. b. 7. E.4.25.a.21, E.4.62. per Brian. 10.E.3.tit.avowrie 100.

inlarge an eſtate in land, there ought to be priuitie, as hath been ſaid; ſo regularly, where a confirmation doth abridge ſeruices, there ought to be priuity alſo.

de touts les auters ſeruices, & le rendra rein a le Seignior, forſque ceo q̄ eſt compriſe deins meſme le Confirmation.

other Services, and ſhall render nothing to the Lord, but that which is compriſed in the ſame Confirmation.

7.E.3.19.22.E.3.18.6. And therefore here Littleton putteth his caſe of Lord and Tenant between whom there is priuity. And therefore if there be Lord, Meſne and Tenant, the Lord cannot confirme the eſtate of the tenant to hold of him by leſſer ſeruices, but this is void, for that there is no priuitie between them, and a confirmation cannot make ſuch an alteration of tenures.

4.E.3.19. And the caſe in 4.E.3. maketh nothing againſt this opinion, for there the caſe in ſubſtance is this, John de Bonvile held certaine Lands of Ralfe Vernon, and before the Statute of Quia emptores terrarum, levied a Fine of the ſame lands to the Abbot of Cogſal and his ſucceſſors, to hold of the chief Lord (which was Ralfe Vernon) by the ſeruices due and accuſtomed, Ralfe Vernon made a Charter to the ſaid Abbot in theſe words. Conceſſi etiam eidem Abbati & ſucceſſoribus ſuis relaxavi & quietum clamavi totum jus, &c. quod habeo, vel potero habere in omnibus tenementis quæ idem Abbas habet de dono Johannis de Bonvile; Tenendum de me & hæredibus meis in puram & perpetuam Eleemoſynam. And adjudged that it was a good tenure in Frankalmoigne; which caſe proveth nothing that the Lord Paramount may by his confirmation to the Tenant peravaile extinct the Meſnaltie (as it is abridged by Maſter Fitzherbert in the title of confirmation, Pl. 21.) for the immediate Lord did there make the ſaid Charter, and not any Lord Paramount. (And therefore it is ever good to relie upon the Book at large, for many times Compendia ſunt diſpendia, and Melius eſt petere fontes, quam ſectari rivulos) And of this opinion was Maſter Plowden upon good advicement and conſideration.

4.E.3.19.9.E.3.1.12.E. 4.11.16.E.3.fines 4. 6.Eliz. Dyer 230. And here is the ſeventh caſe, wherein the releaſe and confirmation doth agree, for if there be Lord and tenant by Fealty and twenty ſhillings rent, the lord may releaſe all his right in the Seigniorie or in the tenancie, ſaving fealtie and ten ſhillings rent, but he cannot ſave a new kind of ſervice, for he may as well abridge his ſervices upon a Releaſe as upon a Confirmation. And as there is required priuitie when the Lord abridgeth the ſervices of his Tenant by his confirmation: ſo muſt there be alſe, when the Lord by his releaſe abridgeth the ſervices of his Tenant. And therefore the Lord Paramount cannot releaſe to the Tenant peravaile ſaving to him part of his ſervices, but the ſaving in that caſe is void.

Britton f.57.177. 40.E. 3.21.47.48.18.E.3.26. 50.Aſſ.6.14.H.4.8. ¶ *Et rendra rien a ſon Seignior forſque ceo que eſt compriſe*, &c. which words are thus to be underſtood, that the tenant ſhall not render any more Rent or annual ſervice to the Lord than is contained in the Deed; but other things, notwithſtanding the ſaid confirmation, the tenant ſhall yield to the Lord as reliefe, ayde pur file marier, and ayde pur faire fitz Chivalier, becauſe there are incidents to the tenure that remaine, and ſhall not be diſcharged without ſpecial words, by the general words, of all other Actions, ſeruices and Demands. And ſo if a man hold of me by Knights Service, Rent, Suit, &c. and I releaſe to him all my right in the Seigniorie, excepting the Tenure by Knights ſervice, or confirme his eſtate to hold of me by Knights Service onely for all manner of Services Exactions, and Demands; Yet ſhall the Lord have Ward, Marriage, Reliefe, Ayde pur file marier, & pur faire fitz Chivalie, for theſe be incidents to the tenure that remaine. But it is holden, that if a man make a gift in taile by deed reſerving two ſhilling rent a luy & ſes heires pro omnibus & omnimodis ſervitiis, exactionibus ſeculanibus, & cunctis demandis, if the Donee die his heire of full age, the Donor ſhall have no reliefe, becauſe in the original Deed of the gift in taile it is expreſly limited, that by the Service of two ſhillings Rent he ſhall be quit of all Demands, (and Reliefe lieth in Demand) and by reaſon of thoſe words, ſay they, there cannot any Reliefe become due, but ſome doe hold the contrary in that caſe.

13.R.2.tit. avowry 89. Nota dictum. Fitzh.

## Sect. 539.

¶ Mes ſi le Seignior voile per fait de confirmation, que le tenant en tiel cas doit

But if the Lord will by his Deed of Confirmation that the Tenant in this caſe ſhall yield render

render a luy un eſperuer, ou un roſe annualment a tiel feaſt, &c. cell confirmation eſt voide, pur cenque il reſerva a luy un nobel choſe que ne fuit parcel de ſes ſervices devant la confirmation, et iſſint le ſeignior poit bien per tiel confirmation abridger les ſervices, per queux le tenant tient de luy, mes il ne poit reſerver a luy nobel ſervices.

to him a Hawke or a roſe yearly at ſuch a feaſt, &c. this confirmation is void, becauſe he reſerveth to him a new thing which was not parcel of his ſervices before the confirmation: And ſo the Lord may well by ſuch confirmation abridge the ſervices by which the tenant holdeth of him, but he cannot reſerve to him new ſervices.

¶ This upon that which hath bẽ ſaid before in the next preceding Section is evident, and needeth no further explication.

## Sect. 540.

¶ Item, ſi loit ſeignior, meſne, et tenant, et le tenant eſt un Abbe, que tient de meſne per certain ſervices annualment, le quel nad alcun cauſe daver acquitance envers ſon meſne pur porter briefe de Meſne, &c. en cell cas, ſi le meſne confirma leſtate q̃ l' Abbe ad en la terre, a aver et tener la terre a luy et a ſes ſucceſſors en frankalmoigne, &c. en cell cas le confirmation eſt bone, et abonques labbe tiendra de le meſne en frankalmoigne. Et la cauſe eſt pur ceo que nul nobel ſervice eſt reſerve, car touts les ſervices eſpecialmẽt ſpecifies ſont extincts, et nul rent eſt reſerve al meſne forſque que l' Abbe tient de luy la terre, et ceo fuit il devant la confirmation, car celuy que tient en frankalmoigne, ne doit faire alcun corporal ſervice, iſſint que per tiel confirmation il appiert, que le meſne ne reſerva a luy alcun nobel ſervice, mes que les tenements ſerront tenus de luy ume ceo fuit devant. Et en cell

ALſo, if there be Lord, Meſne and tenant, & the tenant is an Abbot that holdeth of the meſne by certain ſervices yearly, the which hath no cauſe to have acquittance againſt his meſne for to bring a writ of Meſne, &c. in this caſe, if the Meſne confirme the Eſtate that the Abbot hath in the land, to have and to hold the land unto him & his ſucceſſors in frankalmoigne, or free almes, &c. in this caſe this confirmation is good, and then the Abbot holdeth of the meſne in frankalmoigne: and the cauſe is, for that no new ſervice is reſerved, for all the ſervices ſpecially ſpecified be extinct, and no rent is reſerved to the Meſne, but the Abbot ſhall hold the land of him as it was before the confirmation; for he that holdeth in frankalmoigne ought to do no bodily ſervice; ſo that by ſuch confirmation it appeareth the meſne ſhall not reſerve unto him any new ſervice, but that the land ſhall be holden of him as it was before, and in this

caſe

caſe l' Abbe avera un briefe de meine, il ſoit diſtreine en ſon default per force de le dit confirmation, ou per caſe il ne puiſſoit aver un briefe advenant, &c.

caſe the Abbot ſhall have a writ of Meſne if he be diſtrained in his default, by force of the ſaid confirmation, where percaſe he might not have ſuch a writ before.

4.E.3.19.12.E.3.15.b. the Lord Wakes caſe. 10.E.3.5. 15. E.3.Confirmat 8. 4.E.3.19.20. F.N.B.136 h 8.q. 4.B.4.35.31.E.1. Meſne 55. 11.R.3.Avowrie 100. 22.E.3.18.b.30.E.3.17. 16.H.3.Avowrie 243.

¶ HEre our Author having ſeen the former Books putteth his caſe, that the meine may eſteth the Confirmation to hold in Frankalmoigne, and not the Lord paramount.

¶ *Et en ceſt caſe l' Abbe avera briefe de meſne.* Here is to be noted, that upon a Confirmation to hold in Free almoigne there lieth a Writ of Meſne, albeit the cauſe of acquital beginne after the Seignior. And ſo upon ſuch a Confirmation the Tenant ſhall have, Contra formam feoffamenti.

## Sect. 541.

45.E.3:10.30.H.6. tit.barre 59. Regiſtrum 102. 1.H.6.cap.5.

¶ HEre is to be obſerved a diverſitie between the cuſtodie of the body of a Ward within age, and a right of inheritance in the body of a villeine in groſs, for a man may be put out of poſſeſſion of the cuſtodie of his Ward, but not of his villeine in groſs, no more than a man can be of his priſoner which he hath taken in warre.

Brook tit.propertie 28.

Alſo of things that are in grant, as Rents, commons, and the like, it is at the election of the party whether he will be diſſeiſed of them or no, as ſhall be ſaid after in his proper place. But of a villeine in groſſe he cannot at all be diſſeiſed.

(a) Bracton lib.59.b. 24.E.3.tit. diſcont.16. 42.E.3.18 40.E.3.17. 43.E.3.4 9.E.4.38. Dyer 10.Eli. Growches caſe.

(a) Non valet confirmatio niſi ille qui confirmat ſit in poſſeſſione rei vel juris unde fieri debet confirmatio, & eodem modo niſi ille cui confirmatio fit, ſit in poſſeſſione.

And materially doth Littleton put his caſe of a villeine in groſſe, for of a villeine regardant to a Manor, the Lord may be put out of poſſeſſion, for by putting him out of poſſeſſion of the Manor which is the principal, he may likewiſe be put out of poſſeſſion of the villeine regardant which is but acceſſory. And by the recovery of the Manor the villeine is recovered. But if another doth take away my villeine in groſſe or regardant, he gaineth no poſſeſſion of him. And this doth well appear by the Writ of Nativo habendo, for that writ is not brought againſt any perſon incertain (becauſe no man can

¶ ITem ſi jeo ſue leiſie dū villein come de villein en gros, et un auter luy prent hors de ma poſſeſſion, enclaimāt luy deſtre ſon villein la ou il naveit alcun droit daver luy come ſon villein, & puis jeo confirma a luy le eſtate que il ad en mon villeine, ceſt confirmation ſemble void, pur ceo que nul poit aver poſſeſſion de un home come de villeiñ en groſſe, ſi non celuy que ad droit de luy aver come ſon villein en groſſe. Et iſſint entant que celuy a que le confirmation fuit fait, ne fuit ſeiſie de luy come de ſon villeine a le temps de cōfirmation fait, tiel cōfirmation eſt void.

ALſo if I be ſeiſed of a villeine as of a villeine in groſſe, and another taketh him out of my poſſeſſion, claiming him to be his villeine there where he hath no right to have him as his villeine, and after I confirme to him the eſtate which he hath in my villeine, this confirmation ſeemeth to be voide, for that none may have poſſeſſion of a man as of a villeine in groſſe, but he which hath right to have him as his villeine in groſſe. And ſo in as much as he to whom the confirmation was made, was not ſeiſed of him as of his villeine at the time of the Confirmation made, ſuch confirmation is void.

can gain the poſſeſſion of him. But the Writ is to this effect; Rex vic. Salutem præcipimus tibi quod juſtè & ſine dilatione habere facias A. B. nativum & fugitivum ſuum, &c. ubicunque inventus fuerit, &c. & prohibemus ſuper forisfacturam noſtram, ne quis eam injuſtè detineat: ſo as detain him one may, but to poſſeſſe himſelf of him, and to diſpoſſeſſe the Lord he cannot.

And if a man might have been diſpoſſeſſed of a Villein in groſſe, or of a Villein regardant (unleſſe he be diſpoſſeſſed of the Manor alſo, as hath been ſaid) the Law would have given a remedy againſt the wrong-doer, as the Law doth in the caſe of a ward.

Now ſeeing it doth appear by our bookes (a) and by Littleton himſelf by implication ſpeaking only of a villein in groſſe) that if a man be diſſeiſed of the Manor whereunto the Villein is regardant, he is out of poſſeſſion of his villein, and ſo an Advowſon appendant, and the like. Hereby (Littleton putting his caſe of a villein in groſſe) and by diverſe Authorities, a point controverted in our Bookes (*) is reſolved, viz. that by the grant of the Manor without ſaying, Cum pertinentiis, the Villein regardant, Advowſon appendant, and the like do paſſe; for if the Diſſeiſor ſhall gain them as incidents to the Manor, whoſe eſtate is wrongful. A multo fortiori the Feoffee, who cometh to his eſtate by lawful conveyance, ſhall have them as incidents. But where the entry of the diſſeiſee is lawful, he may ſeiſe the villein regardant, or preſent to the Advowſon, &c. before he enter into the Manor; otherwiſe it is where his entry is not lawful; and ſo are the antient Authors (b) to be intended.

(a) Bracton, f. 243. Britton, f. 126.

(*) 9.E.4.38.3.H.4.15. 18.E.44.16.E.3. Quar. Imp. 140. 19.R.2. Treſp. 255. 19.H.6.33.21.H.6.9. 33.H.6.33.5.H.7.36. 38. 10.H.7.9.F.N.B.32.q. 22.H.6.33. per Moyle. 30.E.3.31.33.E.3,21. 43.E.3.12

(b) Bracton, f. 242, 243. Britton, f. 126. Flet. ace.

## *Sect.* 542.

¶ Mes ceſt cas, uſi riels parols fueront en le fait, &c. Sciatis me dediſſe & conceſſiſſe tali &c. talem villanum meum, ceſt bone, mes ceo urera per force & voy de grant, & nemy per voy de confirmation, &c.

But in this caſe, if theſe words were in the deed, &c. *Sciatis me dediſſe & conceſſiſſe tali, &c. talem villanum meum*, this is good; but this ſhall enure by force and way of grant, and not by way of confirmation, &c.

¶ Here it is to be obſerved, that a man hath an inheritance in a villein, whereof the wife of the Lord ſhall be endowed as hath been ſaid, for in him a man may have an eſtate in Fee, or Fee taile, for life or years. And the before Littleton is here to be underſtood, that in the Grant there were theſe words (his heirs) or elſe nothing paſſed but for life, as of other things that lie in Grant.

2.H.6.F.N.B.77.a.b.

24.E.3.Piſcont.16.

## *Sect.* 543.

¶ Et alcun foits ceux verbs Dedi & conceſſi, ureront per voy dextinguiſhment. del choſe done ou grant, ſicome un tenant tient de ſon ſeignior per certeine rent, & le ſeignior granta per ſon fait a le tenant & a ſes heires le rent, &c. ceo urera a le teñ per voy dextinguiſhment, car per ceſt grant le rent eſt extinct, &c.

And ſometimes theſe verbes *Dedi & conceſſi*, ſhall enure by way of extinguiſhment of the thing given or granted; as if a tenant hold of his Lord by certain rent, and the Lord grant by his deed to the tenant and his heirs the rent, &c. this ſhall enure to the tenant by way of extinguiſhment: for by this grant the rent is extinct, &c.

And this grant of the rent ſhall enure by way of releaſe. 3.E.3.12. & 3.Aſſ.7

## *Sect.* 544.

¶ EN meſme le manner eſt, lou un ad un rent charge hors de certaine terre, & il graunta al tenant de la terre le Rent charge, &c. & la cauſe eſt, pur ceo que appiert, per les parols del grant, que le volunt le donor eſt, que le tenant avera le rent, &c. & entant que il ne puit aver ne perceiver aſcun rent hors de ſon terre demeſne, per ceo le fait ſerra intendue & prís pur l' pluis advantage & availe pur le Tenant que puit eſſe prís, & ceo eſt per voy dextinguiſhment.

IN the ſame manner it is, where one hath a Rent Charge out of certain Land, and he grant to the Tenant of the Land the Rent Charge, &c. And the reaſon is, for that it appeareth by the words of the Grant, That the will of the Donor is, That the Tenant ſhall have the rent, &c. and inaſmuch as he cannot have or perceive any rent out of his own Land, therefore the deed ſhall be intended and taken for the moſt advantage, and availe for the tenant, that it may be taken, and this is by way of extinguiſhment.

34.H.6.fol.42. ¶ BUt if the grantee of the rent-charge granteth it to the Tenant of the Land and a ſtranger, it ſhall be extinguiſhed but for the moity: and ſo it is of a Seigniory.

## *Sect.* 545.

¶ ITem, ſi jeo leſſa Terre a un home pur term dans, & puis jeo confirma ſon eſtate ſans pluis parolx mitter en le fait, per cel il nad pluis greinder eſtate que pur terme dans, ſicome il avoit advant.

ALſo, if I let Land to a man for term of years, and after I confirm his eſtate, without putting more words in the Deed, by this he hath no greater eſtate then for terme of yeares, as he had before.

## *Sect.* 546.

¶ MEs ſi jeo releſſa a luy mon droit que jeo aye en le terre ſans plus parols mitter en le fait, il ad eſtate de frankte-nement. Iſſint poyes entend, mon fits, divers grand diverſities perenter Releaſes & Confirmations.

BUt if I releaſe to him all my right which I have in the land, without putting more words in the Deed, he hath an eſtate of freehold. So thou mayeſt underſtand (my ſon) divers great diverſities between Releaſes and Confirmations.

In theſe two Sections is the ſeventh caſe wherein a releaſe and Confirmation do differ.

*Sect.*

## *Sect.* 547.

¶ Item, ſi jeo eſteant deins age leſſa terre a un auk̃ pur terme de xx. ans, & puis il granta le terre a un auter p̃me de x. ans, iſſint il granta forſque parcel de ſon terme, en ceſt caſe quant jeo ſur de pleine age, ſi jeo releſſa al Grantée de mon leſſee, &c. ceſt releaſe eſt void, pur ceo que il ny ad aſcun p̃vity perenter luy & moy, &c. Mes ſi jeo confirme ſon eſtate, donque ceſt confirmation eſt bone. Mes ſi mon Leſſee granta tout ſon eſtat a un auk̃, donq̃s mõ releaſe fait a l' grãtee ẽ bone & effectual.

ALſo, if I being within age let land to another for terme of xx. yea s, and after he granteth the land to another for term of x. years, ſo he granteth but parcel of his term: In this caſe when I am of full age, if I releaſe to the Grantee of my Leſſee, &c. this Releaſe is void, becauſe there is no privity between him and me, &c. but if I confirme his eſtate, then this confirmation is good. But if my leſſee grant all his eſtate to another, then my releaſe made to the Grantee is good and effectual.

¶ Here are two things to be obſerved: Firſt, That the Leaſe of an enfant in this caſe is not void but voidable. Secondly, this is the eighth caſe put by Littleton, wherein the Releaſe and Confirmation do differ. 7.E.4.6.b.18.E.4.2. 9.H.7.24.

## *Sect.* 548.

¶ Item, ſi home granta un rẽt charge iſſuant hors de ſon terre a un auter pur terme de ſon vie, & puis il confirma ſon eſtate en le dit rent, a aver & tener a luy en fee taile ou en fee ſimple, ceſt Confirmation eſt voyd, quant a enlarger ſon eſtate, put ceo que celuy que confirme naveit aſcun reverſion en le rent.

ALſo, if a man grant a Rent-charge iſſuing out of his Land to another for term of his life, and after he confirmeth his eſtate in the ſaid rent; To have and to hold to him in fee taile or in fee ſimple, this Confirmation is void as to inlarge his eſtate, becauſe he that confirmeth hath not any reverſion in the Rent.

¶ Here the Diverſity is apparant, between a rent newly created, and a rent in eſſe: which needeth no explication. Only this is to be obſerved, That Littleton intendeth his Deed of Confirmation not to contain any clauſe of Diſtreſſe; for otherwiſe, as to the Confirmation the Deed is void, but the clauſe of Diſtreſſe doth amount to a new grant, as in the Chapter of Rents hath been ſaid. 21.E.3.47.15.E.4.8.b. Pl.Com.35.8.H.4.19.

## *Sect.* 549.

¶ Mes ſi home ſoit ſeiſie en fee de Rent ſervice ou de

BUt if a man be ſeiſed in fee of a rent ſervice, or rent-charge,

rent charge, & il grant le rent a un auter pur terme de vie, & le tenant atturna, & puis il confirma lestate de le grantee en fee taile, ou en fee simple, cest confirmation est bone, quant a enlarger son estate, solonqz les parols le cõfirmation, pur ceo que celuy q̃ confirmast al tẽps de confirmation avoit un reversion del rent.

and he grant the rent to another for life, and the tenant attorneth, and after he confirmeth the estate of the grantee in fee taile, or in fee simple, this confirmation is good, as to enlarge his estate according to the words of the confirmation, for that he which confirmed at the time of confirmation had a reversion of the rent.

¶ Here is the eighth case wherein the release and Confirmation doth agree; and it is here to be observed, that to the grant of the estate for life, Littleton doth put an attornment, because it is requisite: but to the Confirmation to the Grantee of the rent to enlarge his estate, there is none necessary; and therefore he putteth none: but of this more shall be said in the Chapter of Attornment, Sect. 556, 557.

## Sect. 550.

¶ Mes en cas avantdit lou home graunt un rent charge a un auter pur terme de vie, sil voile q̃ le grauntee averoit estate en le taile, ou en fee, il covient que le fait de grant del rent charge pur terme de vie, soit surrender ou cancel & donques de faire un novel fait dautiel rent charge, A aver & perceiver a le grantee en le taile, ou en fee, &c. Ex paucis plurima concipit ingenium.

But in the case aforesaid where a man grants a rent charge to another for term of life, if he will that the grantee should have an estate in taile, or in fee, it behoveth that the deed of grant of the rent-charge for term of life be surrendred or cancelled, and then to make a new deed of the like rent charge, To have and perceive to the grantee in tail or in fee, &c. *Ex paucis plurima concipit ingenium.*

Vide Sect. 636.

*Surrender ou cancell.* Note, by cancellation of the Deed the rent which lieth only in grant ceaseth (as here it appeareth) as well as by the Surrender. And the reason wherefore (if the Grantor make a new grant of the rent, and not enlarge it by way of confirmation, as Littleton must be intended) the deed should be surrendred or cancelled, is, lest the Grantor should be doubly charged, viz. with the old grant for life, and with the new grant in fee, or as hath been said, the Grantor may grant to the Grantee for life and his heirs, that he and his heirs shall distrain for the rent, &c. and this shall amount to a new grant, and yet amount to no double charge, whereof you may see before in the Chapter of Rents.

## CAP. 10 Of Attornment. *Sect.* 551.

ATtornm̃t eſt, come ũ ſoit ſeiſ̃ e tenãt, & le Sñr voile granter per ſon fait les ſervices de ſ̃ t a un auter pur terme dans, ou pur terme de vie, ou en taile, ou en fee, il covient que le tenant atturna al grauntée en le vie le grantor, p force & vertue del grant, ou auterment, le grant eſt void. Et atturnement eſt nul auter en effect forſq̃ quant le t ad oye del grant fait per ſ̃ Sñr, q̃ meſme le tenant agrée a le dit grant, ſcome adire a le grauntée, jeo moy agrée a le grant fait a vous, &c. ou jeo ſeu bien content de le graunt fait a vous, mes le pluis common atturnment eſt, adire, Sir, jeo atturna a vous per force del dit graunt, ou jeo deveigne vre tenant, &c. ou liverer al grantee un denier, ou un maile, ou un farthing per voy d'atturnement.

ATtornment is, as if there bee Lord and tenant, & the Lord will grant by his Deed the ſervices of his Tenant to another for term of years, or for term of life, or in tail, or in Fee, the tenant muſt attorne to the Grantee in the life of the grantor by force and vertue of the grant, or otherwiſe the grant is void. And attornment is no other in effect, but when the tenant hath heard of the Grant made by his Lord, that the ſame tenant do agree by word to the ſaid grant, as to ſay to the grantee, I agree to the Grant made to you, &c. or I am well content with the grant made to you, but the moſt common attornment is, to ſay, Sir, I attorne to you by force of the ſaid Grant, or I become your Tenant, &c. or to deliver to the Grantee a peny, or a half-peny, or a farthing, by way of Attornment.

¶ *Attornment* is an agreement of the tenant to the grant of the ſeignory, or of a rent, or of the Donee in tail, or Tenant for life or years to a grant of a reverſion or Remainder made to another. It is an antient word of art, and in the Common Law ſignifieth a turning or attorning from one to another; we uſe alſo attornamentum as a Latine word, and Attornare to attorn. And ſo Bracton (a) uſeth it, Item videndum eſt, ſi Dominus attornare poſſit alicui homagium & ſervitium tenentis ſui contra voluntatem ipſius tenentis, & videtur quod non.

Bracton, lib.2.fol.81. Brit.f.105.b.170.& 177. Fleta.l.3.cap.6.

(a) Bracton, l.2.f.81.b. Fleta, Britton ubi ſupra

And the reaſon why an Attornment is requiſite, is yelded in old Books to be, Si Dominus attornare poſſit ſervitium tenentis contra voluntatem tenentis, tale ſequeretur inconveniens, quod poſſit eum ſubjugare capitali inimico ſuo, & per quod teneretur Sacramentum fidelitatis facere ei qui eum damnificare intenderet.

Bracton, l.2.f.81.b. Britton, ubi ſupra.

¶ *Il covient que le tenant attorna al grantee en la vie del grantor, &c.* And ſo muſt he alſo in the life of the Grantee, and this is underſtood of a Grant by deed. And the reaſon hereof is, for that every Grant muſt take effect as to the ſubſtance thereof in the life both of the Grantor and the Grantee. And in this caſe if the Grantor dieth before attornment, the Seignory, Rent, Reverſion, or Remainder deſcend to his heir; and therefore after his deceaſe the Attornment cometh too late, ſo likewiſe if the Grantee dieth before Attornment, an Attornment to the

Vide Littl.ſ.128. 11.H.7.19.

Lib.1.fo.104,105. Shelleys caſe.

43.Aſſ.19.34.H.6.7. 20.H.6.7.

the heir is void, for nothing descended to him; and if he should take, he should take it as a Purchaser, where the heirs were added but as words of limitation of the estate, and not to take as Purchasers.

34.H.6.7.20.H.6.7. Bracton, lib.2.f.81,82. acc. Lib.6.f.68. Sir Moyle Finches case.

But if the grant were by fine, then albeit the Conusor or Conusee dieth, yet the grant is good. For by fine levied the state doth pass to the Conusee and his heirs, and the attornment to the Conusee or his heirs at any time to make privity to distrain is sufficient. But all this is to be taken as Littleton understood it, viz. of such grants as have their operation by the common Law. For since Littleton wrote, if a fine be levied of a Seigniory, &c. to another, to the use of a third person and his heirs, he and his heirs shall distrain without any Attornment, because he is in by the Statute of 27.H.8.cap.10. by transferring of the state to the use, and so he is in by act in Law.

27.H.8.cap.16. Vide Sect.584.

And so it is, and for the same cause, if a man at this day by Deed indented and inrolled, according to the Statute, bargaineth and selleth a Seigniory, &c. to another, the Seigniory shall pass to him without any Attornment; and so it is of a Rent, a Reversion, and a Remainder. So as the Law is much changed, and the antient privilege of Tenants, Donees, and lessees much altered concerning attornment since Littleton wrote.

Lib.6.ubi supra. Vide Sect.149. 49.E.3.4.34.H.6.8. 6.E.4.13.

But if the Conusee of a fine before any attornment by Deed indented and inrolled bargaineth and selleth the Seigniory to another, the bargainee shall not distrain, because the bargainor could not distrain. Et sic de similibus, for nemo potest plus juris ad alium transferre quam ipse habet. Vide Sect. 149. where upon a recovery, the Recoveror shall distrain and avow without Attornment.

A grant to the King, or by the King, to another, is good without Attornment, by his Prerogative.

¶ *Attornement est nul auter en effect, &c.* It is to be understood, that there be two kinds of Attornment, viz. an attornment in deed or express, and an attornment in law or implicite: of attornment express, or in deed, Littleton speaketh here, and of attornment in Law he speaketh after in this Chapter. And to both these kinds of attornments there is an incident inseparable, that is, that the tenant hath notice of the grant: for (an attornment being an agreement or consent to the grant, &c.) he cannot agree or consent to that which he knoweth not. And the usual pleading is, to which grant the Tenant attorned. And therefore if a Bayly of a Manor who used to receive the rents of the Tenants, purchase the Manor, and the Tenants having no notice of the purchase, continue the payment of the rents to him, this is no attornment. So if the Lord levy a fine of the Seigniory, and by fine take back an estate in fee, the tenant continueth the payment of the rent to the first Conusor without notice of the fines, this is no attornment. But it is to be known, that there be two kinds of notices, viz. a notice in deed or express, whereof Littleton here speaketh, when he saith, that the tenant agreeth to the grant, and a notice in law or implied, whereof Littleton hereafter speaketh in this Chapter.

Lib.2.f.67.b. Tookers case. 13.El.Dier 302. Tookers case, ubi supra Lib.2. Tookers case, ubi supra.

¶ *Del grant fait per son Seignior.* Here is to be seen, when the thing granted is altered, what becometh of the attornment.

If there be Lord, Mesne and Tenant, and the Mesne grant over his Mesnalty by Deed, the Lord releaseth to the tenant, whereby the Mesnalty is extinct, and there is a rent by surplusage, and attornment to the grant of this rent seck is good, although the quality of that part of the rent is altered, because it is altered by Act in law.

If a reversion of two Acres be granted by Deed, and the Lessor before attornment levy a fine of one of them, and the Tenant attorn to the Grantee by Deed, this is good for the other Acre.

(a) If the Reversion be granted of three Acres, and the lessee agree to the said grant for one acre, this is good for all three; and so it is of attornment in Law, if the reversion of three acres be granted, and the Lessee surrender one of the Acres to the Grantee, this attornment shall be good for the whole reversion of the three acres, according to the Grant.

(a) 18.E.3.tit.variance 63.22.E.3.18. Tookers case, ubi supra

¶ *Et le tenant Agree.* Hereafter in this Chapter Littleton doth teach what manner of Tenant shall attorn.

¶ *Agree per parol, &c.* And so he may, and more safely by his Deed in writing.

¶ *Si come adire a le grantee, &c.* Here is to be seen to what manner of Grantees the attornment is good. Regularly the attornment must be according to the grant either expressly or implicitly. Of the first Littleton hath here spoken.

39.H.6.3. Tookers case, ubi supra.

Impli=

Impliedly, as if a reversion be granted to two by Deed, and the Lessee attorn to one of them according to the grant, this attornment is good, but not to vest the reversion only in him to whom attornment is made, but it shall enure to both the Grantees, for that is according to the grant, and for that it cannot vest the reversion only in him to whom the attornment is made. And so it is if one Grantee dieth, the Attornment to the Survivor is good. Tookers case, ubi supra. 11.H.7.12. 20.H.6.7.

If the Lord grant by Deed his Seigniory to A. for life, the remainder to B. in fee. A. dieth and then the tenant attorn to B. this Attornment is void, because it is not according to the grant, for then B. should have a remainder without any particular estate.

If a reversion be granted to a man and a woman, they are to have moieties in law; but if they entermarry and then attornment is had, they shall have no moities, (and yet by the purport of the grant they are to have moities) because it is by Act in Law. Tookers case, ubi supra. Pl.Com.187.483.

If a Feme grant a reversion to a man in fee, and marry with the Grantee, the Lessee Attorn to the husband, this is a good Attornment in law to the husband. 2.R.2.tit.Attornment 8 Lib.4.f.61. Hemlings case.

If a reversion be granted by Deed to the use of I. S. and the Lessee hearing the Deed read, or having notice of the contents thereof, attorn (Gelly que ule) this is an implied Attornment to the Grantee.

If a reversion be granted for life, the remainder in tail, the remainder in fee, the Attornment to the Grantee for life shall enure to them in the remainder to vest the remainder in them. Temps E.1. Attorn. 21. 18.E.4.7.

And in those cases, if the Tenant should say, that I do attorn to the Grantee for life, but that it shall not benefit any of them in remainder after his death, yet the Attornment is good to them all; for having attorned to the Tenant for life, the Law which he cannot control doth vest all the remainder. And of this more shall be said hereafter in this Chapter.

Littleton here putteth five examples of an express Attornment; but of them the last is the best, because the rat is not only a witness of the words, but the eye of the delivery of the penny, &c. and so there is dictum & factum. And any other words which import an agreement or assent to the grant, do amount to an attornment. And albeit these five express attornments be all set down by Littleton, to be made to the person of the Grantee; (b) yet an attornment in the absence of the Grantee is sufficient; for if he doth agree to the grant either in his presence or in his absence it is sufficient. (b) Lib.2.f.68,69. Tookers case. 28.H.8.tit.Attornment Br.40.

## Sect. 552.

¶ Item, si le Seignior graunt l'service de son tenant a un home, & puis per un fait postant un darreine date, il granta mesmes les services a un autre, & l'tenant attorne a le second grantee, ore le dit grauntee ad les services, & issint que apres le Tenant voile attorner a le primer grantee, yet clerement hoid, &c.

ALso, if the Lord grant the service of his Tenant to one man, and after by his Deed bearing a later date he grant the same services to another, and the tenant attorn to the second Grantee, now the said Grantee hath the services; and albeit afterwards the Tenant will attorn to the first Grantee, this is clearly void, &c.

¶ Here it is to be observed, that Littleton expresseth not what Estate is granted, and very materially; for if the former grant were in Fee, and the latter grant were for life, and the Tenant doth first attorne to the second Grantee, he cannot after attorn to the first Grantee to make the Fee simple pass, for that should not be according to the grant; but in that case the Attornment to the first is countermanded. And so it is if a Reversion expectant upon an Estate for life be granted to another in Fee, and after the Grantee before Attornment confirme the estate of the Lessee in tail, the Attornment to the Grantee for the Fee simple is void.

In the same manner, if a Reversion upon an estate for years be granted in fee, and the first confirme the estate of the Lessee for life, he cannot afterwards attorn.

If

If a feme ſole maketh a leaſe for life or years reſerving a rent, and granteth the Reverſion in fee, and taketh husband, this is a Countermand of the Attornment.

11.H.7.19.2.R.2. ubi ſupra. P.3.El.Bendloes.* Hemlings caſe, ubi ſupra

Where our Author putteth his caſe of the whole reverſion, if two Coparceners be of a reverſion, and one of them granteth the moity by Fine, the Conuſee ſhall have a Quid juris clamat for the moity.

If in the caſe that our Author here putteth of ſeveral grantees, if the Tenant attorn to both of them, the Attornment is void, becauſe it is not according to the Grant. If a reverſion be granted for life, and after it is granted to the ſame Grantee for years, and the Leſſee attorneth to both Grants, it is void for the incertainty: A multo fortiori, if the Lord by one Deed grant his Seigniory to I. Biſhop of London and to his heirs, and by another Deed to I. Biſhop of London, and to his Succeſſors, and the Tenant attorn to both grants, the Attornment is void, for albeit the Grantee be but one, yet he hath ſeveral capacities, and the grants are ſeveral, and the attornment is not according to either of the grants.

11.H.7.12.

But if A. grant the reverſion of Black acre or White acre, and the Leſſee attorn to the Grant, and after the Grantee maketh his election, this Attornment is good: for albeit the ſtate was incertain, yet he attorned to the Grant in ſuch ſort, as it was made; and ſo note a diverſity between one grant and ſeveral grants, and obſerve in this caſe an Attornment good in expectation, and yet nothing paſſed at the time of the Attornment, but by the election ſubſequent.

## Sect. 553.

Here it is to be obſerved, that when a man maketh a feoffment of a Manor, the ſervices do not paſſe, but remain in the Feoffor until the Freeholders do attorn; and when they do attorn, the attornment ſhall have relation to ſome purpoſe, and not to other. For albeit the Attornment be made many years after the feoffment; yet it ſhall have relation to make it paſſe out of the Feoffor; Ab initio even by the Livery upon the feoffment, but not to charge the tenants with any mean arrerages, or for waſte in the mean time, or the like.

Temps, E.2. Attornment, 48.E.3.15.

If a reverſion of Land be granted to an alien by Deed, and before Attornment the Alien is made Denizon, and then the attornment is made, the King upon office found ſhall have the land: for as to the eſtate between the parties, it paſſeth by the Deed Ab initio.

Paſch.5 E.3. Coram Rege. Suſſex in Theſaur. 21.E.3.47. 34.E.3. Double plea. 24. 42.Aſſ.p.6,43.Aſſ.p.20. 30.E.3.19.E.3. 26.E.3. Per quæ ſervicia 21.

If a man plead a feoffment of a Manor, he need not plead an Attornment of the Tenants; but (if it be material) it muſt be denied or pleaded of the other ſide.

8.H.4.1.b.12.H.4. 20.H.6.7.35.H.6. 9.E.4.33.13.H.7.14.a. 1.H.7.31. 4.E.6. Attornment, Br. 30.

And upon conſideration had of all the books touching this point, whether the ſervices of the Freeholders do paſſe, wherein there have been three ſeveral opinions, viz. ſome have holden that the ſervices do paſs in the right by the Livery as parcel of the Manor: but not to avow without Attornment, as in the caſe of the Fine. And others have holden, that they both paſſe in right and in poſſeſſion to diſtrain without Attornment. And the third opinion is, that in this caſe the ſaid ſervices paſſe neither in poſſeſſion nor in right, but until attornment remain

ITem, ſi homme ſoit ſeiſie de un manor, quel Manor eſt parcel en demeſne, & parcel en ſervice, ſil voile aliener tel manor a un auter, il conuient que per force del alienation, que touts les tenants que teignont del alienor, come de ſon Manor, attornerent al alienee, ou autrement les ſervices, demurront continualment en la lienor, forpriſe tenants a volunt, car il ne beſoigne que Tenants a volunt attornent ſur tiel alienation, &c.

ALſo, if a man be ſeiſed of a Manor, which Manor is parcell in demeſne, and parcell in ſervice, if he will alien this Manor to another, it behoveth that by force of the alienation, all the Tenants which hold of the alienor as of his Manor doe attorn to the alienee, or otherwiſe the ſervices remaine continually in the alienor, ſaving the tenants at will; for it needeth not that Tenants at will do attorn upon ſuch alienation, &c.

remain continually in the Alienor, as Littleton here holdeth. And ſo it was reſolved, Paſch. 15. El. betweene Brasbitch and Barweil, according to the opinion of our Author. And I never yet knew any of Littletons cases (albeit I have known many of them) to be brought in queſtion, but in the end the Judges concurred with our Author. Vid. Hill. 14. El. Rot. 508. in Communi banco.

And where our Author ſpeaketh of the Attornment of the Freeholders, if the Lord make a leaſe for years, or for life of a Manor, and the Freeholders attorn to the Leſſee, if after the reverſion of the Manor be granted, the Attornment of the leſſee for years or life ſhall bind the Freeholders; for by their former Attornment they have put the Attornment into the mouth of the Leſſee. 9. E. 2. tit. Attornment. 18. b. 19. E. 2. Ibid. 19. 21. E. 3. 47. 5. H. 5. 12. b. Vid. Lit. Sect. 594. & 551

¶ *Forſpriſe tenant a voluntʼ, &c.* Here is implyed tenant at will, or by copy of Court Roll, according to the cuſtom of the Manor, ſo as the Freehold and inheritance both of lands in the hands of tenant at will by the Common law, or by cuſtom, ſhall paſſe both in right and in poſſeſſion without any Attornment.

## *Sect.* 554.

¶ Item, ſi ſoient ſeiſ & tenant, & le tenant leſſa la terre a un auter pur terme de vie, ou dona la terre en le taile ſavant le reverſion a luy, &c. ſi le Seignior en tiel cas granta ſon ſeigniory a un auter, il covient que celuy en le reverſion atturna al grauntee, & nemy le tenant a terme de vie, ou le tenant en le taile, pur ceo que en ceſt cas celuy en le reverſion eſt tenant al Seignior, & nemy le Tenant a terme de vie, ne le tenant en le taile.

ALſo, if there bee Lord and tenant, and the Tenant letteth the land to another for term of life, or giveth the land in taile, ſaving the Reverſion to himſelf, &c. if the Lord in ſuch caſe grant his Seigniory to another, it behoveth that he in the reverſion attorne to the Grantee, and not the Tenant for term of life, or the Tenant in tail, becauſe that in this caſe he in the Reverſion is Tenant to the Lord, and not the tenant for term of life, nor the Tenant in taile.

¶ For it is a maxim in Law, that no man ſhall attorne to any Grant of any Seigniory, Rent ſervice, Reverſion or Remainder, but he that is immediately privy to the Grantor; and becauſe in this caſe there is no privity between the Lord and the tenant for life, or Donee in taile, but only between the Lord and him in the reverſion, for in this caſe the Attornment of him in the reverſion only is good.

¶ *Savant le reverſion a luy, &c.* That is to ſay, without limitation of any Remainder over, and this is but to make his opinion plain, as to the point that he putteth it.

## *Sect.* 555.

¶ En meſne le maner eſt, lou ſont Seigniour, meſne & tenant, ſi le Seigniour voile granter les ſervices del meſne, coment que il ne fait aſcun mention en ſon grant del meſne, uncore il covient que le meſne atturna, &c. & nemy le tenant

¶ IN the ſame manner it is where there are Lord, Meſne and Tenant, if the Lord will grant the ſervices of the Meſne, albeit he maketh no mention in his grant of the Meſne, yet the Meſne ought to attorne, &c. and not the Tenant peravaile, &c.

pera-

peravaile, &c. pur ceo q̄ le meſne eſt tenant a luy, &c.

for that the Meſne is Tenant unto him, &c.

This ſtandeth upon the ſame reaſon that the next precedent caſe did.

## *Sect.* 556.

¶ HEre is to be obſerved a diverſity between a Rent ſervice and a Rent charge, or a Rent ſecke; for as to the Rent ſervice, no man (as hath been ſaid) can attorne, but he that is privy, ſo in caſe of a Rent charge it behoveth that the Tenant of the Freehold doth attorn to the Grantee, without reſpect of any privity. And therefore the diſſeiſor only in the caſe of a grant of a Rent charge, ſhall attorn, becauſe he is (as Littleton ſaith) tenant of the Freehold; but in caſe of a grant of a Rent ſervice the Attornment of the diſſeiſee ſufficeth.

21.H.6.9.b.

If there be Lord and Tenant by homage, fealty, and rent, the tenant is Diſſeiſed, the Lord granteth the rent to another, the Diſſeiſee attorneth, this is void: but if he had granted over his whole Seigniory, the Attornment had been good; and the reaſon of this diverſity is here given by our Author, for that when the rent was granted only, it paſſed as a rent ſeck, and conſequently the Diſſeiſor being ter-tenant, muſt attorn. But when the Seigniory is granted, then the Diſſeiſee in reſpect of the privity may attorn.

¶ ME̅s auterm̄t eſt, lou certaine terre eſt charge dun rent charge, ou Rent ſeck, car en tiel caſe ſi celuy que ad le rent charge ceo grant a un auter, il covient q̄ le tenant del franktenement atturna al Grantée, pur ceo que le franktenement eſt charge ou le rent, &c. & en rent charge nul avowrie doit eſtre fait ſur aſcun perſon pur le diſtreſſe priſe, &c. mes il avowera le priſe bone & droiturel, come en terres ou tenements iſſint charges a ſon diſtreſſe, &c.

BUt otherwiſe it is where certain land is charged with a Rent-charge or Rent ſecke, for in ſuch caſe if hee which hath the rent-charge grant this to another, It behoveth that the Tenant of the freehold attorn to the Grantee, for that the Freehold is charged with the rent, &c. And in a Rent-charge no Avowry ought to be made upon any perſon for the diſtreſs taken, &c. but he ſhall avow the priſel to be good and rightful, as in lands or tenements ſo charged with his diſtreſſe, &c.

¶ *Covient que le Tenant del Franktenement. &c.* And therefore if the tenant of the land charged with a rent charge, or a rent ſeck, make a leaſe for life, and he that hath the rent charge or rent ſeck granteth it over, the tenant for life ſhall attorn; for he is Tenant of the Freehold, according to the expreſs ſaying of our Author, and (as hath been ſaid) there needeth no privity.

And it was holden by Dyer chiefe Juſtice of the Court of Common Pleas, and Mounſon Juſtice, in the argument of Bracebriges caſe abovеſaid, and not denied, that if he that hath a rent charge granteth it over for life, and the Tenant of the land attorn thereunto, and after he granteth the reverſion of the rent charge, that the Grantee for life may attorn alone. And that theſe words of Littleton are to be underſtood when a rent charge or rent ſecke is granted in poſſeſſion: And there with agreeth 46. H. 3. where it appeareth, That the Quid juris clamat, in that caſe, did lie againſt the grantee for life.

46.E.3.27.2.H.6 9. Vi.Lit.Sect.549. & 553.

A man maketh a leaſe for life, and after grants to A. a rent charge out of the reverſion, A. granteth the rent over, he in the reverſion muſt attorn, and not the tenant of the freehold; for that the Freehold is not charged with the rent, for a releaſe made to him by the Grantee doth not extinguiſh the rent. And Littleton is to be underſtood, that the tenant of the Free-

hold

hold muſt attorn when the Freehold is charged.

¶ *Et en Rent charge nul Avowrie doit eſte fait ſur aſcun perſon, &c.* This is the reaſon that Littleton giveth of the difference between the Rent-ſervice and the Rent charge. Now it may be ſaid, That this reaſon is taken away by the Statute of 21.H.8.for by that Statute the Lord needs not avow for any rent or ſervice upon any perſon in certain, and then by Littletons reaſon there needeth no priviti to the attornment of a ſeigniory, for ſay they, Ceſſante cauſa vel ratione legis, ceſſat lex. As at the Common Law no aid was grantable of a ſtranger to an avowry, becauſe the avowry was made of a certain perſon, but now the Avowry being made by the ſaid Act of 21. Hen. upon no perſon, therefore the reaſon of the Law being changed, the Law it ſelf is alſo changed, and conſequently in an Avowry, according to that Act, aid ſhall be grant of any man, and the like in many other caſes, which caſe is granted to be good Law: but albeit the Lord (as hath been ſaid) may take benefit of the Statute, yet may he avow ſtill at his election upon the perſon of his Tenant. Alſo albeit the manner of the Avowry be altered, yet the priviti (which is the true cauſe of the ſaid difference) remaineth ſtill as to an Attornment. 21.H.8.cap.19. Vide Sect.454. 27.H.8.4.b.

¶ *Rent charge, &c.* It is to be obſerved, to what kind of inheritances being granted, an Attornment is requiſite. And in this chapter Littleton ſpeaketh of five: Firſt of a Seigniory, Rent ſervice, &c. Secondly, of a Rent charge. Thirdly, of a Rent ſeck. And hereafter in this Chapter of two more, viz. of a reverſion and remainder of Lands, for the tenant ſhall never need to attorn but where there is Tenure-attendance, remainder, or payment of a rent out of land. And therefore if an Annuity, Common of paſture, common of Eſtovers, or the like be granted for life or years, &c. the reverſion may be granted without any attornment: and albeit ſometimes in ſome of theſe caſes or the like, an Attornment be pleaded, yet it is but ſurpluſage, and more then needeth, becauſe in none of them there is any Tenure, Attendance, remainder, or payment out of Land. 21.H.7.1. 1.H.5.1.37. Aſſ.14.36. Aſſ.pl.3.31.H.7.8. tit. Attornment. Br.39.

## *Sect.* 557.

¶ ITem, ſi ſoit Seignior & tenant, & le tenant leſſa ſon tenement a un auter p̄ term̄ de vie, l'remainder a un auſ en fee, & puis le Seignior granta les ſervices a un auter, &c. & le ten̄t a terme de vie attorna, ceo eſt aſſets bone, pur ceo que le Tenant a terme de vie eſt Tenant en ceſt caſe al ſeignior, &c. & celuy en le remainder ne poit eſtre dit ten̄t le ſeignior, quāt a cel entēt forſque apr̄s la mort le tenant a t̄me de vie, uncore en ceſt caſe ſi celuy en le remainder mourust ſans h̄e, le ſeignior avera le remainder p voy deſcheate, pur ceo que com̄n̄t que le ſeignior en tiel cas covient dabower ſur le tenant a terme de vie, &c. uncore tout lentier tenement quant a touts les eſtates de franktenement, ou d fee ſimpl', ou auterment, &c. en tiel cas ſont enſemble tenus d le ſeignior, &c.

ALſo, if there be Lord and Tenant, and the tenant letteth his tenement to another for terme of life, the remainder to another in fee, and after the Lord grant the ſervices to another, &c. and the Tenant for life attorne, this is good enough, for that the Tenant for life is Tenant in this caſe to the Lord, &c. and he in the remainder cannot be ſaid to be tenant to the Lord, as to this intent, untill after the death of the tenant for life; yet in this caſe if he in the remainder dieth without heir, the Lord ſhall have the remainder by way of Eſcheat, becauſe that albeit the Lord in ſuch caſe ought to avow upon the tenant for life, &c. yet the whole entire Tenement, as to all the eſtates of the Freehold or of Fee ſimple, or otherwiſe, &c. in ſuch caſe are togeether holden of the Lord, &c.

¶ Bes

¶ * Mes nemy de faire Avowrie sur eux touts ensemble M. 3. H. 6.

¶ * But not to make Avowrie upon them altogether. *M.* 3. *H.* 6.

15.E.3.Attorn.10. 12.E.4.4. 18.H.6.2.9.E.2.tit.Attorn.18.18.E.4.7. Temps.E.1. Attorn.22. Vide Sect.580.

¶ *ET le Tenant a terme de vie attorne, &c.* For he that is (as hath been said) privy and immediately Tenant to the Lord must attorn: and that is in this case. The tenant for life; and so of the other side if a Seigniory be granted to one for life, the remainder to another in fee, the Attornment to the tenant for life is an Attornment to the remainder also; unless it be that they in the remainder ought to have acquital, or other privilege, (whereof they should be prejudiced) and then albeit an Attornment be had to the Tenant for life, and he acknowledge the acquital, &c. yet after his decease he in remainder shall not distrain until he acknowledge the acquital, notwithstanding the Attornment of the Tenant for life.

¶ *Avera le remainder per voy descheat.* For the remainder is holden of the Lord, but not immediately holden; and in this case, by the escheat of the remainder the Seigniory is extinct; for the fee simple of the Seigniory being extinct, there cannot remain a particular estate for life thereof, in respect of the Tenure and attendance over; and of this opinion is Littleton (a) himself in our Books. But otherwise it is of a Rent charge in fee; for if that be granted for life, and after he in the reversion purchase the land, so as the reversion of the Rent charge is extinct, yet the Grantee for life shall enjoy the during his life, for there is no Tenure or attendance in this case.

2.H.6.1.Old Tenures 107.
(a)15.E.4 13.a.

M.3.H.6.1.

¶ * *Mes nemy de faire Avowrie, &c.* This is added to Littleton, but it is consonant to Law, and the authority truely cited.

## *Sect.* 558.

¶ ITem, si soit Seignior & tenant, & le tenant lessa les tenements a un feme pur terme de vie, le remainder ouster en fee, & la feme prent baron, & puis le seignior granta les services, &c. a le baron & ses heires, en cest case le service est mis en suspence durant le coverture. Mes si la feme devie vivant le Baron, le baron & ses heires averont le rent de ceux en le remainder, &c. & en cest case il ne besoigne aucun attornment per parol, &c. pur ceo que le baron que doit attorn̄ accepta le fait del graunta de les services, &c. le quel acceptance est un attornment en la Ley.

ALso, if there be Lord and Tenant, and the Tenant letteth the tenements to a woman for life, the remainder over in fee, and the woman taketh husband, and after the Lord grant the services, &c. to the husband and his heirs, in this case the service is put in suspence during the Coverture: but if the wife die living the husband, the husband and his heirs shall have the rent of them in the remainder, &c. And in this case there needeth no Attornment by parol, &c. for that the husband which ought to attorn, accepted the deed of grant of the services, &c. the which acceptance is an attornment in Law.

3.E.3. 42.15.E.3.Attornment,11.

¶ *LE quel acceptance est un attornment en la Ley, &c.* Littleton having spoken (as hath been said) of Attornments in Deed or express, now cometh to speak of Attornments in Law, or implied; and having before set down five expiess Attornments in Deed, doth in this Chapter enumerate seven Attornments in Law. Here it is to be understood, That the expresse Attornment of the husband will bind the wife after the coverture,

coverture; and inasmuch as this acceptance of the grant is an Attornment in law, without a word of Attornment the Seigniory shall pass. And this is the first example that Littleton putteth of an Attornment in Law, which amounteth to an express Attornment, for that it is an agreement to the grant. 44. E. 3. tit. Fines 96. 12. H. 4. 4.

If the Lord grant his Seigniory to the Tenant of the Land, and to a stranger, and the Tenant accept the Deed; this acceptance is a good Attornment to extinguish the one moitie, and to vest the other moity in the Grantee, as hath been said.

## *Sect.* 559.

¶ En mesme manner est, si soyent Seignior, & tenant, & le tenant prent feme, et puis le Seignior granta les services a la feme et ses heirs, & le barō accepta le fait, en cest cas apres la mort le barō, la feme et ses hēs averont les services, &c. car per le acceptance del fait per l'barō, ceo est bone attornment, &c. coment que durant la coverture les services sont mis en suspēce, &c.

¶ IN the same manner is it, if there be Lord and tenant, and the Tenant taketh Wife, and after the Lord grant his services to the wife and his heirs, and the husband accepteth the deed. In this case after the death of the husband, the wife and her heirs shall have the services, *&c.* for by the acceptance of the deed by the husband, this is a good attornment, *&c.* albeit during the coverture the services shall be put in suspence, *&c.*

¶ Here is the second example, that Littleton putteth of an Attornment in Law, and standeth upon the former reason.

¶ *Sont mise en suspence.* Suspence cometh of suspendeo, and in Legal understanding is taken, when a Seigniory, Rent, Profit apprender, &c. by reason of unity of possession of the Seigniory, Rent, &c. and of the land out of which they issue, are not in esse for a time, & tunc dormiunt, but may be revived or awaked. And they are said to be extinguished when they are gone for ever, & tunc moriuntur, and can never be revived; that is, when one man hath as high and perdurable an estate in the one as in the other.

## *Sect.* 560.

¶ ITem, si soyent Seignior & tenant, et l'tenāt granta les tenements a un home pur terme de la vie, le remainder a un auter en fee, si le Seignior granta les services a le tenant a terme de vie en fee, en cest cas le tenant a

ALso, if there be Lord and Tenant, and the Tenant grant the tenements to a man for terme of his life, the remainder to another in fee, if the Lord grant the services to the Tenant for life in fee; in this case the tenant for terme of life

¶ Here is the third case that Littleton putteth of an Attornement in Law. And it is to be observed, that albeit a grant, as hath been said, may enure by way of release, and a release to the Tenant for life doth work an absolute extinguishment, whereof he in the remainder shall take benefit, yet the Law shall never make any construction against the purport of the grant to the prejudice of any, or against the meaning of the parties as here

here it should be for to by construction it should enure to a release, the heirs of the Tenant for life should be disherited of the rent, and therefore Littleton here saith, that the heirs of the grantee shall have the seigniory after his death. And here is an Attornement in Law to a grant suspended, that cannot take effect into the Grantee so long as he liveth, but shall take effect in his heirs by discent; for the Inheritance of the Seigniory was in the Tenant for life, and the suspension only during his life.

terme de vie ad ſes en les ſervices. Mes les ſervices ſont mis en ſuſpence durant la vie. Mes les hers le tenant a terme de vie averont les ſervices apres ſ̄ decease, &c. Et en ceſt cas il ne beſoigne attornement, car per lacceptanse del fait d̄ celuy, q̄ doit attourner, &c. eſt ceo attournement de luy meſme.

hath a Fee in the ſervices, but the ſervices are put in ſuſpence during his life. But the Heirs of the Tenant for life ſhall have the ſervices after his deceaſe, *&c.* And in this caſe there needeth no Attornement; for by the acceptance of the Deed by him which ought to attorne, *&c.* this is an Attornement of it ſelf.

## *Sect.* 561.

Mes lou le tenant ad ey grand & haut eſtate en les tenements, ſicome le Seignior ad en le Seigniory, en tiel caſe, ſi le Seignior graunta les ſervices al tenant in fee, ceo uera per voy dextinguiſhment, Cauſa patet.

BUT Where the tenant hath as great and as high eſtate in the tenements, as the Lord hath in the Seigniory; in ſuch caſe if the Lord grant the ſervices to the Tenant in fee, this ſhall enure by way of extinguiſhment, *Cauſa patet.*

¶ HEre Littleton intendeth not only as great and high an Eſtate, but as perdurable alſo, as hath been ſaid; for a Diſſeiſor or Tenant in fee upon Condition hath as high and great an Eſtate, but not ſo perdurable an Eſtate, as ſhall make an extinguiſhment.

## *Sect.* 562.

¶ HEre in this caſe he in the Reverſion of the tenancy muſt attorn, becauſe he is the Tenant to the Lord, and yet the Seigniory ſhall be ſuſpended during the life of the Grantee, becauſe he hath an eſtate for life in the Tenancie, but his heirs ſhall enjoy the Seigniory by Diſcent.

¶ *Uncore il ne*

ITem, ſi ſoyent Seignior & tenant, & l' tenant fait un leas a un hõe pur terme d̄ ſa vie, ſa-vāt l' reverſion a luy, ſi le Seignior granta l' Seigniorie a le tenant a terme de vie ē fee, & ceſt caſe il cõvi-

ALSO, If there be Lord and Tenant, and the tenant maketh a Leaſe to a man for terme of his life, ſaving the reverſion to himſelf, if the Lord grant the Seigniory to tenant for life in fee; In this caſe it behoveth that he in the rever-

ent

ent que celuy en le reuerſion attorna al tenant a terme d' vie per force d' cel grant, ou auterment l' grãt eſt void, pur ceo que celuy en le reuerſion eſt tenãt al Sñr, &c.

¶ * Et uncore il ne tiendra d' tenant a terme de vie, durãt ſa vie. Cauſa patet. * ¶

ſion muſt attorne to the tenant for life by force of this grant, or otherwiſe the grant is void; for that he in the reverſion is Tenant to the Lord, &c.

¶ Yet he ſhall not hold of the Tenant for life during his life. *Cauſa patet*, &c.

*tient, &c.* This is added and not in the original, and is againſt Law, and therefore to be rejected.

¶ *Tenant al Seignior, &c.* Here is to be underſtood a diverſity when the whole eſtate in the Seigniory is ſuſpended, and when but part of the eſtate in the Seigniory is ſuſpended. And in this caſe the Seigniory is ſuſpended but for term of life, (a) and therefore as to all things concerning the right it hath his being; but as to the poſſeſſion during the particular eſtate the Grantee ſhall take no be-

(a) 34.Aſſ.p.13.

neſit of it, therefore during that time he ſhall have no Rent, Service, Wardſhip, relief, Herriot, or the like, becauſe theſe belong to the poſſeſſion; but if the Tenant dieth without heir, the tenancy ſhall eſche at unto the Grantee, for that is in the right, and yet when the Seigniory is revived by the death of the Tenant, there ſhall be Wardſhip; as if the Tenant marry with the Seigniorels and dyeth, his heir within age, the wife ſhall have the Wardſhip in the heir. Alſo in the caſe that Littleton here putteth, albeit the Seigniory be ſuſpended but for life, yet ſome hold that he cannot grant it over, becauſe the Grantee took it ſuſpended, and it was never In eſſe in him; but if the Tenant make a Leaſe for years or for life to the Lord, there the Lord may grant it over, becauſe the Seigniory was In eſſe in him, and the fee ſimple of the Seigniory is not ſuſpended; but if the Lord diſſeiſe the tenant, or the Tenant enfeoffe the Lord upon condition, there the whole eſtate in the Seigniory is ſuſpended; and therefore he cannot during the ſuſpenſion take benefit of any Eſcheat, or grant over his Seigniory.

16.E.3.tit.Voucher 83.

5.E.3. Twougs caſe.

## *Sect.* 565.

¶ Item, ſi ſoient ſeignior et tenant, et le tenant tient del Seignior per xx. maners des ſervices, et le Seignior granta ſon ſeigniory a un auter, ſi le tenant paya en fait alcun parcel dalcun de les ſervices al grauntée, ceo eſt bone attornment, de et pur touts les ſervices, coment que lentent de le teñ fuit dattourner ſolque de cel parcel pur ceo que le Seigniory eſt entier, coment que ils ſont di-

ALſo, if there be Lord and Tenant, and the Tenant holdeth of the Lord by xx. manner of ſervices, and the Lord grant his Seigniory to another, if the tenant pay in Deed any parcel of any of the ſervices to the Grantee; this is a good Attornement, of and for all the ſervices, albeit the intent of the tenant was to attorne but for this parcel, for that the Seigniory is intire, although there be divers man-

¶ HEre it appeareth that an attornement being made for parcel, is good for the whole; for ſeeing he hath attorned for part, it cannot be void for that, and good it cannot be unleſs it be for the whole; but of this ſufficient hath been ſaid before in this Chapter.

4.H.3.55.Malmans caſe. 25.E.3.23.5.E.4.2. 22.Aſſ.66.7.H.4.10. 55.H.6.8.Per Pr.ſote.

¶ *Paya aſcun parcel des ſervices.* Here is the fourth example of an Attornment in Law, for payment of any parcel of the ſervices is an agreement in Law to the grant.

40.E.3.34.

¶ *Coment que lentent del tenant fuit dattorner, &c.*

Quia intentio inſervire debet legibus, non leges intentioni.

And yet as far as it may

20.H.6. ſtand with the rule of Law, it is honourable for all Judges to judge according to the intention of the parties, and ſo they ought to do. And of this ſomewhat in this Chapter hath been ſaid before.

vers maners des ſervices que le tenant doit faire, &c.

ner of ſervices which the Tenant ought to do, *&c.*

## *Sect.* 564.

48.E.24.3.E.3. Quid juris clamat. 4.E.3.28,29. 37.H.6.14.per Moyle. 17.E.3.29.

¶ HEre is to be obſerved, that this judgement in the Scire facias (which is no more but that the Demandant ſhall have execution, &c.) is a good Attornment, albeit it is preſumed that Judicium redditur in invitum, and that an Attornment in Law of any part is good for the whole. And this is the firſt example that Littleton putteth of an Attornement in Law.

Note, that in caſe of a Deed nothing paſſeth before Attornment, as hath been ſaid; In the caſe of the Fine, the thing granted paſſeth as to the ſtate, but not to diſtrain, &c. without attornment. In the caſe of the King the thing granted doth paſs both in eſtate and in privity to diſtrain, &c. without Attornment, unleſs it be of lands or tenements that are parcel of the Dutchy of Lancaſter, and lie out of the County Palatine.

¶ ITem, ſi ſoit ſeignior et tenant, et le tenant tiel del ſeñ per pluſors maners des ſervices, et l'ſeñ granta les ſervices a un auter per fine, ſi le grantée ſua un Scire facias hors del meſme l'fine pur alcun parcel de les ſervices, et ad judgement de recover, cel judgement eſt bone attornement en ley, pur touts les ſervices.

ALſo, if there be Lord and tenant, and the tenant holdeth of the Lord by many kind of ſervices, and the Lord grant the ſervices to another by fine, if the grantee ſue a *Scire facias* out of the ſame fine for any parcel of the ſervices, and hath judgement to recover; that judgment is a good attornment in law for all the ſervices.

## *Sect.* 565.

¶ ITem, ſi le Seignior dun rent ſervice granta les ſervices a un auter, et le tenant attorna per un denier, et puis le grantée diſtraine pur le rent arere, et le tenant a luy fait reſcous, en ceo cas le grantée navera aſſiſe del rent, forſque briefe de reſcous, per ceo que le don del denier pur le tenant, ne fuit forſque per voy dattornement, &c. Mes ſi le tenant avoit done a le grantée le dit denier, come parcel de le rent, ou un maile, ou un farthing per voy de

ALſo, if the Lord of a Rent ſervice grant the ſervices to another, and the tenant attorn by a penny, and after the Grantee diſtrain for the Rent behinde, and the tenant make reſcous; In this caſe the grantee ſhall not have an Aſſiſe for the rent, but a writ of reſcouſe, becauſe the giving of the penny by the tenant was not but by way of attornement, *&c.* but if the tenant had given to the grantee the ſaid penny as parcel of the rent, or half a penny, or a farthing by way of ſeiſin of the rent, then this

ſeiſin

seisin del rent, donques ceo est bone attornment, et auxy est bone seisin al grauntée del rent, et donqz sur tiel rescous le grantée avera assise, &c.

is a good attornement, and also it is a good seisin to the Grantee of the rent, and then upon such rescous the Grantee shall have an assise, *&c.*

¶ HEreupon is to be observed a diversity between money given by way of Attornment, and where it is given as parcel of the rent by way of seisin of the Rent. For albeit the rent be not due before the day, yet a payment of parcel of the rent before hand is an actual seisin of the rent to have an Assise. And so it is if he give an oxe, a horse, a sheep, a knife, or any other valuable thing in name of seisin of the rent before hand, this is good. And therefore a payment in name of seisin is more beneficial for the Grantee, because that is both an actual seisin and attornment in Law, and yet being given before the day in which the rent is due, it shall not be abated out of the rent. So, as to give seisin of the rent, it is taken for part of the rent; but as to the payment of the rent, it is accounted as no part of the rent; and the reason of the diversity is; for that remedies to come to rights or duties are ever taken favourably. Here also appeareth that there is an actual seisin, or a seisin in deed of a Rent, whereof (as Littleton here speaketh) an Assise doth lye, and a seisin in Law which the Grantee hath by Attornment before actual possession.

39.H.6.26.5.E.4.2. Vide Sect.235. 25.E.3.44. 49.E.3.15. 37.H.6.39.49.Ass.p.6. 34.H.6.42. 15.E.3.Execution 63. 42.E.3.22.28.H.6.6.b. 7.H.4.2.tit.Attorney Br. 97.

## *Sect.* 566.

¶ ITem, si sont pluzors Jointenãts que teignont per certaine serbices, et le Seignioz graunta a un auter les serbices, et un de les Joyntenants attorna al grauntée, ceo est auxy bon, sitome touts ussent attorne, pur ceo que le Seignioz est entrie, &c.

ALso, if there be many jointenants which hold by certaine services, and the lord grant to another the services, and one of the Joyntenants attorne to the Grantee, this is as good as if all had attorned, for that the Seigniory is entire, &c.

¶ HEre is to be observed what manner of Tenants shall attorne to the Grant. And first, (b) if there be two or more Joyntenants, and one of them attorn, it is sufficient: for, as it hath been often said, there cannot be an attornment in part. And albeit there is great Authority against Littleton, yet the Law hath been adjudged according to Littletons opinion, as it hath been in either of his cases when they have come in question; and as it is of an Attornement, so it is of a seisin; a seisin of a rent by the hands of one Joyntenant is good for all, and a seisin of part of the rent is a good seisin of the whole.

(b) 39.H.6.3.26. See Tookers case ubi supra, and the Authorities there cited.

(c) If either the Grantor or the Grantee die, the Attornment is countermanded; but if the Tenant die, he that hath his estate may attorn at any time. If the tenant grant over his estate, his assignee may attorn.

(c) Vid.l.4.fo.8.lj.6. fol.57.lib.9.fol.34. Vid.4.H.6.29.18.E.4.16

(d) If an Infant hath lands by purchase, or by discent, he shall be compelled to attorn in a Per quæ servitia, and no mischief to the Infant; for when he cometh to full age he may disclaim to hold of him, or he may say that he holds by lesser services; but there should be a greater mischief for the Lord, if the Attornment of an Infant should not be good, for he should lose his services in the mean time.

(d) 42.E.3.Age 33. 26.E.3.62.27.H.8. tit. Attorn Br.26.E.3.62. 26.Ass.27.32.E.3. tit.per quæ servic. 9. 2.E.2. Attorn 78. 2.E.2. ib.77.18.H.6.2. Lib.9.fo. 84,85. Coneys case 4. Mar.Dier 137. 21.E.3.Age 85. 7.E.2.Age 140.

If an Infant be a Lessee, he shall be compelled to attorn in a Quid juris clamat. The Attornment of an Infant to a grant by deed is good, and shall binde him, because it is a lawful act, albeit he be not upon that grant by Deed compellable to attorn. Of Baron and Feme Littleton putteth many cases in this Chapter.

(e) A man that is deaf and dumb, and yet hath understanding, may attorn by signes: (f) but one that is not Compos mentis cannot attorn; for that he that hath no understanding cannot agree to the Grant.

(e) 26 E.3.63. (f) 18.E.3.53.

All what conveyances shall be good without Attornments, more shall be said in this Chapter, in his proper place.

## *Sect. 567.*

¶ Item, ſi home leſſa tenemẽts a terme dans, per force de quel leaſe le Leſſée eſt ſeiſie, et puis le Leſſor per ſon fait granta le reverſion a auter pur termẽ de vie, ou en taile, ou en fée, il covient en tiel caſe que le tenant a terme dans attorna, ou autrement rien paſſera a tiel grantée per tiel fait. Et ſi en ceſt caſe le tenant a terme dans attorna al Grantée, donques maintenant paſſera le Franktenement al Grauntée per tiel attornement ſauns alcun liverie de ſeiſin, &c. pur ceo que ſi alcun livery de ſeiſin, &c. ſerra ou beſoigne deſtre fait, en cel caſe donques le tenant a terme dans ſerroit al temps de liverie de ſeiſin oustre de ſon poſſeſſion, le quel ſerroit encounter reaſon, &c.

ALſo, if a man letteth tenements for term of years, by force of which Leaſe the Leſſee is ſeiſed, and after the Leſſor by his Deed grant the reverſion to another for term of life, or in Taile, or in Fee; it behoveth in ſuch caſe that the Tenant for years attorne, or otherwiſe nothing ſhall paſs to ſuch grantee by ſuch deed; And if in this caſe the Tenant for years attorn to the grantee, then the Freehold ſhall preſently paſs to the Grantee by ſuch attornment without any liverie of ſeiſin, *&c.* becauſe if any livery of ſeiſin, *&c.* ſhould be or were needful to be made, then the Tenant for years ſhould be at the time of the Livery of ſeiſin ouſted of his poſſeſſion, which ſhould be againſt reaſon, *&c.*

¶ HEre Littleton having ſpoken of Grants of Seigniories and Rent-charges, and Rents ſeeke iſſuing out of land, here treateth of a Grant of a reverſion of land upon an eſtate for years; ſeeing this grant of the reverſion muſt be by Deed, and the agreement of the Leſſee for years requiſite thereunto, the Freehold and inheritance do paſs thereby, as well as by livery of ſeiſin, if it were in poſſeſſion; and the grant of the reverſion by Deed with the Attornment of the Leſſee, do counterbail in Law a Feoffment by Livery, as to the paſſing of the Freehold and Inheritance.

¶ *A terme dans.* (g) And yet a tenant by Statute Merchant, or tenant by Statute Staple, or by Elegit, muſt alſo attorn; for the Grantee may have a Venire facias ad computandum, or tender the money, &c. and diſcharge the land; and if the reverſion be granted by fine, they ſhall be compelled to attorn in a Quid juris clamat.

(g) 6.E.3.32.25.E.3.53. Brook Tit. Attorn. 48. 32.E.3.Seir.fac.101. Dy.1.a.

And ſo the Executors that have the Land until the debts be paid muſt attorn upon the grant of the Reverſion, although they have not any certain term for years.

## *Sect. 568.*

¶ HEre Littleton ſpeaketh of a Reverſion expectant upon an eſtate for life, or gift in taile.

¶ *Il covient que le Tenant de la Terre at-*

¶ Item, ſi Tenements ſoient leſſes a un home pur terme de vie, ou done en le taile ſavãt

ALſo, if Tenements be letten to a man for term of life, or given in taile, ſaving the reverſion, *&c.* if he in

le

le reversion, &c. si celuy en le reversion en tiel case granta le reversion a un auter person fait, il covient que le Tenant de la Terre attourna al grantée en la vie le grantor, ou autrement, le graunt est void.

the reversion in such case grant the reversion to another by his Deed, it behoveth that the Tenant of the Land attorne to the Grantee in the life of the grantor, or otherwise the Grant is void.

*tarne al Grantee, &c.*

Let us therefore speak first of Tenant for life: and yet in some case albeit Tenant for life hath granted over his Estate, yet he shall attorne, (a) as if Tenant in Dower, or by the Curtesie, grant over his or her estate, and the heir grant over the reversion, the Tenant in Dower, or by the Courtesie may attorne, because at the time of the grant made they were attendant to the heir in reversion, and the Grantee

(a) 10.H.4.tit.Attorn. 16. 11.H.4.18. 30.E.3. 16.38.E.3.23.18.E.4.3. 10.E.3. Quid juris clam.41.41.E.3,18. Temps E.1.tit. Waste 121.

cannot be Tenant in Dower, or Tenant by the Courtesie. And if the Reversion be granted by Fine, the Fine must suppose that the tenant in Dower or by the Courtesie, did hold the land, albeit they had formerly granted over their estate; and albeit the reversion upon pais by the Fine, yet the Quid juris clamat must be brought against him that was Tenant at the time of the note levied. But yet after the reversion is granted over, the Grantee shall not have any Action of Waste against the tenant in Dower, or by the Courtesie; but the action of waste must be brought against their assignee, and not against themselves; for Tenant by the Courtesie or Tenant in Dower cannot hold of any, but of the heir: and therefore in respect of the privity, they shall attorn, and be subject to an action of waste, as long as the reversion remaineth in the heir, albeit they have granted over their whole estate. And it is worthy of the observation, that if the grantee of the reversion doth bring an action of waste against the assignee of the tenant by the Courtesie, (b) the Pl. must reverse the statute which proveth that no prohibition of Waste lay at the common Law, as it did if the heir had brought it against the tenant by the courtesie himself; and therefore some do hold, that if the heir do graunt over the reversion, that the attornment of the Assignee of the Tenant by the courtesie, or of tenant in Dower, is sufficient, because they afterward must be attendant, and subject to the Action of Waste.

F.N.B.55.E.Regist. f. 72. 4.E.3.26.

(b) Regist.71.

If the reversion of Lesse for life be granted, and Lesse for life assigne over his estate, the Lesse cannot attorn; but the attornment of the Assignee is good, because (as Littleton here saith) it behoveth that the Tenant of the Land do attorn, and after the assignment there is no tenure or attendance, &c. betwen the Lesse and him in reversion.

18.E.4.10.b.26.E.3.62.

If Lesse for life assigneth over his estate upon condition, he having nothing in him but Condition, shall not attorn, but the Assignee may attorn, because he is Tenant of the land.

5.H.5.10.

## *Sect.* 569.

FEmelm l'manner est, si terre soit done en taile, ou lesse a un hõe p terme de vie, le remainder a un auter en fee, si celuy en l'remainder voile grantet est remaind a un auter, &c. si le tenant de la terr attorna en la vie le grantor, donques l'grant de tiel rem est bone, ou autrement nemy.

IN the same manner is it, if land be granted in taile, or let to a man for terme of life, the remainder to another in fee, if he in the remainder will grant this remainder to another, &c. if the tenant of the land attorn in the life of the Grantor, then the grant of such a remainder, is good, or otherwise not.

Littleton here in this Attornment by tenant in taile, and true it is that he may attorn, but where the reversion is vested in such persons that is not compellable to attorn, because he hath an estate of inheritance, which shall continue for ever. And so it is of a tenant in taile after possibility of issue extinct, he shall not be compelled to attorn for the inheritance which was once in him. (c) But if a feoffment in tail after possibility of issue extinct grant over his estate, his assignee shall be compelled to attorn, because he had but a bare estate for life.

12.M.4.3.4.3.E.4.11. 43 E.3.1.46.E.3.13.

5.H.5.

20.E.3. Quid juris clam.50.

(c) See the Chap. of Tenants in tail after possibility of Issue extinct. And Ewins case there cited to be adjudged.

But

But as to Tenant in taile, note a diverſity between a Quid juris clamat, and a Quem reddit tuum reddit, or Per quæ ſervitia; for against a Tenant in Taile, no Quid juris clamat lyeth, as is aforeſaid. But if a man make a gift in taile, the remainder in fee, and the Seigniory or rent-charge iſſuing out of the land be granted by Fine, the Conuſee ſhall maintain a Per quæ ſervitia, or a Quem reddidit, and compel him to attorn; for herein his eſtate of Inheritance is no priviledge to him; for that a tenant in fee ſimple (as his eſtate was at the Common Law) is alſo compellable in theſe caſes to attorn.

## Sect. 570.

*P. 12. E. 4. Et la eſt tenus per tout le Court, que Tenant en Taile ne ſerra arc. barr attorner, mes ſi attorna gratis, ceſt aſſets bone. *

P. 12. *Edw.* 4. It is there holden by the whole Court, that Tenant in Taile ſhall not be compelled to attorn; but if he will attorn *gratis*, it is good enough.

12. E. 4. 3. 4. This is added to Littleton; and therefore though it be good Law, and the Book truly cited, yet I paſs it over.

## Sect. 571.

ITem, ſi terre ſoit leſſe a un home pur terme dans, le remainder a un auter p̄ term̄ de vie, reſervant al Leſſour un certain rent per an, et liverie de ſeiſin ſur ceo eſt fait al tenant p terme dans, ſi celuy en le reverſion en ceſt caſe granta le reverſion a un auter, &c. et le tenant que eſt en le remainder apres le terme dans ſoy attourna, ceo eſt bone Attournement, et celuy a que ceſt reverſion eſt graunt per force de tiel Attournement diſtreyner a le Tenant a terme dans put le Rent vie apres tiel Attornement, coment que le tenſt a terme dans ne unques attourna a luy. Et la cauſe eſt, p̄ ceo que lou le reverſion eſt dependant ſur leſtate del franktenement, ſuffiſt que le tiel franktenem̄t attourna ſi tiel grant del Reverſion, &c.

ALſo, if Land be let to a man for years, the remainder to another for life, reſerving to the Leſſor a certain rent by year, and Livery of Seiſin upon this is made to the Tenant for years, if he in the Reverſion in this caſe grant the Reverſion to another, *&c.* and the Tenant which is in the Remainder after the terme of years attorne; this is a good Attornement, and he to whom this Reverſion is granted, by force of ſuch Attornement ſhall diſtrein the Tenant for years for the Rent due after ſuch Attornement, albeit the Tenant for years did never attorn unto him. And the cauſe is, for that where the Reverſion is depending upon an eſtate of freehold, it ſufficeth that the Tenant of the Freehold do attorn upon ſuch a Grant of the reverſion, *&c.*

Q. *Mais que le Tenant del Franktenement attorna.* Note, Littleton ſaith not here, That the Tenant of the Franktenement ought in this caſe to attorn, but that it

it ſufficeth that he doth attorn. And I heard Sir James Dyer chief Juſtice of the Common Pleas hold, that in this caſe if the Tenant for years did attorn, it would veſt the reverſion; for ſeeing the eſtate for years is able to ſupport the eſtate for life, he ſhall bind him in the remainder by his attornement in reſpect of his eſtate and privity. Paſch. 15. Eliz. in Braſbritches caſe in communi Banco.

## *Sect.* 572.

ET eſt aſcavoir, que lou un leas a terme dans, ou a terme de vie ou done en taile eſt fait a aſcun home, reſervant a tiel leſſor, ou donor un certaine rent, &c. ſi tiel leſſor, ou donor, graunta ſon reverſion a un auter, & le tenant del terre attourna, le rent paſſa al grauntee, coment que en le fait del grant de reverſion nul mention ſoit fait de le rent, pur ceo que le rent eſt incident al reverſion en tiel caſe, & nemy è converſo, &c. Car ſi home voile graunter le rent en tiel caſe a un auter, reſervant a luy le reverſion del terre, coment que le tenant attorna a le grauntee, ceo ſerra forſque un rent ſerke, &c.

AND it is to be underſtood, that where a leaſe for years or for life, or a gift in taile is made to any man, reſerving to ſuch Leſſor or Donor a certain rent, &c. if ſuch Leſſor or Donor grant his Reverſion to another, & the tenant of the land attorn, the rent paſſeth to the Grantee, although that in the deed of the Grant of the Reverſion no mention be made of the Rent, for that the rent is incident to the Reverſion in ſuch caſe, and not *è converſo, &c.* For if a man will grant the rent in ſuch caſe to another, reſerving to him the Reverſion of the Land, albeit the Tenant attorn to the Grantee; this ſhall be but a Rent ſecke, *&c.*

Of this Littleton hath ſpoken in the Chapter of Rents.

## *Sect.* 573.

ITem, ſi hõe leſſa terre a un auter p̃ terñ d̃ ſa vie, & puis il confirma p̃ ſon fait leſtate d̃ l'tenant a terñ de vie, le remainder a un auter en fee, & le tenant a terme de vie accepta le fait, donques eſt le remainder en fait en celuy a que le remainder eſt done ou limitte per meſme le fait, car per lacceptance del tenant a terñ de vie del le fait, ceo eſt un agreement del luy, & iſſint un attornement en ley. Mes uncore celuy en le remainder navera aſcun

ALſo, if a man let land to another for his life, and after he confirm by his Deed the eſtate of the Tenant for life, the remainder to another in fee, and the Tenant for life accepteth the Deed, then is the remainder in fait in him to whom the remainder is given or limited by the ſame Deed. For by the acceptance of the Tenant for life of the deed, this is an agreement of him, and ſo an Attornement in Law. But yet he in the remainder ſhall not have any actiaction

non de Waſte ne auter benefit per tiel remainder, ſi non que il avoit l' dit fait en poigne, per que le remainder fuit taile ou graunt a luy. Et pur ceo que en tiel cas le tenant a term de vie voile p cas reteigner le fait a luy, a cel entent que celuy en le remainder naveroit aſcun action de waſte envers luy, pur ceo que il ne poit bener daver le fait e ſa poſſeſſion, il ſerra bone e ſure choſe en tiel cas pur celuy en le remainder, que un fait endent ſoit fait per celuy que voile fait tiel confirmation e le remainder outer, &c. e que celuy que fait tiel confirmation delibera un part del Indenture al tenant a terme de vie, e le auter part a celuy que avera le remainder. Et donque il per monſtrance de le part del endenture, poit aver action de waſte envers le tenant a terme de vie, et touts auters advantages que celuy en le remainder poit aver en tiel caſe, &c.

on of Waſte nor other benefit by ſuch remainder, unleſs that he hath the ſaid Deed in hand whereby the remainder was entayled or granted to him. And becauſe that in ſuch caſe the Tenant for life peradventure will retain the Deed to him to this intent that he in the remainder ſhould not have any action of Waſte againſt him; for that he cannot come to have the Deed in his poſſeſſion, it will be a good and ſure thing in ſuch caſe for him in the remainder, that a Deed indented be made by him which will make ſuch Confirmation and the remainder over, *&c.* and that he which maketh ſuch Confirmation deliver one part of the Indenture to the tenant for life, and the other part to him that ſhall have the remainder. And then he by ſhewing of that part of the Indenture may have an Action of waſte againſt the tenant for life, and all other advantages that he in the remainder may have in ſuch a caſe, *&c.*

Vid.Sect.325.575. Vide Pl.Com.in Col. thirſts caſe, Doct. & Stud.cap.20.fol.93,94. 8.R.2. in Waſte in Liver eſcrite. 17.E.3. confirmat. 47. 35.H.6.fol.8. 14.H.8. Pl.Com.149.in Throckmortons caſe, 45.E. 3.13.15 11.H.4.39. 14. H.4.32.

¶ HEre Littleton putteth a caſe of a remainder whereunto an Attornment is requiſite. And this is the firſt example of an Attornment in Law.

¶ *Remainder un auter, &c.* Of this ſufficient hath been ſaid in the Chapter of Confirmation. Sect. 525.

¶ *Et non obſtant il avoit le fait en poigne.* And albeit he hath no remedy to come to the Deed during the life of Tenant for life, yet becauſe he is privy in eſtate, he ſhall not maintain an Action of waſte, without ſhewing the Deed; but when the remainder is once executed, he ſhall not need to ſhew the Deed.

¶ *Il ſerra bone & ſure choſe, &c.* Hereby it appeareth how neceſſary it is to take learned advice in a matter of Conveyance; for thereby ſhall be prevented many queſtions, and not to follow the advice of him that is experimented only. For as in Phyſick, Nullum medicamentum eſt idem omnibus, ſo in Law one form or preſident of conveyance will not fit all caſes.

Sect.

## Sect. 574.

Item, ſi deux Joyntenants ſoit, les queux leſſont lour tert a un auter pur terme de vie, rendant a eux & a lour heires tertaine rent per an, en teſt caſe ſi un des Joyntenants en le reverſion releſſa a lauter Joyntenant en meſme le reverſion, teſt releas eſt bone, & celuy a que le releas eſt fait avera ſolement le rent del tenant a terme de vie, & avera ſolement un briefe de waſte envers luy toment q̄ il ne unques attornetvit per force de tiel releas, &c. Et la cauſe eſt pur le privity que un foits fuit perenter le tenant a terme de vie, & eux en le reverſion.

Alſo, if two Joyntenants be, who let their Land to another for terme of life, rendring to them and to their Heires a certain yearly Rent: In this caſe if one of the Joyntenants in the reverſion releaſe to the other Joyntenant in the ſame reverſion, this releaſe is good, and he to whom the releaſe is made ſhall have only the rent of the Tenant for life, and ſhall only have a Writ of Waſte againſt him, although he never attorned by force of ſuch releaſe, &c. And the reaſon is for the privity which once was between the Tenant for life and them in the Reverſion.

¶ *Deux joyntenants.* And to this (as it is here to be underſtood) albeit there be three or more Joyntenants, and one of them releaſeth to one of the other.

It is true, that there is a difference betweene theſe releaſes; for the Releaſe in the one caſe maketh no degree, but he to whom the Releaſe is made is ſuppoſed in from the firſt Feoffor; and in the other it worketh a degree, and he to whom the Releaſe is made is in the Per by him; yet in neither of theſe caſes there is requiſite any attornment, for both of them are within Littletons reaſon for the privitie, &c.

¶ *Pur le privity, &c.* 2. Eliz. Dyer 176. For if one joyntenant make a leaſe for yeares, reſerving a Rent and dieth, the Survivor ſhall not have the rent; and therefore Littleton here anneth materiatly, for the privitie that was between the Tenant for life and them in the reverſion.

And here it is good to be ſeen what grantors or others that make Conveyances, &c. are ſuch as their Grants or Conveyances are either good without Attornment, or where the Tenant is no way compellable to attorn. Tenant for life ſhal not be compelled to attorn in a Quid juris clamat upon a grant of a reverſion by fine holden of the King in chief without licence; but the reaſon hereof is, not becauſe the Tenant for life might be charged with the fine; for his eſtate was more ancient than the fine levied: but becauſe the court will not ſuffer a prejudice to the King, and the King may ſeiſe the reverſion and rent, and ſo the Tenant ſhall be attendant to another. Alſo it is a general rule, that when the grant by fine is defeaſible, there the Tenant ſhall not be compelled to attorn. 45.E.3.6.b. 13.Eliz. Dyer 188. Lib.3 fol.86. Juſt. Windhams caſe. 39.H.6.24.

As if an Infant levie a fine, this is defeaſible by Writ of Error during his minority, and therefore the Tenant ſhall not be compelled to attorn.

So if the Land be holden in ancient Demeſne, and he in the reverſion levieth a fine of the reverſion at the Common Law, the Tenant ſhall not be compelled to attorn, becauſe the eſtate that paſſed is reverſible in a Writ of Deceit. 5.E.3.25.31.E.3. Ancient Deweſne 16.

So if Tenant in tail had levied a fine, the Tenant ſhould not be compelled to attorn, becauſe it was defeaſible by the iſſue in tail. 24.E.3.25.b.37.H.6.33 48.E.3.23.

But now the Statutes of 4.H.7. & 32.H.8. having given a further ſtrength to fines to bar the iſſue in tail, the reaſon of the Common law being taken away; the Tenant in this caſe ſhall be compelled to attorn, as it was adjudged * in Juſtice Windhams caſe. (*)Lib.3.fol.86. Juſtice Windhams caſe.

If an alienation be in Mortmain, the tenant ſhall not be compelled to attorn, becauſe the Lord Paramount may defeat it. 17.E.3.7.22.E.3.18.

Sect.

## *Sect. 575.*

¶ EN meſme le maner, & pur meſme la cauſe eſt, lou hõe leſſa terre a un auter pur terme de vie, le remainder a un auter pur terme de vie, reſervant le reverſion al leſſor, en ceſt cas ſi celuy en le reverſion releſſa a celuy en le remainder et a ſes heires tout ſon droit, &c. donqz celuy en le remainder ad un fee, &c. et il avera un briefe de Waſte envers le tenant a terme de vie ſans aſc attornment de luy, &c.

¶ IN the ſame manner, and for the ſame cauſe is it, where a man letteth land to another for life, the remainder to another for life, reſerving the reverſion to the leſſor; in this caſe, if he in the reverſion releaſeth to him in the remainder and to his heirs all his right, &c. Then he in the remainder hath a fee, &c. And he ſhall have a writ of Waſte againſt the Tenant for life without any attornment of him, &c.

Vide Sect.549.553 556.

This needeth no explication.

## *Sect. 576, 577.*

¶ There have been now, in all, ſeven Examples, that Littleton putteth of an Attornement in Law; and here he putteth two caſes alſo of a notice in Law. And the reaſon of both theſe are here rendred by Littleton. Firſt for the notice, Littleton ſaith that the Leſſee ſhall not by Law be miſconuſant of the Feoffements that were made of and upon the ſame land. And the reaſon of the Attornment is, becauſe the whole Fee-ſimple paſſeth by the Feoffement, and the Leſſee by his regreſs leaveth the reverſion in the Feoffee, which (ſaith Littleton) is a good Attornement. The ſame Law it is of a Tenant by Statute Merchant, or Staple, or Elegit. And ſo it is of a Leaſe for life, as Littleton here ſaith; and ſo it was reſolved (c) in Brasbritches caſe, and after in the Dean of Pauls his Caſe in the

46.E.3.30.b.2.H.5.4.5.H.5.12.34.H.6.6.18.E 3.47.9.H.6.10.

(c) Brasbritches caſe. 9.15.Eliz. Deane of Pauls caſe. 29.Eliz.

¶ ITem, ſi home leſſa terres ou Tenements a un auter pur terme des ans, et puis il oulta ſon termour, et ent enfeoffa un auter en fee, et puis le tenant a terme dans enter ſur le feoffee, enclaimant ſon terme, &c. et puis fait waſte, en ceſt caſe le feoffee avera per la ley un briefe de waſte envers luy, et uncore il nattornait pas a luy. Et la cauſe eſt, come jeo ſuppoſe, p ceo que celuy que ad droit de aver terres ou tenements pur term dans, ou auterment, ne ſerroit per la ley miſconuſant de les feoffements q̃ fueront faits

ALſo, if a man let lands or tenements to another for terme of years, and after he ouſt his termor, and thereof enfeoffe another in Fee, and after the tenant for years enter upon the feoffee, clayming his term, &c. and after doth waſte; in this caſe the feoffee ſhall have by law a Writ of Waſte againſt him, and yet he did not attorne unto him. And the cauſe is, as I ſuppoſe, for that he which hath right to have lands or tenements for years, or otherwiſe, ſhould not by Law be miſconuſant of the feoffements which were made of & upon the ſame

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de et ſur meſmes les terres, &c. et entant que per tiel Feoffement le tenant a terme dans fuit mis hors de ſon poſſeſſion, et p ſon entre il cauſa le reverſion deſtre a celuy a que le feoffment fuit fait, ceo eſt bone attornement: car celuy a que le feoffment fuit fait, avoit nul reverſion devaunt que le tenant a terme dans avoit enter ſur luy, pur ceo que il fuit en poſſeſſion en ſon demeſne come de fee, et per lent del tenant a term dans il y ad forſque un reverſion, quel eſt p le fait l' teſn a term dās, ſ. p ſon entrie, &c.

lands, &c. and inaſmuch as by ſuch feoffment the tenant for years was put out of his poſſeſſion, and by his entry he cauſed the reverſion to be to him to whom the feoffement was made, this is a good attornment, for he to whom the feoffement was made had no reverſion before the tenant for years had entred upon him, for that he was in poſſeſſion in his demeſne as of fee, and by the entrie of the Tenant for years, he hath but a reverſion, which is by the act of the tenant for years, ſ. by his entrie, &c.

Common place. But ſhall the leſſee in this caſe whether he will or no do an Act that amounts to an Attornment, viz. by his regreſſe, or elſe loſe the profit of his land? And ſome do hold that in that caſe, if the leſſe for life doe recover in an Aſſiſe, this is no Attornement, becauſe he comes to it by courſe of Law, and not by his voluntary act. And yet in that caſe, as in the caſe of the fine, the ſtate of the reverſion is in the feoffee. (f) But others do hold it all one in caſe of a recovery, and a regreſſe.

(f) 18.E.3.48.b. Lib.6.fol.60.b. Sir Moyle Finches caſe.

(g) If the leſſor diſſeiſe Tenant for life or ouſt Tenant for years, and maketh a feoffment in fee, by this the rent reſerved upon the leaſe for life or yeares is not extinguiſhed, but by the regreſſe of the leſſee the rent is revived, becauſe it is incident to the reverſion: and ſo hath it been adjudged. But if a man be ſeiſed of a rent in fee, and diſſeiſe the tenant of the land, and make a feoffment in fee, the Tenant re-entreth, this rent is not revived. And ſo note a diverſitie between a rent incident to a reverſion, & a rent not incident to a reverſion.

(g) 9.H.6.16. Deane of Pauls caſe, ubi ſupra.

If two joynt leſſees for yeares, or for life, be ouſted or diſſeiſed by the leſſor, and he enfeoffe another, if one of the leſſees re-enter, this is a good Attornement, and ſhall bind both; for an Attornement in law is as ſtrong as an Attornment in Deed.

*Sect.* 577.

MEſme la ley eſt, come il ſemble, lou un Leas eſt fait pur terme d vie, ſabāt le reverſion al Leſſor, ſi l' Leſſour diſſeiſi le Leſſee, et fait feoffment en Fee, ſi le tenant a terme de vie enter et fait waſte, le feoffee avera briefe de waſte ſans aſcun auter attournment, Cauſa qua ſupra, &c.

THe ſame Law is, as it ſeemeth, where Leaſe is made for life, ſaving the reverſion to the Leſſor, if the leſſor diſſeiſe the Leſſee, and make a feoffment in Fee, if the tenant for life enter and make waſte, the feoffee ſhall have a Writ of Waſte without any other attornement, *cauſa qua ſupra*, &c.

If a man make a leaſe for life, and then grant the reverſion for life, and the Leſſee attorne, and after the Leſſor diſſeiſe the leſſee for life, & make a feoffment in fee, and the leſſee re-enter this ſhall leave a reverſion in the Grantee for life, and another reverſion in the feoffee; and yet this is no Attornment in law of the Grantee for life, becauſe he doth no act, nor aſſent to any which might amount to an Attornment in law. Res inter alios acta alteri nocere non debet. Neither hath the grantee for life the land in poſſeſſion, ſo as he may well be miſconuſant of the feoffment made upon the land, and ſo out of the reaſon of Littleton. But yet the reverſion in fee doth paſſe to the Feoffee.

## *Sect.* 578.

¶ HEre it appeareth, that where the Ancestor taketh an estate of Freehold, and after a Remainder is limited to his right heires, that the Fee-simple resteth in himselfe, as well as if it had been limited to him and to his heires; for his right heires are in this case words of limitation of estate, and not of purchase. Otherwise it is, where the Ancestor taketh but an Estate for years: As if a lease for years be made to A. the remainder to B. in taile, the remainder to the right heires of A. there the remainder resteth not in A. but the right heires shall take by purchase, if A. die during the estate Taile, for as the Ancestor and the heire are Correlativa of Inheritance; so are the Testator and executor, or the Intestate and Administrator of Chattels. And so it is, if A. make a Feoffment in fee to the use of B. for life, and after to the use of C. for life, or in taile, and after to the use of the right heires of B. B. hath the Fee simple in him, as well when it is by way of limitation of use, as when it is by Act executed.

¶ ITem, ſi leas ſoit fait pur terme d̄ vie, le remaind̄ a un auter en le Taile, le remaind̄ ouſter a les droit heires le tenant a terme de vie: En ceſt caſe ſi le tenant a terme de vie granta ſon remainder en fee a auter per ſon Fait, cel remainder maintenant paſſa per le fait ſans aſcun Attournment, &c. Car ſi aſcun doit attorne en ceſt caſe, ceo ſerroit le tenant a terme de vie, et en vain ſerroit que il atturneroit ſur ſ̄ grant demeſne, &c.

ALſo, if a leaſe be made for life, the remainder to another in taile, the remainder over to the right heirs of the tenant for life; In this caſe if the Tenant for life grant his remainder in Fee to another by his deed, this remainder maintenant paſſeth by the deed without any Attornement, *&c.* for that if any ought to attorne in this caſe, it ſhould be the Tenant for life; and in vaine it were that he ſhould attorne upon his own Grant, *&c.*

Vid. Sect. 194. 173.

¶ *En vaine ſerroit*, &c. Quod vanum & inutile eſt Lex non requirit. Lex eſt ratio ſummæ, quæ jubet quæ ſunt utilia & neceſſaria, & contraria prohibet, and arguments drawn from hence are forcible in law.

## *Sect.* 579.

¶ ITem, ſi ſoit Seignior et tenant, et le Tenant tient del Seignior per certaine rent et ſervice de chivalier, ſi le Sr̄ grant les ſervices de ſon tenſt p̄ fine, les ſervices ſont maintenant en le grantee per force del fine, mes uncore le Sr̄ ne poit pas diſtreyne p̄ aſcun parcel de les ſervices ſans attournment: Mes ſi le tenant de dia (ſon heire deins age) le Sr̄ avera le gard del

ALſo, if there be Lord and Tenant, and the Tenant holdeth of the Lord by certain rent and Knights ſervice, if the Lord grant the ſervices of his Tenant by fine, the ſervices are preſently in the Grantee by force of the fine: but yet the Lord may not diſtreine for any parcel of the ſervices, without Attornement. But if the Tenant dieth, his heire within age, the Lord ſhall have the wardſhip,

corps

cozps del heire, et de ſes terres, &c. coment que il ne unqz atturnaſt, pur ceo que le Seignioꝛie fuit en le grantee, maintenant p foꝛce d fine. Et auxy en tiel cas, ſi le tenant moꝛuſt ſans heir, le Seignioꝛ avera les tenemts per voy deſcheat.

of the body of the heire, and of his lands, *&c.* albeit he never attorned, becauſe that the Seigniorie was in the Grantee preſently by force of the fine. And alſo in ſuch caſe, if the Tenant die without Heire, the Lord ſhall have the Tenancie by way of Eſcheat.

¶ HEre Littleton beginneth to ſhew what advantages the Conuſee of a Fine may take before Attornement, and what not.

(h) First, He cannot diſtrain, becauſe an Avowrie is in lieu of an Action, and thereunto priuity is requiſite. So likewiſe, and ſo for the ſame cauſe he cannot have an Action of Waſte, nor Writ of Entrie, ad Communem legem, or in conſimili caſu, or in Caſu proviſo, writ of Cuſtomes and ſervices, nor Writ of Ward, &c.

(h) 8.E.3.44.26.E.3. 63.10.H.6.16.34.H.6.7. 12.E.4.4.40.E.3.7.5. H.5.12.48. E.3.15.b.3. E.2.*Droit*.33.

But if a man make a Leaſe for years, and grant the reverſion by fine, if the Leſſee be ouſted, and the Conuſee diſſeiſed, the Conuſee without Attornment ſhall maintain an aſſiſe, for this Writ is maintained againſt a ſtranger, where there needeth no priuitie. And ſuch things as the Lord may ſeiſe or enter into without ſuing any Action, there the Conuſee before any Attornement may take benefit thereof, as to ſeize a ward or Heriot, or to enter into the Lands or tenements of a Ward, or eſcheated to him, or to enter for an alienation of Tenant for life or years, or of Tenant by Statute Merchant, Staple, or Elegit, to his diſheriſon.

## *Sect.* 580,581,582.

¶ EN meſme le manner eſt, ſi hõe granta le reverſion de ſon tenant a terme de vie, a un auſ per fine, le reverſion paſſa maintenant al Grantee per force d fine, mes le grantee jammes naũa Action de Waſt ſans atturnment, &c.

IN the ſame manner it is, if a man grant the reverſion of his tenant for life, to another by fine, the reverſion maintenant paſſeth to the grantee by force of the fine, but the Grantee ſhall never have an Action of waſte without Attornement, *&c.*

*Sect.* 581.

¶ MEs uncoze ſi le Tenant a terme de vie alienaſt en fee, le grantee poit enter, &c. pur ceo que l'reverſion fuit en luy per force del Fine, et tiel alienation fuit a ſon diſhinheritance.

BUt yet if the tenant for life alieneth in Fee, the grantee may enter, *&c.* becauſe the Reverſion was in him by force of the fine, and ſuch Alienation was to his diſheritance.

¶ IT is ſaid in our Books, That if Tenant for life hath a priviledg not to be impeachable of Waſte; or any other priviledg, if he doth attorne without ſaving his priviledge, that he hath loſt it, which is ſo to be underſtood, where he attornes in a Quid juris clamat brought by the Conuſee of a fine, that if he claimeth not his Priviledge, but attorne generally, his priviledge is loſt, for that the Writ ſuppoſeth him to be but a bare Tenant for life, and by his general Attornement according to the Writ he is barred for ever to claime any priviledge, but a bare Eſtate for life. But if upon a grant of the reverſion by deed, the Tenant for life doth Attorne, he loſeth no priviledge; for there can be no concluſion or barre by the Attornement in pais: and ſo it is of an Attornement in Law, As if the Leſſor aſſeſſe the Leſſee for life, and make a Feoffement in fee, and the leſſee re-enter, this is an attornment in law, which ſhall not prejudice him

40.E.3.7.43.E.3.5. 48.E.3.32.45.E.3.6. 21.E.3.48.24.E.3.32. 39.H.6.25.F.N.B.136.b

of any priviledge: ſo it is if the leſſor levie a Fine of the reverſion, and the Conuſee die without heire, whereby the Reverſion eſcheateth, in this caſe the law doth ſupply an Attornement, and therefore the leſſee ſhall loſe no priviledge. But in the Quid juris clamat, if the leſſee ſhew his Eſtate and his priviledge, and is ready, ſaving to him his priviledge, &c. to attorne, hereby either his priviledge ſhall be allowed and entred of record, or he ſhall not be compelled to attorne: (b) and if the Plaintiffe be within age, ſo as he cannot acknowledge the priviledge, Tenant ſhall not be compelled to attorne until his full age, when he may acknowledge it. But otherwiſe it is (as ſome hold) if a Quid juris clamat be brought by Baron and Feme, the priviledge ſhall be entred into the Roll notwithſtanding ſhe is a Feme Covert. And in a Per quæ ſervitia brought by the conuſee of the meſne, the Tenant may ſhew that he held by homage Aunceſtrel, and ſaving to him his Warrant and acquital, he is ready to attorne. In the ſame manner, if the Tenant hath any other acquital, and the Meſne levie a Fine to one for life, the remainder to another in Fee, the Tenant for life bringeth a Per quæ ſervitia, and the Tenant is ready to attorne, ſaving his acquital, and the plaintiffe acknowledgeth it, and thereupon the Tenant attorne. Tenant for life dieth: in this caſe albeit regularly, the Attornement to the Tenant for life is an Attornement to him in the remainder, yet in this caſe he in the remainder ſhall not diſtraine, till he hath acknowledged the acquital, which muſt be in a Per quæ ſervitia brought him againſt the Tenant.

(b) 43.E.3.3.

45.E.3.11.a. Ver. N.B. in Per quæ ſervitia. 5. E.3.Meſne 56. & per quæ ſervitia 16. 37. H. 6.33 39.H.6.25.18. E. 4.7.

Vide Sect.557.

*Sect.* 582.

¶ MEs en cē cas lou le Sñr granta l'ſ ſervices ď ſon tenant per fine, ſi Tenaut devie (ſon heire eſteant de plein age) le grantee per l' fine navera reliefe, ne unques diſtreinera pur reliefe, ſi non que il avoit lattornement del Tenaunt que mozuſt, car ď tiel choſe que giſt en diſtreſſe, ſur q̄ le Bre ď replevin eſt ſue, &c. home doit & covient davower l' priſel boñ et vroiturel, &c. et la covient eſtre attornement del tenant, coment que le graunt de tiel choſe ſoit per fine, mes daver le gard ď les terres ou tenemts iſſint tenus durant le nonage heire, ou ď eux aver per voy deſcheat, la ne beſoigne aſcū diſtreſſe, &c. mes un entrie en la terre perforce de le droit del ſeignioꝛie q̄ le grantee ad per force del Fine, &c. Sic vide diverſitatem.

BUt in this caſe where the Lord granteth the ſervices of his Tenant by fine, if the Tenent die (his heir being of full age) the grantee by the fine ſhall not have relief, nor ſhall ever diſtrein for reliefe, unleſſe that he hath the Attornement of the Tenant that dieth: for of ſuch a thing which lieth in Diſtreſſe, whereupon the writ of Replevin is ſued, *&c.* a man muſt and ought to avow the taking good and rightful, *&c.* & there ought to be an Attornment of the tenāt, although the graunt of ſuch a thing be by fine: but to have the wardſhip of the lands or tenemēts ſo holden during the nonage of the heire, or to have them by way of eſcheat, there needs no diſtreſs, *&c.* but an entrie into the land by force of the right of the Seignioꝛie, which the Grantee hath by force of the fine, *&c.* *Sic Vide diverſitatem*, &c.

¶ *Alien en fee*, &c. Of this ſufficient hath been ſaid in the next precedent Section.

¶ *Navera reliefe*, &c: Of this ſufficient hath been ſaid in the next precedent Section.

*Sect.*

## *Sect.* 583.

¶ Item, ſi ſoit Seignior, meſne, & tenant, & le meſne granta per fine les ſervices de ſon tenant a un auter en fee, & puis le grantee moruſt ſans heire, ore les ſervices del meſnaltie ſe dievendront & eſcheate al Seignior Paramont per voy deſcheat; & ſi apres les ſervices del meſnaltie ſont aderere, en ceſt cas celuy que fuit Seignior Paramont poit diſtreiner le tenant, ment obſtant que le tenant ne unques atturnaſt: et le cauſe eſt, pur ceo que le meſnaltie fuit en fait en le grantee per force de le dit fine, & le Seignior Paramont puiſſoit avower ſur le grantee, pur ceo que il fuit ſon tenant en fait, coment que il ne ſerroit a ceo compelle, &c. Mes ſi le grantor en ceſt caſe deviaſt ſans heire en la vie le grantee, donque il ſerroit compelle davower ſur le grantee, et auxy entant que le Seignior Paramont ne claime le meſnaltie per force del graunt fait per fine levie per le meſne, mes per vertue de ſon Seigniorie Paramont, s. per voy deſcheat, il avowa ſur le tenant pur les ſervices que le meſne avoit, &c. coment que le tenant ne unques atturna pas.

ALſo, if there be Lord, Meſne and Tenant, and the Meſne grant by fine the ſervices of his Tenant to another in fee, and after the grantee die without heir, now the ſervices of the meſnaltie ſhall come and eſcheat to the Lord Paramount by way of eſcheate; and if afterwards the ſervices of the Meſnaltie be behind; in this caſe he which was Lord Paramount may diſtreine the Tenant notwithſtanding that the tenant did never attorne; and the cauſe is, for that the Meſnaltie was in Deed in the Grantee by force of the ſaid fine, and the Lord paramount may avow upon the Grantee, becauſe in deed he was his Tenant, albeit he ſhall not be compelled to this, *&c.* But if the grantor in this caſe had died without heire in the life of the Grantee, then he ſhould be compelled to avow upon the Grantee; & alſo in as much as the lord Paramont doth not claime the Meſnaltie by force of the grant made by fine levied by the Meſne, but by vertue of his Seigniorie Paramont, *viz.* by way of eſcheat, he ſhall avow upon the tenant for the ſervices which the Meſne had, *&c.* albeit that the Tenant did never attorne.

¶ HEre Littleton putteth a caſe, where one that claimeth under a Conuſee by fine may diſtraine or maintain any Action, albeit there was never any Attornement made to the Conuſee, or to him that hath his eſtate. 45. E. 3. 2. 34. H. 6. 7. 37. H. 6. 38. 39. H. 6. 31. 5. H. 7. 18. per Curiam. Lib. 6. fol. 68. Sir Moyle Finches caſe.

And here is a diverſitie between an act in Law that giveth one inheritance in lieu of another, and an act in law that conveyeth the eſtate of the Conuſee onely. Of the former Littleton here putteth an example of the eſcheat of the Meſnaltie which drowneth the Seignior Paramont; and therefore reaſon would that the lord by this act in law ſhould have as much benefit of the Meſnalty eſcheated, as he had of the Seignior that is drowned: the rather for that the law caſteth it upon him, and he hath no remedy to compel the Tenant to

attorne. Another reason hereof Littleton here yieldeth, because the Lord commeth to the mesnaltie by a Seigniorie Paramount, and therefore there needeth no attornment. (c) As if Lessee for life be of a Mannor, and he surrender his estate to the Lessor, there needeth no attornement of the Tenants, because the Lessor is in by a title Paramount. But if the Conusee dieth, and the Law casteth his Seigniorie upon his heire by discent, he shall not be in any better estate than his Ancestor was, because he claimeth as heire meerly by the Conusee.

(c) Temps E. 2 Attorn. 18. 39. H. 6. 38. per Prisot.

So it is (as hath been said) if the Conusee of a fine before Attornement bargaineth and selleth the Seigniorie by deed indented and inrolled, the Bargainee shall not distraine, because the Bargainor, from whom the Seigniorie moveth, had never actual possession.

Sir Moyle Finches case, ubi supra.

So and for the same reason if a reversion be granted by fine, and the Conusee before Attornement disseise the Tenant for life, and make a feoffment in fee, and the Lessee re-enter, the feoffee shall not destraine.

## Sect. 584.

¶ Here Littleton expresseth two diversities, first between an act in Law, and the grant of the party. This case is put of an (d) escheat, which is a meer act in Law; but so it is when it is partly by Act in Law, and partly by the Act of the party; as if the Conusee of a Statute Merchant extendeth a Seigniorie or rent, he shall distraine without any Attornement. If a man make a lease for life or years, and after levie a fine to A. to the use of B. and his heires, B. shall distraine, and have an action of waste, albeit the Conusee never had any Attornement, because the Reversion is vested in him by force of the Statute, and hath no remedy to compel the Lessee to attorne.

(d) 45. E. 3. 2. 34. H. 6. 7. 5. H. 7. 18. per Cur am. 13. H. 4. avowrie 237.

Lib. 6. fol. 68. in Sir Moyle Finches case.

27. H. 8. cap. 10.

And so it is of a bargain and sale by Deed indented and inrolled; but this is by force of a Statute since Littleton wrote.

¶ En meisme le maner est, lou le reversion dun tenant a terme de vie soit grant per fine a un auter en fee, & le grantee apres morust sans heire, ore le Seignior ad le Reversion p voy descheat. Et si apres le tenant fait waste le Seignior avera briefe de wast envers luy, nient contrestant que il ne unques atturna, Cause que supra. Mes lou un home claime per force del graunt fait per le fine, s. come heire, ou com assignée, &c. la il ne distreinera ne avowera, ne avera action de wast, &c. sans Attornement.

IN the same manner it is, where the reversion of a Tenant for life is granted by fine to another in Fee, and the grantee afterwards dieth without heire, now the Lord hath the reversion by way of escheat; and if after the Tenant maketh waste, the Lord shall have a Writ of Waste against him, notwithstanding that he never attorned, *Causa qua supra*. But where a man claimeth by force of the grant made by the fines, as heire, or as assignee, *&c.* there he shall not distraine nor avow, nor have an action of waste, *&c.* without Attornement.

Secondly, where he that commeth in by Act in law is in the per, as the heire of the Conusee, who sitteth in his Ancestors seat, Tanquam pars antecessoris de sanguine, and the lord by escheat, which is an estranger, and commeth in meerly in the Post.

## Sect. 585.

¶ Item, en ancient Bourroughs & Cities, lou terres & tene-

ALso, in ancient Boroughs and Cities, where Lands and Tements

ments deins meſme les boroughes & Cities ſont deviſable per teſtament per cuſtome & uſe, &c. ſi en tiel borough ou citie home ſoit ſeiſie de rent ſerbice, ou de rent charge, & deviſa cel rent ou ſerbice a un auter per ſon teſtament et mozuſt, en ceſt cas celuy a que tiel deviſe eſt fait, poit diſtreiner le tenant pur le rent ou ſerbice aderere, coment que le tenant nattozna pas.

nements within the ſame Boroughs and Cities are deviſable by teſtament, by cuſtome and uſe, *&c.* if in ſuch Borough or Citie a man be ſeiſed of a rent ſervice, or of a rent charge, and deviſeth ſuch rent or ſervice to another by his teſtament and dieth, In this caſe he to whom ſuch deviſe is made, may diſtreine the tenant for the rent or ſervice arere, although the Tenant did never attorne.

HEre doth Littleton put a caſe, where a man may have a Seignioꝛie, Rent, Reverſion oꝛ remainder mærly by the act of the party and may diſtraine, and have any action without any attoꝛnment, and that is by deviſe of lands deviſable by cuſtome when Littleton wꝛote, by the laſt Will and Teſtament of the owner. 34.H.6.6.5.H.7.18. 19.H.6.24.21.H.6.38.a. F.N.B.121. n.

## *Sect.* 586.

¶ FEm meſme le manner eſt, lou home leſſa tiels tenements deviſables a un auter pur terme de vie, ou per terme dans, et deviſa le reverſion per ſon teſtamẽt a un auter en fee, ou en fee taile, et mozuſt, et puis le tenant fait waſte, celuy a que le deviſe fuit fait avera vꝛieſe de waſte, coment que le tenanc ne unque attozna. Et la cauſe eſt pur ceo, que la voluntle deviſour fait per ſon Teſtament ſerra perfoꝛme ſolonque lentent del deviſour, et ſi leffect de ceo girroit ſur lattournement del tenant, donques per caſe le tenant ne voyle unques atturner, et donques le voluntdel deviſoꝛ ne ſerroit unque perfoꝛme &c. et pur ceo le deviſee diſtreinera, &c. ou avera action de waſte, &c. ſans attourñment. Car ſi home deviſa tiels tenements a un auter per ſon teſtament, Habend' ſibi imperpetuum, & mozuſt, et le deviſee enter, il ad fee ſim-

IN the ſame manner is it, where a man letteth ſuch tenements deviſable to another for life, or for yeares, and deviſeth the reverſion by his Teſtament to another in fee, or in fee taile, and dyeth, and after the Tenant commits waſte, he to whom the deviſe was made ſhall have a writ of waſte, although the Tenant doth never attorne. And the reaſon is, for that the will of the Deviſor made by his Teſtament ſhall be performed according to the intent of the Deviſor; and if the effect of this ſhould lie upon the Attornement of the tenant, then perchance the Tenant would never attorne, and then the will of the deviſor ſhould never be performed, *&c.* and for this the deviſee ſhall diſtraine, *&c.* or he ſhall have an action of waſte, *&c.* without attornement. For if a man deviſeth ſuch tenements, to another by his teſtament, *Habend' ſibi imperpetuum*, & dieth, and the de-

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ple, Cauſa qua ſupra, uncore ſi fait de feoffment uſt eſtre fait a luy per le deviſor en ſa vie de meſmes les tenements, Habend' ſibi imperpetuum, et livery de ſeiſin ſur ceo fuit fait, il naveroit eſtate forſque pur terme de ſa vie.

viſee enter, he hath a fee ſimple, *Cauſa qua ſupra*; yet if a deed of feoffement had been made to him by the deviſor of the ſame tenements, *Habend' ſibi imperpetuum*, and liverie of ſeiſin were made, upon this he ſhould have an eſtate but for terme of his life.

¶ BOth this and the precedent caſe ſtand upon one and the ſame reaſon, which Littleton here yieldeth, viz. becauſe that the will of the Deviſor expreſſed by his Teſtament ſhall be perfourmed according to the intent of the Deviſor; and it ſhall not lie in the power of the tenant or leſſee to fruſtrate the will of the deviſor by denying his attornment. Here Littleton mentioneth a maxime of the Common law, viz. Quod ultima voluntas teſtatoris eſt perimplenda ſecundum veram intentionem ſuam; and, reipublicæ intereſt ſuprema hominum teſtamenta rata haberi.

Vide Sect.167. Bracton.li.11.f.22.& f. 60. Fleta lib.2. cap.15. Britton fo.78.& f. 212. b.22.E.3.16,34. H.6.7. 15.H.7.12.19.H.8.4.

¶ *Teſtament.* Teſtamentum, i. teſtatio mentis, which is made nullo præſentis metu periculi, ſed ſola cogitatione mortalitatis. Omne teſtamentum morte conſummatum.

¶ *Car ſi home deviſa tiels tenements a un auter*, &c. Here Littleton putteth a caſe, where the intent of the Teſtator ſhall be taken, viz. where a man by deviſe have a fee ſimple without theſe words, heirs; and here Littleton putteth the diverſity between a will and a feoffment.

Vide Sect.167. Now by the Statutes of 32. and 34.H.8. (as hath been ſaid in the Chapter of Wurgage,) lands, Tenements and Hereditaments are deviſable, as by the ſaid Acts do appear.

## *Sect.* 587.

¶ ITem, ſi home ſeiſie dun mannor quel' eſt parcel en demeſn et parcel en ſervice, et en ſoit diſſeiſie, mes les Tenants que teignont del mannor ne unqz attournant a le Diſſeiſor, en teſt cas coment que le Diſſeiſor moruſt ſeiſie, et ſon heire ſoit eins per diſcent, &c. uncore poit le Diſſeiſee diſtreine pur le rent arere, et avera les ſervices, &c. Mes ſi les tenants viendront al Diſſeiſor, et diont, nous deveignomus voſtre tenants, &c. ou auter attournement a luy feſoyent, &c. et puis le Diſſeiſor morust ſeiſie, donque le Diſſeiſee ne poit diſtreine pur le rent, &c. pur ceo que tout le manor diſcendiſt al heire le Diſſeiſor, &c.

ALſo, if a man be ſeiſed of a mannor which is parcel in demeſne and parcel in ſervice, and is thereof diſſeiſed, but the tenants which hold of the mannor do never attorne to the Diſſeiſor: In this caſe albeit the Diſſeiſor dieth ſeiſed, and his heire is in by diſcent, *&c.* yet may the Diſſeiſee diſtraine for the rent behind, and have the ſervices, *&c.* but if the tenants come to the Diſſeiſor and ſay, We become your tenants, *&c.* or make to him ſome other attornement, *&c.* and after the Diſſeiſor dieth ſeiſed, then the Diſſeiſee cannot diſtraine for the rent, *&c.* for that all the Mannor deſcendeth to the heire of the Diſſeiſor, *&c.*

LIttleton having ſpoken of eſtates gained by lawful conveiances, doth now ſpeak of eſtates gained by wrong. And here putteth a caſe of a diſſeiſin of a Mannor, where it appeareth, that the Diſſeiſor cannot diſſeiſe the lord of the rent or ſervices without the

the Attornement of the Tenants to the Diſſeiſor; for ſeeing an Attornement is requiſite to a feoffment and other lawful conveyances, a fortiori, a Diſſeiſor or other wrong-doer ſhall not gain them without Attornement. The like law is of an Abator and an Intrudor. But albeit the Diſſeiſor hath once gotten Attornement of the Tenants and payment of their Rents, yet may they refuſe afterwards for avoiding of their double charge. And here the attornment of the Tenant of a Mannor to a diſſeiſor of the demeans ſhall diſpoſſeſſe the lord of the rents and ſervices parcel of the Mannor, becauſe both demeanes, rents and ſervices make but one entire Mannor, and the demeanes are the principal: but otherwiſe it is of rents and ſervice in groſſe, as in this next Section our author teacheth us.

## *Sect.* 588.

¶ MEs ſi un tient de moy per rent ſervice, le quel eſt un ſervice en groſſe, et nient p reaſon de mon mannor, et un auter que nul droit ad claima le rent, et reſceive et prent meſme le rent de mon tenant per coherſion de diſtres, ou per auter forme, et diſſeiſist moy per tiel prender de rent, coment que tiel diſſeiſor morust iſſint ſeiſie en pernāt de rent, uncore apres ſa mort jeo puiſſoy bien diſtreiner le tenant pur le rent que fuit aderere devant le deceaſe del diſſeiſor, et auxy apres ſon deceas. Et la cauſe eſt, pur ceo que tiel diſſeiſor neſt pas mon Diſſeiſor forſque a ma election et ma volunt. Car coment que il prent le rent de mon tenāt, &c. uncore jeo puiſſoy a touts ſoits diſtreiner mon tenāt pur le rent arere, iſſint que il eſt a moy forſque ſicome jeo voile ſufferer le tenant, eſtre per tant de temps arere p paier a moy m̄ le rent, &c.

But if one holdeth of me by rent ſervice, which is a ſervice in groſſe, and not by reaſon of my Mannor, and another that hath no right claimeth the rent, & receives & taketh the ſame rent of my Tenant by coertion of diſtreſſe, or by other forme, and diſſeiſeth me by ſuch taking of the rent; Albeit ſuch Diſſeiſor dieth ſo ſeiſed in taking of the rent, yet after his death I may well diſtreine the tenant for the rent which was behind before the deceaſe of the Diſſeiſor, and alſo after his deceaſe. And the cauſe is, for that ſuch Diſſeiſor is not my diſſeiſor, but at my election and will. For albeit he taketh the rent of my tenant, &c. yet I may at all times diſtreine my tenant for the rent behind, ſo as it is to me but as if I will ſuffer the tenant to be ſo long time behind in payment of the ſame rent unto me, *&c.*

## *Sect.* 589.

¶ CAr le payment de mon tenant a un auter, a que il ne doit pas payer, neſt pas diſſeiſin a moy, ne oulta moy pas de mon rent ſans ma volunt et ma election, &c. Car coment que jeo puiſſoy aver Aſſiſe envers tiel Per-

FOr the payment of my Tenant to another to whom he ought not to pay is no diſſeiſin to me, nor ſhall ouſt me of my rent, without my will and election, *&c.* For although I may have an aſſiſe againſt ſuch Pernor, yet this is at my elec-

nor

noꝛ uncoꝛe ceo eſt a mon election, ſi jeo voile prender luy come mon diſſeiſoꝛ, ou non. Iſſint tiels diſcents de rents en gros, ne ouſteront pas le ſeignioꝛ de diſtreyner, mes a cheſcun temps ils poyent bien diſtreiner pur l'rent arere, &c. Et en ceſt caſe ſi apres le diſtreſſe de luy que iſſint toꝛcioulment oꝛiſt le rent, jeo graunt per mon fait le ſerbice a un auꝰ, et le tenant attourna, ceo eſt alſetts bone, et les ſerbices per tiel graunt et attournement maintenant ſont en le Gꝛantee, &c. Mes auterment eſt, lou le rent eſt parcel del Manoꝛ, et le diſſeiſoꝛ moruſt ſeiſie del Manoꝛ entire, come en le caſe pꝛocheine avant eſt dit, &c.

tion, whether I will take him as my Diſſeiſor, or no. So, ſuch diſcents of rents in groſſe ſhall not ouſt the Lord of his Diſtreſſe, but at any time he may well diſtreine for the Rent behind, *&c.* And in this caſe, if after the diſtreſſe of him which ſo wrongfully took the Rent, I grant by my Deed the ſervice to another, and the Tenant attorne, this is good enough, and the ſervices by ſuch grant and Attornement are preſently in the Grantee, *&c.* But otherwiſe it is, where the Rent is parcel of a Mannor, and the Diſſeiſour dieth ſeiſed of the whole Mannor, as in the caſe next before is ſaid, *&c.*

¶ HEre Littleton putteth a diverſity between a Rent ſervice parcel of a Manno, whereof he had ſpoken before, and a Rent ſervice in Gꝛoſſe. Foꝛ a man cannot be diſſeiſed of a Rent ſervice in Gꝛoſs, Rent charge, oꝛ Rent ſeek by Attoꝛnement oꝛ payment of the Rent to a ſtranger, but at his election; foꝛ the rule of Law is, Nemo reddituꝰ alterius invito Domino percipere aut poſſidere poteſt; and our Authoꝛ hath before * taught us, what be Diſſeiſins of Rents ſervices, Rents charges, and Rents ſeeks; and payment to a ſtranger is none of them, but at the Loꝛds election, as our Authoꝛ here ſaith.

* Vid. Sect. 237, 238, 239. 240.

24. E. 3. 4. 1. E. 5. 5. See the Authorities there following in the next Paraph.

¶ *Pernor.* i. The taker of my rent. But if the diſſeiſee bꝛing an Aſſiſe againſt ſuch a Pernoꝛ, then he doth admit himſelfe out of poſſeſſion.

5. E. 4. 1. 23. H. 3. tit. Aſſ. 439. 24. E. 3. 40. 34. 16. Aſſ. p. 15. 16. E. 3. Releaſe 56. 1. E. 3. 5. F. N. B. 179. E. 15. E. 4. 8. Flet. lib. 4. c. 12.

¶ *Diſcents.* A diſcent of a rent in groſſe bindeth not the right owner, but that he may diſtraine, albeit he admitted himſelf out of poſſeſſion, and determined his Election, as by bꝛinging of an Aſſiſe, &c.

If the Tenant of the land pay the Rent to a ſtranger which hath no right thereunto, and the right owner releaſe to him, this releaſe is good because he thereby admitted himſelf to be out of poſſeſſion. But if the Tenant had given him any thing in name of Attoꝛnment, and the right owner had releaſed to him, this releaſe had been void, becauſe an Attoꝛnment oneꝛly can be no diſſeiſin of the Rent.

¶ *Jeo grant per mon fait,* &c. This alſo pꝛobeth, that the right owner is not out of poſſeſſion, and that this grant over is a demonſtration of his election that he is in poſſeſſion.

## *Sect.* 590.

¶ ITem, ſi jeo ſue ſeiſie dun manoꝛ parcel en demeſn et parcel en ſerbice, et jeo doñ certaine acres del terre, parcel de demeſne demeſme l' manoꝛ a un

ALſo, if I be ſeiſed of a Manor, parcel in Demeſne, and parcel in Service, and I give certain acres of the land, parcel of the Demeſne of the ſame Mannor, to

auter

auter en le taile, rendant a moy et a mes heires un certaine rent, &c. Si en cell cale jeo ſue diſſeiſie de la Manor, et touts les tenants attournont et payont lour rents al diſſeiſor, et auxy le dit tenant en le taile pay a le rent per moy reſerve al Diſſeiſor, & puis le diſſeiſor mozust ſeiſie, &c. et ſon heire entra, et eſt eins p diſcent, uncore en cell cale jeo puiſſe bien diſtreigner le Tenant en le taile, et ſes heires, pur le rent p moy reſerve ſur le done, ſ. auxy bien pur le rent eſteant adcrere devant le diſcent al heire le Diſſeiſor, et auxy pur le rent que happa deſtre adcrere apres meſm le diſcent, nient obſtant tiel mozant ſeiſie del diſſeiſor, &c. Et la cauſe eſt, pur reo que quant home dona tenements en le taile, ſavat le reverſion a luy, et il ſur le dit done reſerva a luy un Rent ou auters ſerbices, tout le rent et les ſerbices ſont incidents a la reverſion, et quant un home ad un reverſion, il ne puiſſoit eſtre ouſte de ſon reverſion per le fait dun eſtrange home, ſi non que le tenant ſoit ouſte de ſon eſtate et poſſeſſion, &c. car cy longement que le Tenant en le Taile & ſes heires continuont lour poſſeſſion p force de mon done, cy longement eſt le reverſion en moy et en mes hrs, et entant que le rent & les ſzvices reſerves ſur tiel done ſont incidents et dependants al reverſion quecunque que ad le reverſion, adera meſme le Rent et Serbices, &c.

another in Taile, yielding to me and to my Heires a certaine Rent, &c. if in this caſe I be diſſeiſed of the Mannor, and all the Tenants attorne and pay their rents to the Diſſeiſor, and alſo the ſaid Tenant in Taile pay the Rent by me reſerved, to the Diſſeiſor, and after the Diſſeiſor dieth ſeiſed, &c. and his heire enter and is in by Diſcent, yet in this caſe I may well diſtraine the tenant in taile and his heires, for the rent by me reſerved upon the Gift, *ſcil.* as well for the Rent being behind before the diſcent to the heire of the Diſſeiſor, as alſo for the rent which happeth to be behinde after the ſame diſcent, notwithſtanding ſuch dying ſeiſed of the diſſeiſor, *&c.* And the reaſon is, for that when a man giveth lands in Taile, ſaving the Reverſion to himſelfe, and he upon the ſaid gift reſerveth to himſelfe a Rent or other ſervices, all the rent and Services are incident to the Reverſion; and when a man hath a Reverſion he cannot be ouſted of his Reverſion by the Act of a Stranger, unleſſe that the Tenant be ouſted of his eſtate and poſſeſſion, *&c.* For as long as the Tenant in taile and his heirs continue their poſſeſſion by force of my gift, ſo long is the reverſion in me and in my Heires: and in as much as the rent and ſervices reſerved upon ſuch gift, be incident and depending upon the reverſion, whoſoever hath the Reverſion, ſhall have the ſame Rent and Services.

Sect.

## Sect. 591.

EN meſme le manner eſt, lou jeo leſſa parcel del demeſne del maner a un auter pur terme de vie, ou p̄ terme dans, rendant a moy certaine rent, &c. coment que jeo ſoy diſſeiſie del manor, &c. et le diſſeiſor mozuſt ſeiſie, &c. et ſon heir eſteant eins per diſcent, uncoze jeo diſtreiner pur le rent arere, ut ſupra, nient obſtant tiel diſcent. Car quant home ad fait tiel done en taile, ou tiel leas pur terme de vie, ou per terme dans del parcel de le demeſne de un mannoz, &c. ſavant le reverſion a tiel donour ou leſſour, &c. et puis il ſoit diſſeiſie de le manoz, &c. tiel reverſion apres tiel diſſeiſin eſt ſever dal manoz en fait, coment que ne ſoit ſever en droit. Et iſſint poyes veier (mon fits) diverſitie, lou il y ad un Manoz parcel en demeſne & parcel en ſervices, les queux ſervices ſont parcel de meſme le manoz nient incidents a aſcun reverſion, &c. & lou ils ſont incidents al reverſion, &c.

IN the ſame maner is it, where I let parcel of the demeſne of the Mannor to another for terme of life, or for terme of years, rendring to me a certain rent, *&c.* albeit I be diſſeiſed of the manor, *&c.* and the diſſeiſor die ſeiſed, *&c.* and his heire be in by diſcent, yet I may diſtreine for the rent arere, *ut ſupra*, notwithſtanding ſuch diſcent; for when a man hath made ſuch a gift in taile, or ſuch a leaſe for life, or for years, of parcel of the demeſnes of a Mannor, *&c.* ſaving the reverſion to ſuch donor or leſſor, *&c.* And after he is diſſeiſed of the Mannor, *&c.* ſuch reverſion after ſuch diſſeiſin is ſevered from the Mannor in deed, though it be not ſevered in right. And ſo thou maiſt ſee (my ſonne) a diverſitie, where there is a Mannor parcel in Demeſne and parcel in Services, which Services are parcel of the ſame Mannor not incident to any reverſion, *&c.* And where they are incident to the reverſion, *&c.*

HEre Littleton putteth a diverſity between Rents and ſervices parcel of a Mannor (whereof he had ſpoken before) and Rents and ſervices incident to a reverſion parcel of a Mannor.

And the reaſon of this diverſitie is, for that as long as the Donee in taile, leſſee for life, or leſſee for years, are in poſſeſſion, they preſerve the reverſion in the donor or leſſor; and ſo long as the Reverſion continues in the Donor or leſſor, ſo long too the rent and ſervices which are incident to the reverſion belong to the donor or leſſor. Neither can the Donor or leſſor be put out of his reverſion, unleſſe the Donee or leſſee be put out of their poſſeſſion; and if the Donee or leſſee be put out of their poſſeſſion, then conſequently is the Donor or leſſor put out of their reverſion. But if the Donee or leſſee make a regreſſe and regaine their eſtate and poſſeſſion, thereby do they ipſo facto reveſt the reverſion in the Donor or leſſor.

(a) 18. Aſſ. p. 2. 38. H. 6. 33. Pl. Com. Sulmerſtones caſe 103. Lib. 5 fo. 11. 12. 25. 19. E. 2. Briefe 8. 5. 4. E. 3 Briefe 713.

And here is to be obſerved, that when a man is ſeiſed of a Mannor and maketh a gift in taile, or leaſe for life, &c. of parcel of the Demeſne of the Mannor, (a) the reverſion is part of the Mannor, and by the grant of the Mannor the reverſion ſhall paſſe with the Attornment of the Donee or leſſee. But if the lord make a gift in tail, or a leaſe for life, of the whole Mannor, excepting black Acre, parcel of the Demeſnes of the Mannor, and after he granteth away his Mannor, black Acre ſhall not paſſe, becauſe during the eſtate tail or leaſe for life

like it is severed from the Manor. And so note a diversity, that a Reversion of part may be parcel of a Manor in possession: but a part in possession cannot be parcel of the reversion of a Manor expectant upon any estate of Freehold. But if a man make a Lease for years of a Manor, excepting black Acre, and after granteth away the Manor, black acre shall passe, because the Freehold being entire, it remaineth parcel of the Manor, and one Præcipe of the whole Manor shall serve. But otherwise it is in case of the gift in taile, or lease for life, like excepting any parts there must be several Writs of Præcipe, because the Freehold is several.

## CAP. II. Of Discontinuance. *Sect.592.*

DIscontinuance est un ancient parol & la ley, & ad divers significations, &c. Mes quant a un entent, il signification, *viz.* whereas un auter certaine terres ou tenements & moustil, & un auter ad droit de auter mesne les terres ou tenements, mes il ne poit enter en eux, per cause d'tiel alienation, &c.

DIscontinuance is an antient word in the Law, and hath divers significations, &c. But as to one intent it hath this signification, *viz.* where a man hath alienned to another certain Lands or Tenements and dieth, and another hath right to have the same Lands or Tenements, but he may not enter into them, because of such an alienation, &c.

¶ *Discontinuance* Is a word compounded of de and continuo, for continuare is to continue without intermission. Now by addition of de (Euphoniæ gratia dis) to it, which is privative it signifieth an intermission. Discontinuare nihil aliud significat quam intermittere, deficere, interrumpere. And as our Author saith: (a) it is a very antient word in Law. Vide Sect.637.

(a) 8.H.4.9.b.11.H.4. 85.b.

A discontinuance of estates in Lands or Tenements is properly (in legal understanding) an alienation made or suffered by Tenant in taile, or by any that is seised in auter droit, whereby the issue in taile, or the heir or successor, or those in reversion or remainder, are driven to their Action and cannot enter.

All which is implied by the description of our Author, and by the (&c.) in the end of this Section.

I have added (properly) by good warrant of our Author himself, for Sect.470. he useth Discontinuance for a devesting or displacing of a reversion, though the entry be not taken away.

The Discontinuance consisteth in doing or suffering an Act be done, as hereafter shall appear. And where our Author saith, that it hath divers significations, there is also a Discontinuance of Process consisting in not doing, where the Process is not continued, concerning which there is an excellent Statute made in furtherance of Justice in (b) 1.E.6. and is well expounded in my Reports; and therefore need not here to be inserted.

(b) Vid. the Statutes of 1.F.6.ca.7. & 3.31.El. c 1. Lib.7 f.30,34 &c. le case de discontinuance de proces. 32.E.3.7.a.46.E.3.30. 37.H.6.25.26. 8.E 4.18.12.E.4. vide Sect.74.174.194. 441.520.

There is another erroneous proceeding, and that consisteth in misdoing, as when one Process is awarded in stead of another, or when a day is given which is not legal, that is called a miscontinuance, and if the Tenant or Defendant make default, it is error; but if he appear, then the miscontinuance is salved; otherwise it is of a Discontinuance. But let us return to the Discontinuance of Estates in Lands, whereof Littleton doth entreat in this Chapter.

¶ *Significations.* Here (as in many other places) it appeareth how necessary it is to know the signification of words.

And in this Chapter it appeareth, that when Littleton wrote, the estate in Lands, and Tenements might have been discontinued five manner of ways, viz. by Feoffment, by Fine, by Release with Warranty, Confirmation with Warranty and by suffering of a recovery in a

Præcipe quod reddat. And this was to the prejudice of five kinds of perſons, viz. of Natives, of Heirs, of Succeſſors, of thoſe in reverſion, and of thoſe in Remainder. But for Natives, and their Heirs, and for Succeſſors, the Law is altered by Acts of Parliament ſince Littleton wrote, as in this Chapter in their proper places ſhall appear.

## Sect. 593.

¶ HEre Littleton putteth an example of a Diſcontinuance made by one ſeiſed in auter droit, as by an Abbot who had a fee ſimple in the right of his Monaſtery; and therefore his Alienation without the aſſent of his Covent had been a Diſcontinuance at the Common Law, and had driven his Succeſſor to a Writ De ingreſſu ſine aſſenſu capituli.

¶ De Ingreſſu ſine aſſenſu Capituli, &c. It is called ſo, becauſe the Alienation was ſine aſſenſu capituli; for if it had been, cum aſſenſu capituli, it ſhould have been a bar to the Succeſſor. And becauſe the Succeſſor could not enter, the Common Law gave him this Writ, and is ſo called of theſe words contained in the writ, which Writ you may read in the Regiſter, and Fitzherberts N.B.

Regiſt.Orig.f.230. F.N.B.195. Bracton,l.4. fol.323.Flet.lib.5.ca.34

¶ SIcome un Abbe ſeiſie de certaine terres ou tenements en fee, & alienaſt meſmes les terres ou tenements a un auter en fee, ou en fee taile, ou pur terme de vie, & puis labbe morust, ſon ſucceſſor ne poit enter en les dits terres ou tenements, coment que il ad droit eux aver come en droit de ſon meaſon, mes il eſt mis a ſon action de recoverer meſmes les terres ou tenements, quel eſt appelle, Breve de ingreſſu ſine aſſenſu capituli, &c.

AS if an Abbot be ſeiſed of certain Lands or tenements in fee, and alieneth the ſame lands or tenements to another in fee, or in fee tail, or for term of life, and after the Abbot dieth, his ſucceſſor cannot enter into the ſaid Lands or Tenements, albeit he hath right to have them as in right of his houſe; but he is put to his action to recover the ſame Lands or Tenements, which is called, *Breve de ingreſſu ſine aſſenſu capituli, &c.*

21.E.4.86.

And here is to be noted, that in Law the Covent, albeit they be regular and dead perſons in Law, yet are they ſaid in law to be Capitulum to the Abbot, as well as the Dean and Chapter, that be Secular, to the Biſhop. But it is to be obſerved and implied in this (&c.) that a ſole body politick that hath the abſolute right in them, as an Abbot, Biſhop, and the like, may make a diſcontinuance, but a Corporation aggregate of many, as Dean and Chapter, Warden and Chaplains, Maſter and Fellows, Mayor and Comminalty, &c. cannot make any Diſcontinuance; for if they joyn, the Grant is good; and if the Dean, Warden, Maſter, or Mayor make it alone where the body is aggregate of many, it is void, and worketh a diſſeiſin. But now (as hath been ſaid) by the Statute of 27.H.8. and 31.H.8. all the Abbots, Priors, and other Religious perſons are ſo diſſolved, as there be none remaining this day, and by the Statutes of 1.El. and 13.El. cap.10. and 1.Jac.cap.3. Biſhops and all other Eccleſiaſtical perſons are diſabled to alien or diſcontinue any of their Eccleſiaſtical livings, as by the ſame Acts doth appear.

See more of this matter hereafter in this Chapter, Sect.648. and before Sect.528.

## Sect. 594.

¶ EN droit ſa feme, &c. That is to ſay, in fee ſimple, Fee taile,

¶ ITem, ſi home ſeiſie de terre come en droit

ALſo, if a man be ſeiſed of Lands as in right of his

de

de la feme, &c. & ent enfeoffa un auter, &c. & morust, la feme ne puit enter, mes est mis a son action, le quel est appel, Cui in vita, &c.

wife, &c. and thereof infeoffe another, &c. and dieth, the Wife may not enter, but is put to her action, the which is called, *Cui in vita, &c.*

or for life. Here Littleton putteth another caſe, where a man is ſeiſed in auter droit, and may make a Diſcontinuance, as the husband ſeiſed in the right of his wife; and therefore the Common Law gave her a Cui in vita, and her heir a Sur cui in vita, becauſe they could not enter. But this is altered ſince our Author wrote, by the Statute of 32.H.8. by the purview of which ſtatute the wife and her heirs after the deceaſe of her husband, may enter into the Lands or Tenements of the wife, notwithſtanding the alienation of her husband.

Bracton, l.4 f.202.&220. & 324. Flet. lib.5.ca.34. &36.F.N.B.193.Regiſt. 32.*H.*8.cap.28.

And here is one of the alienations to make a Diſcontinuance, viz. a feoffment; and where our Author ſpeaketh of a husband ſeiſed in the right of his wife, ſo it is, where the husband and wife are joyntly ſeiſed to them and their heirs of an eſtate made during the coverture, and the husband make a feoffment in fee, and dieth, the wife now may enter within that Statute, although it was the Inheritance of them both. And ſo it is if the feoffment be made by the husband and wife, (albeit the words of the Statute be by the husband only) for in ſubſtance this is the act of husband only.

Dyer.4.& 5.Ph.& Mary 149.3.El. Dyer.191. Lib.8.fol.71,72. Greveleys caſe.

If the husband cauſe a Præcipe quod reddat upon a faint title to be brought againſt him and his wife, and ſuffereth a recovery without any Voucher, and execution to be had againſt him and his wife, yet this is holpen by the Statute; for this by like conſtruction is the act of the husband, and the words of the Statute be, made, ſuffered, or done.

Greveleys caſe, ubi ſup.

If the husband make a feoffment in fee of the Lands which he holdeth in the right of his wife, and after they are divorced Cauſa præcontractus, yet the woman may enter within the purview of that Statute, and is not driven to her Writ of Cui ante divortium, as ſhe was at the Common Law, albeit the entry be by Statute given to the wife, and now upon the matter ſhe was never his lawful wife. But it ſufficeth that ſhe was his wife de facto at the time of the alienation; and where her husband dieth ſhe cannot be his wife at the time of the entry.

If the husband levie a fine with Proclamations, and dieth, the wife muſt enter or avoid the Eſtate of the Conuſee within five years, or elſe ſhe is barred for ever by the ſtatute of 4.H.7.for the Statute of 32.H.8. doth help the Diſcontinuance, but not the bar; and the Statute ſpeaketh of a fine, and not of a fine with Proclamations.

6.*E.*6.Dyer.72.b. 4.H.7.c.24.

If lands be given to the husband and wife, and to the heirs of their two bodies, and the husband maketh a feoffment in fee and dieth, the wife is holpen by the ſaid Statute, as hath been ſaid; and ſo is the iſſue of both their bodies. Feme tenant in tail taketh husband, the husband maketh a feoffment in fee, the wife before entry dieth without Iſſue, he in the reverſion or Remainder may enter. For firſt the reverſion or Remainder cannot be diſcontinued in this caſe, becauſe the eſtate tatle is not diſcontinued. Secondly, the words of the Statute be, Shall not be prejudicial or hurtful to the wife or her heirs, or ſuch as ſhall have right, title or intereſt by the death of ſuch a wife, but that the ſame wife and her heirs, and ſuch other to whom ſuch right ſhall appertain after her deceaſe, ſhall or lawfully may enter into all ſuch Manors, Lands, &c. according to their rights and titles therein: by which words the entry of him in the Reverſion or Remainder in that caſe is preſerved. The husband is tenant in tatle, the remainder to the wife in tatle, the husband makes a feoffment in fee, by this the husband by the Common Law did not only diſcontinue his own eſtate tatle, but his wives remainder: but at this day after the death of the husband without iſſue, the wife may enter by the ſaid Act of 32. H. 8.

Greveleys caſe, ubi ſupra. Paſch.7.Jac.

If the husband hath iſſue, and maketh a feoffment in fee of his wives Land, and the wife dieth, the heir of the wife ſhall not enter during the husbands life, neither by the Common law, nor by the Statute.

8.*E.*2.tit.Cui in vita 26 34.*E.*1.lib.30.10.*E.*3. 12.*Dyer.*21.*El.*363.

¶ Cui in vita, &c. Here is alſo implied a Sur cui in vita, alſo for the heir. This Writ here mentioned in our Author is ſo called of thoſe words contained in the Writ, which you may read in the Regiſter and Fitzherberts N. B.

## Sect. 595.

¶ *Enfeoffa un auter, &c.* Here is implied, or make a gift in taile, or an eſtate for life. Here Littleton putteth a third example of a Diſcontinuance made by Tenant in taile, ſo as his iſſue is put to his Formedon in the Diſcender, which is given to the iſſue in taile by the Statute of 13.E.cap.1. becauſe he cannot enter.

Fleta.lib.5.cap.34. F.N.B.211.H.212. Regiſtr.

¶ *Tenant en taile:* This extendeth as well to a woman Tenant in taile as to a man, and was generally good Law when Littleton wrote, but now by the Statute of (d) 11. H. 7. if the woman hath any eſtate in taile joyntly with her husband, or only to her ſelf, or to her uſe, in any Lands or Hereditaments of the inheritance or purchaſe of her husband, or given to the husband and wife in taile by any of the Anceſtors of the husband, or by any other perſon ſeiſed to the uſe of the husband or his Anceſtors, and ſhall hereafter being ſole or with any other after taken husband diſcontinue, &c. the ſame: every ſuch Diſcontinuance ſhall be void, and that it ſhall be lawful for every perſon to whom the intereſt, title, or inheritance after the deceaſe of the ſaid woman ſhould appertain, to enter, &c. So as if ſuch a feme Tenant in taile do make any Diſcontinuance in fee, in taile, or for life, although it be without warranty, yet this doth not take away the entry after her death, either of the iſſue, or of him in reverſion, or remainder. This Statute hath been excellently expounded by divers reſolutions and judgements (e) which I have quoted in the margent, and are worthy of due obſervation.

(d) 11.H.7.ca.2. Vide Sect.967.

(e) Lib.3.f.50,51. Sir George Browns caſe, eodem li.f.60.&c. Linc.Col.caſe, lib.2. fo.176. Mildmayes caſe. Dyer. 3.& 4. Ph.& Mar. 146. idem.8.El.248. 17.El.354. idem. 20.El. 362.27.H.8.23. Lib.5. fol.79. Fitzh.caſe. Lib.8.fol.71,72. Greveleys caſe.

If lands were entailed to a man and to his wife, and to the heirs of their two bodies, and the husband had made a feoffment in fee and died, and then the wife died, this had been a diſcontinuance at the common Law: for the title of the iſſue is as heir of both their bodies, and not as heir to any of them, and his entry muſt enſue his title or action.

¶ *De formedon.* De forma donationis, ſo called becauſe the Writ doth comprehend the form of the gift. And there be three kinds of Writs of Formedon, viz. The firſt in the Diſcender to be brought by the iſſue in taile, which claim by diſcent Per formam doni. The ſecond is in the Reverter, which lieth for him in the reverſion or his heirs or aſſigns after the ſtate taile be ſpent. The third is in the remainder, which the law giveth to him in the remainder, his heirs or aſſigns, after the determination of the eſtate taile: of all which you may read in the Regiſter, and F.N.B.

Here Littleton ſheweth that the iſſue in taile ſhall have a Formedon in the deſcender, what other actions Tenant in taile may have, and not have, is good to be ſeen.

(a) 4.E.3.38.43.E.3.23. 4.E.4.25.F.N.B.124.
(a) Tenant in taile ſhall have a Quod permittat.

(b) 2.E.2.Droit.28.
(b) Tenant in taile ſhall have a Writ of Cuſtoms and Services. In le debet, & ſoler, but ſhall not have it in the Debet only.

(c) F.N.B.123.
(c) In like manner he ſhall have a Secta ad molendinum in le debet & ſoler, but not in the Debet tantùm.

(d) 21.E.3.11.5.E.3.23. 11.H.4.49.
(d) Tenant in taile ſhall have a Writ of Entre in conſimili caſu, and an Admeaſurement, and a Nativo habendo, Ceſſavit, Eſcheat, Waſte, and the like.

(e) 2.E.3.Droit.28. 13.H.7.24.5.E.4.2. 20.E.3.Avowrie 131. F.N.B 10.46.E.3.tit. Cui in vita, 33.
(e) But tenant in taile ſhall not have a Writ of Right Sur diſclaimer, nor a Quo jure, nor a Ne injuſte vexes, nor a Nuper obiit, or Rationabile parte, nor a Mordancester, nor a Sur cui in vita; for theſe and the like none but tenant in fee ſhall have: and the higheſt Writ that a Tenant in taile can have is a Formedon.

Alſo, if tenant in taile of certaine land, thereof enfeoffe another, &c. and hath iſſue and dieth, his iſſue may not enter into the land albeit he hath title and right to this, but is put to his action which is called a *Formedon en le diſcender, &c.*

¶ Item, ſi teñ en taile de certaine terre ent enfeoffa un auſ, &c. & ad iſſue & morust, ſon iſſue ne poit pas enter, en la terre coment que il ad title & droit a ceo, mes eſt mis a ſon action que eſt appel Formedon en le diſcender, &c.

*Sect.* 596, 597.

¶ Item, ſi ſoit tenſ̃ en le taile, le reverſiõ eſteant al donor & a ſes heires, ſi le tenant fait feoffment, &c. & mourt ſans iſſue, celuy en le reverſion ne poit enter, mes eſt mis a ſon action de Formedon en le reverter.

Also, if there be tenant in tail, the reverſion being to the Donor and his heires, if the Tenant make a feoffment, &c. and die without iſſue, he in the reverſion cannot enter, but is put to his action of *formedon in l'reverter*

597.

¶ EN meſme le maner eſt, lou tenãt en le taile ſeiſie de certeine terre dont le remainder eſt a un auter en le taile, ou a un auter en fee. Si le tenant en le taile alienast en fee, ou en fee taile, & puis deviast ſans iſſue, ceux en le remainder ne poiẽt enter, mes ſont mis a lour briefe de Formedon en le remainder, &c. & pur ceo que per force de tielx feoffments & alienations en les caſes avantdits, & en ſemblables caſes, ceux queux ont title & droit apres la mort d̃ tiel feoffour ou alienour, ne poient pas enter, mes ſont miſes a lour actions, Ut ſupra, & p̃ ceo cauſe tiels feoffments & alienations ſont appels diſcontinuances.

IN the ſame manner is it, where tenant in taile is ſeiſed of certain Land whereof the remainder is to another in taile, or to another in fee. If the tenant in taile alien in fee, or in fee taile, and after die without iſſue, they in the remainder may not enter, but are put to their writ of *Formedon* in the remainder, &c. and for that that by force of ſuch feoffments and alienations in the caſes aforeſaid, and the like caſes, they that have title & right after the death of ſuch a feoffor or alienor may not enter, but are put to their actions, *Ut ſupra*; and for this cauſe ſuch feoffements and alienations are called diſcontinuances.

¶ *Fait Feoffment*, &c. Here is implied Fee ſimple, Fee taile or eſtate for life, and in this and the next Section Littleton putteth two caſes, where if the iſſues in taile fail, they in the reverſion and remainder are driven to their Formedon in reverſion or remainder, and this remaineth as it was when Littleton wrote, not altered by any Statute. And the reaſon whereof theſe Alienations in the ſeveral caſes in this & the next Section do make a Diſcontinuance, and put him in the reverſion or remainder that right had to his Action, and took away his entry, was for that he was privy in eſtate, and for the benefit of the Purchaſer, and for the ſafegard of his Warranty, ſo as every mans right might be preſerved, viz. to the Demandant for his antient right, and to the Feoffee for the benefit of his Warranty, which was founded upon great reaſon and equity, which benefit of the Warranty ſhould be prevented and abated if the entry of him that right had were lawful, and thereby alſo the danger that many times happeneth by taking of poſſeſſions was wiſely prevented by Law. But then it may be demanded, ſeeing that there was no reverſion or remainder expectant upon any eſtate taile at the Common Law, nor the iſſue in taile had any remedy by the Common law if the Tenant in taile had alienes, then by what Law is the alienation of Tenant in taile a Diſcontinuance at this day to the iſſue in tail, or to him in reverſion or remainder? Whereunto it is thus anſwered

vide Sect. 562, 567, 601, 637, 638.

30. E. 1. Formedon 65. 19. E. 2. Formedon 61. 18. E. 46. 12. E. 4. 3.

ſwered, that it is prouided by the Statute of W. 2. ca. 1. De donis conditionalibus, quod non habeant illi quibus tenementum ſic fuerit datum poteſtatem alienandi, &c. Upon theſe words the Sages of the Law haue conſtrued the ſaid Act according to the rule and reaſon of the Common Law, and that in diuers and ſundry variable manners. For ſome Alienations of tenant in tail they haue adiudged voidable by the Iſſue in tail by action only, ſome at the election of the iſſue in tail to auoid it by Action, Entry, or claim: ſome are meerly void by the death of the Tenant in taile: which ſeuerall Conſtructions were made upon the ſelf-ſame words aforeſaid.

13.E.3.12.19.E.3.Bre. 468.24.E.3.28.36.Aſſ.8 22.R.2.Diſcon.5.E.4.3 4.H.7.17.33.E.Formedon & 13.7.Pl.Com. Smith & Stapletons caſe.

As for example, if tenant in taile make a Feoffment in fee, this driues the iſſue in tail to his Action, which is called in Law a Diſcontinuance; and this conſtruction was made, for that at the Common Law the Feoffment of an Abbot or Biſhop, or of the husband ſeiſed in the right of his wife, did worke a Diſcontinuance, and did driue the ſucceſſor and the wife to their Action, and forecloſed them of their entry: and as the entry of the Iſſue was taken away, ſo conſequently of them in reuerſion and remainder. Alſo if an Abbot, Biſhop, or husband in the right of his wife, ſeiſed of a rent, or of any other inheritance that lieth in Grant, had alienes, it was in the election of the Succeſſor or Wife after the death of her husband to claim the rent, &c. or to bring an Action, for that alienation did not worke a Diſcontinuance, and ſo it is by conſtruction in caſe of Tenant in tail. Laſtly, if the Abbot, Biſhop, or Huſband had granted a Rent newly created out of the land, &c. to another in Fee, this had vtterly ceaſed by their death, and ſo it is alſo by conſtruction in caſe of Tenant in tail. So as theſe words (Non habent poteſtatem alienandi) do worke theſe effects, viz. as to Lands, That a Feoffment barreth not the Iſſue, &c. of his Action, but worketh a Diſcontinuance to bar him of his Entry: as to Rents or any thing in eſſe, that lie in grant, that the ſaid words do take away his power to make any Diſcontinuance: as to Rents, &c. newly created, that they take away his power to make them to continue longer then during his life.

But there is a diuerſity between an alienation working a diſcontinuance of an Eſtate which taketh away an entry, and an alienation working, diueſting or diſplacing of Eſtates which taketh away no entry. As if there be Tenant for life, the remainder to A. in tail, the remainder to B. in fee, if tenant for life doth alien in Fee, this doth diueſt and diſplace the remainders, but worketh no Diſcontinuance. And therein it is to be obſerued, That to euery diſcontinuance there is neceſſary a deueſting, or diſplacing of the eſtate, and turning the ſame to a right: for if it be not turned to a right, they that haue the Eſtate cannot be driuen to an Action. And that is the reaſon that ſuch Inheritances as lie in Grant, cannot by Grant be diſcontinued, becauſe ſuch a Grant diueſteth no Eſtate, but paſſeth only that which he may lawfully grant; and ſo the eſtate it ſelf doth deſcend, revert, or remain, as ſhall be ſaid hereafter in this Chapter.

A. maketh a gift in tail to B. who maketh a gift in tail to C. C. maketh a feoffment in Fee, and dieth without Iſſue, B. hath Iſſue and dieth, the Iſſue of B. ſhall enter: for albeit the Feoffment of C. did diſcontinue the reuerſion of the Fee ſimple which B. had gained upon the Eſtate tail made to C. yet could it not diſcontinue the right of Intail which B. had, which was diſcontinued before: and therefore when C. died without Iſſue, then did the diſcontinuance of the Eſtate tail of B. which paſſed by his Livery ceaſe, and conſequently the entry of the Iſſue of B. lawful; which caſe may open the reaſon of many other caſes.

Alſo note, That a Diſcontinuance made by the husband did take away the entry only of the wife and her heirs by the Common law, and not of any other which claimed by title paramount above the Diſcontinuance. As if Lands had been given to the husband and wife, and to a third perſon, and to their heirs, and the husband had made a Feoffment in Fee, this had been a diſcontinuance of the one moity, and a diſſeiſin of the other moity: if the husband had died, and then the wife had died, the ſurvivor ſhould have entred into the whole, for he claimed not under the diſcontinuance, but by title paramount from the firſt Feoffor: and ſeeing the right by Law doth ſurvive, the Law doth give him a remedy to take advantage thereof by entry, for other remedy for that moity he could not have.

¶ *Fee, ou fee taile.* And ſo it is of an eſtate for life.

## *Sect.598, 599, 600.*

¶ ITem, ſi Tenant en Taile ſoit diſſeiſie, & il releſſa per

ALſo, if Tenant in taile be diſſeiſed, and he releaſe by his ſon

ſon fait a le Diſſeiſor, & a ſes heires tout le droit, le quel il ad en meſme les tenements, ceo ne pas diſcontinuance, pur ceo que rien de droit paſſa al Diſſeiſor, forſque pur terme de vie del tenant en le Taile, que fit le Releaſe, &c.

Deed to the Diſſeiſour and to his heires all the right which he hath in the ſame Tenements, this is no diſcontinuance, for that nothing of the right paſſeth to the Diſſeiſor, but for terme of the life of tenant in Taile, which made the Releaſe, &c.

## *Sect.* 599.

¶ MEs per feoffment del tenant en le Taile, fee ſimple paſſa per meſme le feoffement per force de Livery de ſeiſin, &c.

BUt by the Feoffment of Tenant in taile, Fee ſimple paſſeth by the ſame Feoffment by force of the Livery of Seiſin, &c.

## *Sect.* 600.

¶ MEs per force dun releaſe rien paſſera forſque le droit que il doit loyalm̃t, & droituralment releſſer, ſans ley ď ou damage al auters perſons q̃ux ent averont droit apres ſon deceaſe, &c. Iſſint il eſt grand diverſity perenter un Feoffement dun tenant en le taile, & un Releaſe fait per tenant en le taile.

BUt by force of a Releaſe nothing ſhall paſs but the right which he may lawfully and rightfully releaſe, without hurt or damage to other perſons who ſhall have right therein after his deceaſe, &c. So there is great diverſity between a Feoffment of Tenant in Taile, and a releaſe made by tenant in taile.

¶ OUr Author having put examples of Eſtates paſſing by tranſmutation of an eſtate and poſſeſſion, doth in this and the two Sections following put a diverſity between a Feoffment and a releaſe or confirmation of a bare right: for it is a rule in Law, That the Diſſeiſee or any other that hath a right only by his Releaſe or confirmation, cannot make any diſcontinuance, becauſe nothing can fall thereby but that which may lawfully paſſe. But otherwiſe it is of a Feoffment in reſpect of the Livery of Seiſin, for that it is the moſt ſolemn and common aſſurance in the Country, and to be maintained for the Common quiet of the Realm: and by the Feoffment the freehold (which is ſo much eſteemed in law) doth paſſe by open livery to the Feoffee, and by the releaſe a bare right. 9.E.4.18.12.E.4.11. 5.H.4.8.21.H.6.58.

## *Sect.* 601.

¶ MEs il eſt dit, que ſi le tenant en taile teſt cas releſſa a ſon diſſeiſor, & oblige luy & ſes hrs

BUt it is ſaid, that if the tenant in taile in this caſe releaſes to his Diſſeiſor, and bind him and his heires to Warran-

¶ THe reaſon why the addition of the warranty in this caſe maketh a Diſcontinuance is that which hath been ſaid, viz. If the Iſſue in Taile ſhould enter, the Warrantie (which is ſo much favoured 3.H.4.9.22.R.2. *Diſcent.*5. 12.E.4.11.21.H.7.9. 43.E.3.8.15.E.4.tit. Diſcent.30. Vide Sect. 596,602,637, 658.

in

in Law) should be destroyed: and therefore to the end that the Assets in Fee simple doe descend to him to whom the Release is made, may plead the same, and barre the Demandant: by which meanes all rights and advantages are saved. And that I may note it once for all; an (il est dit) with Littleton, is as good as a Concessum in a Book case.

a Garrantie & mes & cest garranty discendist a son Issue, ceo est discontinuance per cause de le garrantie.

tie, and dieth, and this Warranty descend to his Issue, this is a Discontinuance, by reason of the Warranty.

## Sect. 602.

¶ MEs si un home ad Issue fits per sa Feme, & sa Feme morust, & puis il prent auter Feme, & tenements sont dones a luy & a sa second Feme, & a les heires de lour deux corps engendres, & ils ont issue un auter fits, & le second Feme morust, & puis le Tenant en le taile est disseise, & il relessa al Disseisor tout son droit, &c. & oblige luy & les heirs a le garrantie, &c. & debie, ceo nest pas discontinuance al issue en le Taile per le second feme, mes il poit bien enter pur ceo que le garrantie discendist a son eigne frere que son pier avoit per le primer feme, &c.

BUt if a man hath issue a Son by his Wife, and his Wife dieth, and after he taketh another wife, and Tenements are given to him and to his second wife, and to the Heirs of their two bodies engendred, and they have issue another son, and the second Wife dieth, and after the Tenant in taile is disseised, and he release to the Disseisor all his right, &c. and bind him and his heirs to warranty, &c. and die, this is no Discontinuance to the Issue in Taile by the second wife, but he may well enter for that the Warranty descendeth to his elder brother, which his Father had by the first wife, &c.

## Sect. 603.

¶ EN meisme le manner est, lou tenements sont discendable a le fits puisne solonqz le custome de Burgh English, queux sont entailes, &c. & le tenant en le taile ad deux fits, & est disseisie, & il relessa a son Disseisor tout son droit oue garrantie, &c. & morust, le puisne fits poit enter sur le Disseisor, nient obstant le garrantie, pur ceo que le garrantie discendist al eigne fits, car touts foits le Garran-

IN the same manner is it, where Lands are descendable to the youngest sonne after the Custome of Borough-English, which are entailed, &c. and the Tenant in Taile hath two sonnes, and is disseised, and he releaseth to his Disseisour all his right with Warranty, &c. and dieth, the younger son may enter upon the Disseisor notwithstanding the warranty, for that the Warranty descendeth to the elder son: for always the war-

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tie diſcendera a celuy que eſt heire per le common ley.

ranty ſhall deſcend to him who is heir by the Common Law.

¶ By theſe two examples in this and the Section next following, it appeareth that a warranty being added to a releaſe or Confirmation, and deſcending upon him that right hath to the Lands, maketh a Diſcontinuance; otherwiſe it is out of the reaſon of the Law, and worketh no Diſcontinuance, if the warranty deſcendeth upon another.

¶ *Oue garrantie. &c.* Here is implied that he doth bind him and his heirs to warrant to the releaſee and his heirs.

¶ *Touts fois le garrantie diſcendiſt ſur le heire al Common ley.* This is a Maxim of the Common Law, and hereof more ſhall be ſaid in the Chapter of Warranty. Sections 718, 735, 736, 737. ſo as it is not the warranty only that maketh a Diſcontinuance, but the warrantie and the Diſcent upon him that right hath together. 13.H.4.Garrantie 54. 19.R.2. Garrantie 100.

## *Sect.* 604.

¶ Item, ſi un Abbe ſoit diſſeiſie, & il releſſa a le diſſeiſor quelqz garrantie, ceo neſt pas Diſcontinuance a ſon ſucceſſor, pur ceo que rien paſſa per cel releas, forſque le droit que il ad durant le temps que il eſt Abbe, & le Garrantie eſt expire per ſon priuation, ou per ſa mort.

ALſo, if an Abbot be diſſeiſed and he releaſeth to the diſſeiſor with warranty, this is no Diſcontinuance to his ſucceſſor, becauſe nothing paſſeth by this releaſe but the right which he hath during the time that he is Abbot; and the Warranty is expired by his priuation, or by his death.

¶ The reaſon hereof yielded by Littleton is, for that the Warrant is expired by his priuation or death.

¶ *Per ſon priuation, ou per ſa mort.* Note that priuation is here reſembled to death, and ſo is tranſlation alſo: wherein this diuerſity is worthy of obſeruation, that when a Biſhop, &c. make an eſtate, leaſe, grant of a Rent charge, warranty, or any other act which may tend to the diminution of the reuenues of the Biſhoppricke, &c. which ſhould maintain the ſucceſſour, there the priuation or tranſlation of the Biſhop, &c. is all one with his death. But where the Biſhop is Patron and Ordinary, and confirmeth a Leaſe made by the Parſon without the Dean and Chapter, and after the Parſon dieth, and the Biſhop collateth another and then is tranſlated, yet the Confirmation remaineth good, for the Reuenues that are to maintain the ſucceſſor are not thereby diminiſhed. And the like diuerſity doth hold in caſe of reſignation, notwithſtanding (m) the Authority to the contrary. Vide 29.E.3.16. (m) 29.E.3.16.tit. garrant.99.

## *Sect.* 605.

¶ Item, ſi home ſeiſie en droit ſa feme eſt diſſeiſie, & il releſſa, &c. oue garrantie, ceo neſt pas diſcontinuance a la feme ſi el ſurveſquiſt ſon baron, mes pue il poit enter, &c. Cauſa patet.

ALſo, if a man ſeiſed in the right of his Wife be diſſeiſed, and he releaſeth, &c. with warranty, this is no diſcontinuance to the wife if ſhe ſurviveth her husband, but that ſhe may enter, &c. *Cauſa patet.*

¶ This is evident, unleſſe the wife be heir to the husband (as by Law ſhe maybe) and then it is a diſcontinuance for the cauſe aforeſaid.

*Sect.*

## Sect. 606.

¶ Item, ſi tenant en taile de certaine terre leſſa meſme la terr̃ a un auter pur term̃ des ans, per force de quel le leſſee en eit poſſeſſion, en quel poſſeſſion le tenant en taile per ſon fait releſſa tout le droit que il avoit ẽ meſm̃ le terre, a aver & tener a le leſſee & a ſes heirs a touts jours, ceo neſt pas diſcontinuance, mes apres le deceaſe le tenant en tail ſon iſſue poit bien enter, pur ceo que per tiel releaſe riens paſſa forſque pur terme de la vie de le tenant en le taile.

ALſo, if Tenant in taile of certaine Land letteth the ſame Land to another for term of years, by force whereof the Leſſee hath thereof poſſeſſion, in whoſe poſſeſſion the Tenant in taile by his Deed releaſeth all the right that he hath in the ſame Land, To have and to hold to the Leſſee and to his heirs for ever; this is no diſcontinuance; but after the deceaſe of the Tenant in taile his iſſue may well enter, becauſe by ſuch Releaſe nothing paſſeth but for term of the life of the Tenant in taile.

¶ *Car per tiel releas riens paſſa.* Here is one of the maxims of the Common Law rehearſed by our Author, whereof he doth put divers examples hereafter.

## Sect. 607.

¶ Eſmeſme le manner eſt, ſi le tenant en le taile, confirma leſtate le leſſee pur terme des ans, a aver & tener a luy & a ſes heires, ceo neſt pas diſcontinuance, pur ceo que riens paſſa per tiel confirmation forſque leſtate que le tenant en le taile avoit pur terme de ſa vie, &c.

¶ IN the ſame manner it is, if the tenant in taile confirme the eſtate of the Leſſee for years, To have and to hold to him and to his heirs, this is no diſcontinuance, for that nothing paſſeth by ſuch Confirmation, but the Eſtate which the Tenant in taile hath for term of his life, &c.

¶ *Riens paſſa per tiel confirmation.* Here is another of the maxims of the Common Law rehearſed by our Author, whereof he putteth examples hereafter. More ſhall be ſaid hereof in the next Section following.

## Sect. 608.

Item, ſi tenant en taile apres tiels leas granta le reverſion en fee per ſon fait a auter, & voile

ALſo, if tenant in taile after ſuch leaſe grant the reverſion in fee by his Deed to another, and wil-

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que apres le terme fine, q̄ meſme le terre remaindroit a le grantée & a ſes heires a tout jours, & le tenant a term̄ dans atturna, ceo neſt pas diſcontinuance. Car tiels choſes queux paſſont en tiels caſes de tenant en le taile tant ſolement per voy de graunt, ou per confirmation, ou per tiel releaſe, rien poit paſſer pur faire eſtate a celuy a que tiel graunt, ou confirmatiõ, ou releaſe eſt fait, forſque ceo que le tenant en taile poit proprement faire, & ceo neſt forſque p̄ terme de ſa vie, &c.

leth that after the terme ended, that the ſame Land ſhall remain to the grantee and his heirs for ever, and the tenant for years attorn, this is no diſcontinuance. For ſuch things which paſs in ſuch caſes of Tenant in taile only by way of grant, or by confirmation, or by ſuch releaſe, nothing can paſs to make an eſtate to him to whom ſuch grant, or confirmation, or releaſe is made, but that which the tenant in taile may rightfully make, and this is but for term of his life, &c.

*Sect.* 609.

CAr ſi jeo leſſa terre a un home pur terme de ſa vie, &c. & le tenant a term de vie leaſſe meſm̄ la terre a un auter pur terme des ans, &c. & puis mon tenant a terme de vie granta le reverſion a un auter en fee, & le tenant a terme des ans atturna, en ceſt caſe le grantée nad en le franktenement forꝛ eſtate pur terme de vie ſon grauntoꝛ, &c. & jeo que ſuis en le reverſion de fee ſimple, ne puiſſe enter per force de cel grant del reverſion fait per mon tenant a terme de vie, pur ceo que per tiel grant mon reverſion neſt pas diſcontinue, mes tout temps demurt a moy, ſicome il fuit adevant, nient obſtant tiel grant del reverſion fait al grantee a luy & a ſes heires, &c. pur ceo que riens paſſa per force de tiel grant forſque eſtate que le grantoꝛ aveit, &c.

FOr if I let Land to a man for term of his life, &c. and the tenant for life letteth the ſame land to another for terme of years, &c. and after my tenant for life grant the reverſion to another in fee, and the tenant for years attorne, in this caſe the grantee hath in the freehold but an eſtate for term of the life of his grantor, &c. And I which am in the reverſion of the fee ſimple may not enter by force of this grant of the reverſion made by my tenant for life, for that by ſuch grant my reverſion is not diſcontinued but always remaines unto me as it was before, notwithſtanding ſuch grant of the reverſion made to the grantee, to him and to his heirs, &c. becauſe nothing paſſed by force of ſuch grant, but the eſtate which the grantor hath, &c.

*Sect.*

## Sect. 610.

¶ EN meſme le maner eſt, ſi le tenant a terme de vie, per ſon fait confirme l'eſtate ſon leſſee pur terme des ans, a aver & tener a luy & a ſes heires, ou releſſa a ſon leſſee & a ſes heires, uncore le leſſee a terme dans, nad eſtate forſque pur terme de vie de le tenant a terme de vie, &c.

¶ IN the ſame manner is it, if tenant for terme of life by his Deed confirme the eſtate of his Leſſee for years, To have and to hold to him and his heirs, or releaſe to his Leſſee and his heirs, yet the Leſſee for years hath an eſtate but for terme of the life of the tenant for life, &c.

¶ *CAr tiels choſes que paſſont en tiels caſes de tenant en le taile, &c.* Here is rehearſed another antient maxim of the Common Law touching Grants, and hereby it appeareth that a Feoffment in Fee (albeit it be by Parol) is of a greater operation and eſtimation in Law, then a grant of a reverſion by Deed though it be enrolled, and Attornment of the Leſſee for years of a releaſe, or a Confirmation by Deed, for the reaſons aforeſaid. And this is manifeſted by the examples which our Author here in theſe three Sections putteth.

## Sect. 611.

¶ *FOrſque eſtate pur terme dans, &c.* Here it is implied, that albeit the feoffment made by Leſſee for years be a feoffment between the Feoffor and feoffee, and that by this feoffment the fee ſimple paſſeth by force of the Livery, yet is it a diſſeiſin to the Leſſor. And here it is worthy to be obſerved, that our Author ſaith, that Tenant for term of years may make a feoffment, whereupon it followeth, that the Feoffor may thereunto anner a warranty, whereupon the Feoffee may vouch him: but of this you ſhall read more in the Chapter of Warranties, 698.

¶ MEs auterment eſt quand tenant a terme de vie fait un feoffement en fee, car per tiel Feoffement le Fee ſimple paſſa. Car Tenant a terme dans poit faire feoffment in Fee, & per ſon Feoffment le fee ſimple paſſera, & uncore il naboit al temps del Feoffment fait forſque eſtate pur terme dans, &c.

BUt otherwiſe it is when tenant for life maketh a Feoffment in fee, for by ſuch a feoffment the fee ſimple paſſeth. For tenant for years may make a feoffment in fee, and by his feoffment the fee ſimple ſhall paſs, and yet he had at the time of the feoffment made but an eſtate for term of years, &c.

## Sect. 612.

¶ ITem, ſi tenn en le taile granta ſon terre a un auter pur terme de vie de meſme le tenant en taile, & liver a luy ſeiſin, &c. & apres per ſon fait il releſſa a le tenant & a ſes heires tout le droit

ALſo, if tenant in taile grant his land to another for term of the life of the ſaid tenant in taile, and deliver to him ſeiſin, &c. and after by his Deed he releaſeth to the tenant and to his heirs all the right

droit quel il aboit en meſme la terre, en ceſt cas leſtate del tenant de la terre neſt pas enlarge per force de tiel releas, put ceo que quant le tenant aboit leſtate en le terre put terme de vie de le tenant en le taile, donque il aboit tout le droit que le tenant en le taile puiſſoit droiturelment granter ou releſſor, iſſint que per tiel releas nul droit paſſa, entant que ſon droit fuit ale avebant.

right which he hath in the ſame land, in this caſe the eſtate of the tenant of the land is not enlarged by force of ſuch releaſe, for that when the tenant had the eſtate in the land for term of the life of the tenant in taile, he had then all the right which Tenant in Tail could rightfully grant or releaſe. So as by this releaſe no right paſſeth, inaſmuch as his right was gone before.

## *Sect.* 613.

¶ Item, ſi tenant en taile per ſon fait grant a un auter tout ſon eſtate que il aboit en les tenemẽts a luy tailes, a aver & tener tout ſon eſtate al auter et a ſes heires a touts jours, et delivera a luy ſeiſin accordant, en ceſt cas le tenant a que laliena-tion fuit fait, nad auter eſtate forſque pur terme de vie del tenant en taile, et iſſint il poit bien eſtre prove, que le tenant en taile ne poit pas graunter ne alener ne faire alcun droiturel eſtate de franktenement a auter perſon, forſque pur term de ſa vie demeſne, &c.

ALſo, if Tenant in Tail by his Deed grant to another all his eſtate which he hath in the tenements to him intail'd, To have and to hold all his eſtate to the other, and to his heirs for ever, and deliver to him ſeiſin accordingly; in this caſe the Tenant to whom the alienation was made hath to another eſtate but for the term of the life of the tenant in tail. And ſo it may be well proved, that tenant in tail cannot grant, nor alien, nor make any rightful eſtate of freehold to another in perſon, but for term of his own life only, *&c.*

¶ The meaning of Littleton in both theſe caſes, in this and in the Section next proceeding is, that having regard to the iſſue in tail, and to them in reverſion or remainder, tenant in tail cannot lawfully make a greater eſtate than for term of his life; and therefore this Releaſe or Grant is no Diſcontinuance. But in regard of himſelf this Releaſe or Grant leaveth no reverſion in him, but puts the ſame in abeiance, ſo as after his Releaſe or Grant made he ſhall not have any action of waſte, &c.

¶ *Grant tout ſon eſtate, Vid. Sect.* 650. Action of waſte, &c. there is implyed that he ſhall not enter for a forfeiture, if after the releaſe or grant the Leſſee maketh a feoffment in fee. 13.H.7.10. 8. Brook Releaſe 95.

## *Sect.* 614.

¶ CAr ſi jeo done Terre a un home en taile, ſavãt

FOr if I give land to a man in tail, ſaving the reverſion to my

¶ HEre Littleton proveth, that the Feoffee of Tenant in Tail hath no rightful eſtate having

having relpect to two perſons, the one is to the Donor, whoſe reverſion is diveſted and diſplaced, and the other to the Iſſue in taile, who is driven to his Action to recover his right.

¶ *A tort luy deforce.*

(n) Bract. l. 4. fol. 238. Flet. lib. 5. cap. 11.

(n) Deforciare is a word of Art, and cannot be expreſſed by any other word; for it ſignifieth, to with-hold lands or tenements from the right owner, in which caſe either the entrie of the right owner is taken away, or the deforceor holdeth it ſo faſt, as the right owner is driven to his real Præcipe, wherein it is ſaid, Unde A. cum injuſtè deforceat, or the Deforceor ſo diſturbeth the right owner, as he cannot enjoy his own: and therefore it is ſaid, Per hoc autem quod dicitur in brevi ultimæ præſentationis deforceant, videtur quibuſdam, quod querens innuat per hoc quod deforceans ſit in ſeiſina, ſicut in brevi de recto, ſed revera non eſt ita; ſed ſatis deforceat qui poſſeſſorem uti ſeiſinâ non permiſerit omninò vel minus commodè impediat præſentando, appellando, impetrando, ſecundùm quod dicitur de diſſeiſitore, ſatisfacit diſſeiſinam, qui uti non permiſit poſſeſſorem vel minus commode, licet omninò non expellat. In this caſe that Littleton putteth, the diſcontinuee being in by wrong, is no Diſſeiſor, Abator, or Intrudor, but a Deforceor; and hereof cometh Deforcement, and thus did Antiquity deſcribe it: (o) Deforcement, come ſi aſcun enter en auter tenement tout come le vera Seignior eſt al Market ou ailors, & retorne & ne poit aver entre eins, eſt celuy deforce & debotue. And for that at the firſt the withholding was with violence and force, it was called a deforcement of Lands or Tenements; but now it is generally extended to all kind of wrongful withholding of Lands or Tenements from the right owner. There is a Writ called a Quod ei deforceat, and lieth where Tenant in Tail, or Tenant for life, loſed by default, by the Statute he ſhall have a Quod ei deforceat againſt the Recoveror, and yet he cometh in by courſe of Law.

Bract. & Flet. ubi ſupra.

(o) Mir. cap. 2. Sect. 15.

Weſtm. 2. cap. 4.

le reverſion a moy, et puis le tenant en le taile enfeoffa un auſ en fee, le feoffee nad pas droiturel eſtate e les tenemts pur deux cauſes. Un eſt, pur ceo que per tiel feoffemt ma reverſion eſt diſcontinue, le quel eſt a tort fait, et nēy a droit fait. Un auter cauſe eſt, ſi l' tenant e taile morust, e ſō iſſue ſuiſt Briefe de Formedon envers le feoffee, l' bē dirra, et auxy le count, &c. q̄ l' feoffee a tort luy deforce, &c. Ergo ſil a tort luy deforce, &c. il nad pas droiturel eſtate.

ſelf, and after the Tenant in taile infeoffeth another in Fee, the Feoffee hath no rightful eſtate in the Tenements, for two cauſes: One is, for that by ſuch Feoffement my reverſion is diſcontinued, the which is a wrong & not a rightfull Act. Another cauſe is, if the Tenant in Tail dieth, and his Iſſue bring a Writ of *Formedon* againſt the Feoffee, the Writ and alſo the Declaration ſhall ſay, *&c.* That the Feoffee by wrong him deforces, &c. *Ergo* if he deforceth him by wrong, he hath no right eſtate.

## Sect. 615.

¶ Item, ſi terre ſoit leſſa a un home pur terme de ſa vie, le remainder a un auter en le taile, ſi celuy en le remainder voile graunter ſon remainder a un auter en fee per ſon fait, et le Tenant a terme de vie atturna, ceo neſt pas diſcontinuance de le remainder.

ALſo, if Land be let to a man for term of his life, the remainder to another in tail, If he in the remainder will grant his remainder to another in Fee by his Deed, and the Tenant for life attorne, this is no diſcontinuance of the Remainder.

Sect.

## *Sect.* 616.

ITem, ſi home ad Rent ſervie ou Rent charge en Tail, & il granta le dit rent a un auter en fée, & le tenant attorna, ceo nest pas discontinuance, &c.

ALso, if a man hath a rent service, or rent charge in taile, and he grant the said rent to another in Fee, and the Tenant attorne, this is no Discontinuance, *&c.*

## *Sect.* 617.

ITem, ſi home ſoit Tenant en Tail, de un Advowſon en groſſe, ou de un Common en groſſe, ſil per ſon fait poile graunt ladbowſon, ou le Common a un auter en fée, ceo nest pas discontinuance. Car en tiels cases les grauntées nont estate forſque pur terme de die de le Tenant en taile que fit le Grant, &c.

ALso, if a man be Tenant in Taile of an Advowſon in Groſs, or of a Common in Groſſe, if he by his deed will grant the Advowſon or Common to another in Fee, this is no diſcontinuance; for in ſuch caſes the Grauntees have no eſtate but for terme of the life of tenant in taile that made the Grant, *&c.*

BY the cases in these three Sections it appeareth, That if a Remainder or a Rent service, or Rent-charge, or an Advowſon, or a Common, or any other Inheritance that lieth in Grant, be granted by Tenant in taile, it is no Diſcontinuance, as formerly hath been ſaid.

(p) Note, here is an Advowſon named by Littleton, as a thing that lieth in Grant, and paſſeth not by Livery of Seiſin.

Bract. l. 2. f. 3. & f. 369. 378. Brit. f. 187. Mer. c. 2 Sect. 17. Flet. li. 3. ca. 15. (p) 5. E. 3. 58. 21. E. 37. 38. 43. E. 3. 1. b. 13. H. 6. 4 5. H. 7. 37. 18. H. 8. 16. Eliz. Dyer 323. b.

## *Sect.* 618.

ET nota, que de tiels choſes que paſſont per voy de grant per Fait fait en pays, et ſans livery, la tiel graunt ne fait pas diſcontinuance, come en les caſes avãtdits, & en auter caſes ſemblables, &c. & coment que tiels choſes ſont graunts en fée per fine levie & le Court

AND note, that of ſuch things as paſs by way of grant, by deed made in the Country, and without livery, there ſuch grant maketh no diſcontinuance, as in the caſes aforeſaid, and in other like caſes, *&c.* and albeit ſuch things be graunted in Fee, by Fine levied in the Kings Court, *&c.*

THere is the generall reaſon yielded of the precedent caſes, and the like, for that it is a Wartime in Law, That a Grant (d) by deed of ſuch things as do lie in Grant, and not in Livery of Seiſin, do work no diſcontinuance. But the particular reaſon is, for that of ſuch things the Grant of Tenant in Taile worketh no wrong, either to the Heir in Taile, or to him in reverſion or remainder; for nothing doth paſs but only during the life of Tenant in Taile, which is lawful, and every diſcontinuance worketh a wrong, as hath been ſaid.

(d) E. 3. 56. 32. E. 3. diſcont. 2. 32. Aſſ. 8. 4. H. 7. 17. 21. H. 7. 42. 15. H. 7. 19. 21. H. 6. 52, 53. 5. E. 4. 3. 21. E. 4. 5. 22. R. 2. Diſcont. 56. 38. H. 8. Diſcont 35. Brook. 19. E. 3. Bre. 468. Pl. Com. 435. 18. Aſſ. p. 2.

(q) 33.E.3. Formedon 47.13.H.7.10. 36.Aſſ.8. 4.H.7.17.

(q) If Tenant in Taile of a Rent ſervice, &c. or of a Reverſion, or remainder in Taile, &c. grant the ſame in fee with warranty, and leaveth Aſſets in fee ſimple, and dieth; this is neither bar nor diſcontinuance to the iſſue in taile, but he may diſtrain for the rent or ſervice, or enter into the land after the deceaſe of Tenant for life. But if the Iſſue bringeth a Formedon in the Diſcender, and admit himſelf out of poſſeſſion, then ſhall he be barred by the warranty and Aſſets.

le Roy, &c. uncore ceo ne fait diſcontinuance, &c, yet this maketh not a Diſcontinuance, &c.

(r) 3.H.7.2.

(r) Tenant in Tail of a rent diſſeiſeth the tenant of the Land, and maketh a Feoffment in fee with warranty, and dieth; this is no diſcontinuance of Rent, but the Iſſue may diſtrein for the ſame, albeit the warranty extend to the rent; yet by the rule of Littleton it lyeth not in diſcontinuance; and where the thing doth lie in Livery, as Lands and Tenements, yet if to the conveyance of the Freehold or Inheritance no livery of Seiſin is requiſite, it worketh no diſcontinuance. (f) As if Tenant in tail exchange Lands, &c. or if the King being Tenant in tail Grant by his Letters Patents the lands in Fee, there is no Diſcontinuance wrought.

9.E.4.22.

(f) 38.H.8.pat. Kr.101. Pl. Com.233.Li.1 f.26. Alton Woods caſe.

48.E.3.23.

¶ *Per Fine.* Of a thing that lieth in Grant, though it be granted by fine, yet it worketh no diſcontinuance; and this is regularly true.

(t) 15.E.4.tit. diſcont. 30.6.H.56,57.

(t) If tenant in tail make a leaſe for years of lands, and after levie a Fine; this is a Diſcontinuance, for a Fine is a feoffment of Record, and a Freehold paſſeth. But if tenant in tail maketh a Leaſe for his own life, and after levy a Fine, this is no Diſcontinuance, becauſe the Reverſion expectant upon a ſtate of Freehold which lieth only in Grant, paſſeth thereby.

## *Sect.* 619.

¶ *NOta, ſi jeo done terre a un auter en taile, & il leſſa meſme la terre a un auter p̄ t̄me dans, & puis le Leſſor graunta le reverſion a un auter en fee, & le tenant a terme dans atturna al Grantee, et le terme eſt expire durant la vie le tenant en taile per que le Grantee enter, & puis le tenant en taile ad iſſue et devie, en ceſt caſe ceo neſt diſcontinuance, nient obſtant que le Grant ſoit execute en la vie le Tenant en taile, pur ceo que al temps de Leaſe fait a terme dans, nul novel Fee ſimple fuit reſerve en le Leſſor, eins le Reverſion demurt a luy en Tail, ſicome il fuit devant le Leaſe fait.* *

NOte, if I give Land to another in taile, and he letteth the ſame land to another for term of years, and after the Leſſor granteth the reverſion to another in fee, and the tenant for years attorn to the grantee, and the terme expireth during the life of the tenant in tail, by the which the Grantee enter, and after the tenant in taile hath Iſſue and die: in this caſe this is no Diſcontinuance, notwithſtanding the Grant be executed in the life of the tenant in taile, for that at the time of the Leaſe made for years, no new fee ſimple was reſerved in the Leſſor, but the Reverſion remained to him in tail, as it was before the Leaſe made.

¶ * This is added to Littleton, and not in the original, and therefore I purpoſely omit it: Yet is the caſe good in Law, becauſe neither the Leaſe for years, nor the grant of the Reverſion diveſteth any Eſtate.

*Sect.*

## *Sect.* 620.

MEs ũ le tenant ẽ taile fait leas a terme de vie le lessee, &c. en cest case le tenant en le taile ad fait un novel reversion de fee simple en luy, pur ceo que quant il fist leas p̃ terme de vie, &c. il discontinua le taile, &c. p̃ force de mesm̃ le leas, & auxy il discontinua ma reversion, &c. & il covient que la reversiõ de fee simple soit en aſcun person ẽ tiel cas, et il ne poit estre en moy que sue donor, entant q̃ mon reversion est discontinue. Ergo il covient que la reversiõ de fee soit en le tenant en le taile, que discontinua ma reversion per tiel leas, &c. Et ũ en cest case le tenant en le taile graunta per son fait cest reversion en fee a un auter, & le tenant a terme de vie attorna, &c. et puis le tenant a term̃ de vie mozust, vivant l' tenant en le taile, et le grantee de le reversion entra, &c. en la vie le tenant en le taile, donq̃ ceo est un discontinuance en fee; & ũ apres le tenant en le taile mozust, son issue ne poit enter, mes est mis a son br̃ de Formedon.

But if the Tenant in tail make a lease for terme of the life of the Lessee, *&c.* In this case the Tenant in Tail hath made a new reversion of the fee simple in him, because when he made the Lease for life, &c. he discontinued the tail, *&c.* by force of the same Lease; and also he discontinued my Reversion, &c. And it behoveth that the Reversion of the fee simple be in some person in such case. And it cannot be in me which am the Donor, inasmuch as my reversion is discontinued, *Ergo* the reversion of the fee ought to be in the tenant in Taile, who discontinued my Reversion by Lease, *&c.* And if in this case the Tenant in taile grant by his Deed this Reversion in fee to another, and the Tenant for life attorn, *&c.* and after the Tenant for life dieth, living the Tenant in taile, and the grantee of the reversion enter, *&c.* in the life of the Tenant in Taile, then this is a discontinuance in fee; and if after the Tenant in taile dieth, his issue may not enter, but is put to his Writ of *Formedon.*

¶ *Per terme de vie del lessee, &c.* Here is implyed, or for terme of another mans life.

¶ *Novel reversion de fee simple.* which must be understood of a fee simple determinable upon the life of the Lessee, which our Author here calleth a fee simple: for if the Lessee dieth, the Donee is Tenant in taile again, as he was before; and that is the reason that if in that case he granteth over the reversion and dieth, and after the death of tenant in taile the lessee dieth, the entry of the issue is lawful, because by the death of the Lessee the Discontinuance is determined, and consequently the grant made of the reversion gained upon that discontinuance is void also. 15.E.4.Tit.Discont.30

If tenant in tail maketh a Lease for three lives according to the Statute of 32.H.8. that is no discontinuance of the Estate tail or of the Reversion, because it is authorized by Act of Parliament, whereunto every man in judgment of law is party. 32.H.8.cap.28.

And yet in some cases the freehold may be discontinued, and not the reversion. (u) As if the husband and wife make a lease for life by Deed of the Wives land reserving a rent, the husband dieth; this was a Discontinuance at the Common law, for life, and yet the Reversion was not discontinued, but remained in the wife. Otherwise it is (u) 38.E.3.32.18.Ass.2. 18.E.3.54.22.H.6.24.

if the husband had made the leaſe alone.

21. H 6. 52. 15. E. 4. tit. Diſcont. 30.

¶ *Et puis le tenant a terme de vie morust &c.* The like law it is if the tenant for life ſurrender to the grantee, or if the grantee recover in an action of waſte, or enter for the forfeiture.

¶ *A avoit ſeiſin & execution.* And here it is to be obſerved, that when the reverſion in this caſe is executed in the life of tenant in taile, it is equivalent in judgment of law to a feoffment in fee, or the ſtate for life paſſed by livery.

32. E. 3. Diſcont. 2. 43. E. 3. Entr. Cong. 31. 3 H. 4. 9. 22. R. 2. diſcon. 50. 34. Aſſ. 6. Pl. 4. 28. Aſſ. 6. P. 6. 43. Aſſ. 6. 48. 18. E. 3. 43. 21. H. 6. 52. 15 E. 4. Tit. Diſcontinuance. 30. Book, tit. diſcont. 9, & 14. 3. H. 7. 17. 1. H. 7. 11.

(x) 22. H. 6. 52, 53.

(x) If tenant in tail make a leaſe for life, the remainder in fee, this is an abſolute Diſcontinuance, albeit the remainder be not executed in the life of tenant in taile, becauſe all is one eſtate, and paſſeth by one livery. And ſo note a diverſity between a grant of a reverſion, and a limitation of a remainder. B. Tenant in taile, maketh a gift in tail to A. and after B. releaſeth to A. and his heirs, and after A. dieth without iſſue, the iſſue of the firſt Donee may enter upon the collateral heir, becauſe A. had no ſeiſin and execution of the reverſion of the land in his demeſne as of fee, as Littleton here ſpeaketh. But if tenant in tail make a leaſe for the life of the Leſſee, and after releaſeth to him and his heirs; this is an abſolute Diſcontinuance, becauſe the fee ſimple is executed in the life of tenant in tail.

(y) 34. E. 1. Quare Impedit. 179. 22. E. 3. 6. 17. E. 3. 3. 33. E. 3. Quare Imp. 196. 23. Aſſ. 8. 50. E. 3. 16.

(y) If tenant in taile of a Mano^r whereunto an Advowſon is appendant maketh a feoffment in fee by deed (as it ought to be) of one Acre with the advowſon, and the Church becometh void, and the feoffee preſent, tenant in tail dyeth, the Church becometh void, the iſſue ſhall not preſent until he hath recontinued the Acre. But if the feoffee had not executed the ſame by preſentment, then the iſſue in tail ſhould have preſented. And ſo was it at the Common law of the husband ſeiſed in the right of his wife, mutatis mutandis.

26. Aſſ. 8. 42. E. 3. 20. 22. R. 2. Diſcont. 50.

If a fine be levied to a tenant in tail, and he granteth and rendzeth the land to him and his heirs, and die before execution, this is no diſcontinuance. Otherwiſe it is, if it had been executed in the life of Tenant in tail.

21. H. 6. 52, 53. Brook, tit. Diſcont. 3. 21. H. 7. 11. Lib. 1. fo. 85. Lib. 10. fol. 96, 97.

If tenant in tail make a leaſe for life of the leſſee, and after grant the reverſion with warranty, and dieth before execution, this is no Diſcontinuance, becauſe the Diſcontinuance was (as hath been ſaid) but for life, and the warranty cannot enlarge the ſame.

¶ *Et ceo eſt per force del grant de meſne le tenant en taile.* Hereupon Littleton himſelf is of the ſame opinion, (*) as it appeareth he was in our Books, that if tenant in tail make a leaſe for life, and grant the Reverſion in fee, and the leſſee attorn, and that Grantee granteth it over, and the leſſee attorn, and then the leſſee for life dieth, ſo as the reverſion is executed in the life of tenant in tail; yet this is no diſcontinuance, but that after the death of Tenant in tail the iſſue may enter, becauſe (as Littleton here ſaith) he is not in of the grant of the tenant in tail, but of his Grantee.

(*) 15. E. 4. Diſcont. 30. Vide Sect. 642.

If at this day tenant in tail make a leaſe for life, and after by Deed indented and inrolled according to the Statute he bargaineth and ſelleth the reverſion to another in fee, and the Leſſee dieth, ſo as the reverſion is executed in the life of Tenant in tail, albeit the bargainee is not in the Per by the tenant in tail, yet inaſmuch as he claimeth the Reverſion immediately from him, which is executed in his life time, this is a diſcontinuance. And ſo it is; and for the ſame cauſe if Tenant in tail, maketh a leaſe for life, and after diſſeiſeth the Leſſee for life, and maketh a feoffment in fee, the Leſſee dieth, and then tenant in tail dieth, albeit the fee be executed, yet for that the fee was not executed by lawful means, (as in all the Caſes of Littleton it appeareth it ought to be) it is no diſcontinuance.

Sect.

## Sect. 621.

EN meſme le manner lestra, ſi en le caſe avant dit, le tenant a terme de vie apres attournement al grantée uſt alien en fée, & le grantée uſt enter pur forfeiture de ſon eſtate, et puis le tenant en taile uſt devie, ceſt un diſcontinuance, Cauſa qua ſupra.

IN the ſame manner ſhall it be, if in the caſe aforeſaid the Tenant for term of life after the Attornment to the grantee had aliened in fee, and the grantee had entred by forfeiture of his eſtate, and after the Tenant in tail had died; this is a Diſcontinuance, *Cauſa qua ſupra.*

¶ This is added in this place, but in the Original it cometh in after in this Chapter. 21.H.6.52;53.25.E.4. Diſcont.30.

## Sect. 622.

MES en ceſt cas, ſi tenãt en taile que granta le reverſion, &c. mozuſt, vivant le tenant a terme de vie & puis le tenant a terme de vie, mozuſt, & puis celuy a que le reverſion fuit graunt enter, &c. donques ceo neſt pas diſcontinuance, mes que liſſue del tenant en taile poit bien enter ſur le grauntée del Reverſion, pur ceo que le reverſion que le grauntée auit, &c. ne fuit executé, &c. en le vie le tenant en taile, &c. Et iſſint il eſt grand diverſity quant tenant en taile fait un leas pur terme dans, & lou il fait leas pur terme de vie, car en iun cas il ad reverſion en taile, & en lauter cas il ad un reverſion en fée.

BUt in this caſe, if tenant in taile that grants the reverſion, &c. dieth, living the Tenant for life, and after the Tenant for life dieth, and after he to whom the reverſion was granted enter, *&c.* then this is no diſcontinuance, but that the iſſue of the Tenant in tail may well enter upon the Grantee of the reverſion, becauſe the Reverſion which the Grantee held, *&c.* was not executed, *&c.* in the life of the Tenant in tail, *&c.* And ſo there is a great diverſity when Tenant in Taile maketh a Leaſe for years, and where he maketh a Leaſe for life; for in the one caſe he hath a reverſion in tail, and in the other caſe he hath a reverſion in fee.

¶ Of this ſufficient hath been ſaid before, and is of it ſelf manifeſt, and needeth no explication.

Like Law was at the Common law, of a husband ſeiſed of land in right of his wife, Mutatis mutandis. 18.Aſſ.6.21.H.6.53.

Sect.

## *Sect.* 623.

¶ CAr ſi terre ſoit done a un home a ſes heires males de ſons corps engendres, le quel ad iſſue deux fits, & leigne fits ad iſſue file & deby, & le tenant en taile fait un leas pur terme des ans, et deby, ore le reverſion diſcendit a le fits puiſne, pur ceo que le reverſion fuit forſque en le taile, et le fits puiſne eſt heire male, &c. Mes ſi le tenant ult fait un leas pur terme de vie, &c. et puis morust, ore le reverſion diſcendit a le file de leigne fits, pur ceo que le reverſion eſt en fee ſimple, & la file eſt heire general, &c.

FOr if land be given to a man and to his heirs males of his body engendred, who hath iſſue two ſons, and the eldeſt ſonne hath iſſue a daughter and dieth, and the tenant in tail maketh a leaſe for years and die; now the reverſion deſcendeth to the younger ſonne, for that the reverſion was but in the taile, and the youngeſt ſonne is heir male, *&c.* But if the Tenant had made a leaſe for life, *&c.* and after died, now the reverſion deſcendeth to the daughter of the elder brother, for that the reverſion is in the fee ſimple, and the daughter is heir general, *&c.*

This is evident alſo, and needeth no explanation.

## *Sect.* 624.

9.E.4.32. 20.H.6.14. Vide 18.E.3.8.

¶ ITem, ſi home ſoit ſeiſie en taile de terres devisables per teſtament, &c. & il ceo devisa a un auter en fee, & morust, & lauter enter, &c. ceo neſt pas diſcontinuance, pur ceo que nul diſcontinuance fuit fait en la vie del tenant en le taile, &c.

ALſo, if a man be ſeiſed in tail of lands deviſable by Teſtament, &c. and he deviſeth this to another in fee, and dieth, and the other enter, *&c.* this is no diſcontinuance, for that no diſcontinuance was made in the life of the Tenant in Taile, &c.

¶ This is manifeſt, and needeth no explanation: Only this is to be obſerved, that no Diſcontinuance can be made by Tenant in Tail, but ſuch as is made, and taketh effect in his life time, which is here implied in the (&c.)

## *Sect.* 625.

(a) 9.E.4.24.b.

ANnot this opinion is Littleton (a) in our Books, and ſaith that ſo it was adjudged.

Lib.1.fol.140. in Chudleys Caſe.

¶ *Enfeoffe le donor, &c.* This muſt be underſtood where the reverſion of the donor is immediatly ex-

¶ ITem, ſi terr̃ ſoit done en taile, ſanant le reverſion al donor, & puis l' tenant en tail per ſon fait enfeoffa l' donor

ALſo, if land be given in Taile, ſaving the reverſion to the Donor, and after the Tenant in Taile by his deed enfeoffe the Do-

a aber et tener a luy et a ſes heirs a touts jours, & liver a luy ſeiſin accordant, &c. ceo neſt pas diſcontinuance, pur ceo que nul poit diſcontinuer leſtate en le taile, ſi non q̄ il diſcontinue le reverſion celuy que ad le reverſion, &c. ou le remainder, ſi aſcun ad le remainder, &c. & entant que per tiel feoffment fait a le donor (le reverſion a donor eſteant en luy) ſon reverſion ne fuit diſcontinue ne alterate, &c. ceſt feoffment neſt pas diſcontinuance, &c.

nor, To have and to hold to him and to his heirs for ever, and deliver to him ſeiſin accordingly, *&c.* this is no diſcontinuance, becauſe none can diſcontinue the eſtate taile, unleſs he diſcontinueth the Reverſion of him who hath the reverſion, &c. or remainder if any hath the remainder, &c. and inaſmuch as by ſuch feoffment made to the Donor (the reverſion then being in him) his reverſion was not diſcontinued nor altered, *&c.* this feoffment is no diſcontinuance, &c.

pectant upon the eſtate of the Donee, (b) for if a man make a Gift in taile the remainder in tail, reſerving the reverſion to himſelf: In this caſe if the Donee enfeoffe the Donor; this is a diſcontinuance, becauſe there is a mean eſtate, and ſo doth Littleton here put his caſe of a reverſion immediately expectant upon the gift in tail. Alſo it is to be intended of a feoffment made to the Donor ſolely or only; for if the Donee enfeoffe the Donor and a ſtranger, that is a diſcontinuance of the whole land. (b) 41. Aſſ. 2. 41. E. 3. 2. 28. H. 8. Dyer 12.

But if tenant for life make a Leaſe for his own life to the leſſor, the remainder to the Leſſor and an eſtranger in fee: in this caſe foraſmuch as the limitation of the Fee ſhould work the wrong, it enureth to the Leſſor as a ſurrender for the one moity, and a forfeiture as to the remainder of the ſtranger; for he cannot give to the leſſor that which he had before, as our Author here ſaith; and as to the remainder to the ſtranger, it is a forfeiture for this moity, and when the Leſſor entreth he ſhall take the benefit of it. But if two joyntenants be, and one of them enfeoffe his companion and a ſtranger, and make Livery to the ſtranger; this ſhall veſt only in the ſtranger, becauſe the livery cannot enure to his Companion.

¶ *Nul poit diſcontinuer leſtate en taile, ſi non que il diſcontinue le reverſion, &c. ou le remainder*, &c. And therefore for this cauſe if the reverſion or remainder be in the King, the Tenant in tail cannot diſcontinue the eſtate tail. (c) But Tenant in tail, the reverſion in the King, might have barred the eſtate tail by a common recovery until the Statute of 33. H. 8. ca. 20. which reſtraineth ſuch a tenant in tail, but that common recovery neither barred nor diſcontinued the Kings reverſion. 40. Aſſ. 36. 36. 21. Aſſ. 36. 18. E. 3. 45. F. N. B. 142. a Pl. Com. 555. (c) 33. H. 8. tit. Tail, Br. 41. Pl. Com. ubi ſupra.

Note, the reverſion may be reveſted, and yet the diſcontinuance remain. (d) As if a Feme Covert be tenant for life, and the husband make a Feoffment in fee, and the Leſſor enter for the forfeiture; here is the reverſion reveſted, and yet the diſcontinuance remained at the Common Law. (d) 17. Aſſ. p. 60. 29. Aſſ. 43. 11. Aſſ. 11. 16. Aſſ. 11. 18. E. 3. 45.

## *Sect.* 626.

¶ EN meſme le manner eſt lou terres ſont dones a un hõe en taile, le remainder a un auter en fee, et le tenãt en taile enfeoffa celuy que eſt en le remainder, a aber et tener a luy, et a ſes heirs, ceo neſt pas diſcontinuance, Cauſa qua ſupra.

IN the ſame manner is it, where Lands are given to a man in tail, the remainder to another in fee, and the tenant in taile enfeoffe him that is in the remainder, To have and to hold to him and to his heirs this is no diſcontinuance, *Cauſa qua ſupra.*

¶ *Le remainder a un auter.* Here it appeareth that (as hath been ſaid in caſe of a reverſion) the remainder muſt be immediately expectant upon the eſtate tail.

*Sect.*

## Sect. 627.

¶ Item, ſi un Abbe ad un Reverſion ou Rent ſervice, ou Rent charge, et voile graunter cel reverſion, ou Rent ſervice, ou Rent charge a un auter en fée, & le tenant atturna, &c. ceo nē pas diſcontinuance.

Also, if an Abbot hath a reverſion, or a Rent ſervice, or a rent charge, and he will grant this reverſion, or rent ſervice, or rent charge to another in Fee, and the Tenant attorne, &c. this is no diſcontinuance.

Of Inheritances that lie in Grants, ſufficient hath been ſaid before.

## Sect. 628.

¶ En meſme le manner, lou Abbe eſt ſeiſie dun Advowſon, ou de tielx choſes que paſſont per voy de grant ſans liverie de ſeiſin, &c.

In the ſame manner, where an Abbot is ſeiſed of an Advowſon, or of ſuch things which paſs by way of Grant without livery of ſeiſin, *&c.*

¶ Here it appeareth, (as hath been ſaid) That an Advowſon doth not lie in Livery, but in Grant.

## Sect. 629.

¶ Item, ſi Tenant en Taile leſſa ſa terre a un auter pur terme de vie, et puis il graunta en fée le Reverſion a un auter, et l' tenant atturna, & puis le tenant a terme de vie aliena en fée, & le grantée de reverſion enter, &c. en le vie le Tenant en le Taile, & puis le Tenant en le Taile Mozuſt, ſon Iſſue ne poit enter, mes eſt mis a ſon Briefe d Formedon, pur ceo que le Reverſion en fée ſimple que le grauntoz avoit per le grant del tenant en le Taile fuit executé en le vie de meſme le tenant en le Taile, & pur ceo eſt un diſcontinuance en fée, &c.

Also, if Tenant in Tail letteth his Land to another for life, and after he granteth in fee the reverſion to another, and the Tenant attorn, and after the Tenant for life alien in Fee, and the Grantee of the reverſion enter, *&c.* in the life of the Tenant in Tail, and after the Tenant in Tail dieth, his Iſſue ſhall not enter, but is put to his Writ of *Formedon*, becauſe the reverſion in Fee ſimple which the Grantor had by the Graunt of the Tenant in Taile, was executed in the life of the ſame Tenant in Tayle, and therefore it is a diſcontinuance in fee, *&c.*

Of this ſufficient hath been ſaid before.

Sect.

## *Sect.* 630.

ET nota, que aſcuns ſont diſcontinuances pur terme de vie. Sicome Tenant en le taile fait un Leaſe pur terme de vie, ſavant le reverſion a luy, auxy longement que le reverſion eſt al tenant en taile, ou a ſes heires, ceo neſt diſcontinuance, forſque durant la vie le tenant a terme de vie, &c. Et ſi tiel tenant en taile dona les tenements a un auter en taile, ſavant le reverſion, donques ceo eſt diſcontinuance durant le ſecond taile, &c.

And note, that ſome make diſcontinuances for terme of life. As if tenant in tail make a leaſe for life, ſaving the reverſion to him, as long as the Reverſion is to the Tenant in Taile or to his Heirs: this is no diſcontinuance but during the life of Tenant for life, *&c.* And if ſuch Tenant in Taile giveth the lands to another in Taile, ſaving the Reverſion, then this is a Diſcontinuance during the ſecond taile, *&c.*

THis is manifeſt, and hath been handled before, and needeth no explanation; only this is to be obſerved, where Littleton putteth hereafter caſes of Diſcontinuances by Feoffment, &c. he hath a double intendment: Firſt, by Feoffment or by any other Conveiance which may make a Diſcontinuance. Secondly, (&c.) implieth a Diſcontinuance by a gift in Tail, or a Leaſe for life, &c.

## *Sect.* 631.

MEs lou le tenant en taile fait un leaſe pur terme dans, ou pur terme de vie, le remainder a un auter en fee, et deliver liverie de ſeiſin accordant; ceo eſt diſcontinuance en fee, pur ceo que le Fee ſimple paſſa per force de liverie de ſeiſin, &c.

But where the tenant in taile maketh a leaſe for years or for life, the remainder to another in Fee, and delivereth Livery of Seiſin accordingly; this is a diſcontinuance in fee, for that the fee ſimple paſſeth by force of the Livery of Seiſin, *&c.*

This is evident alſo, and hereof ſufficient hath been ſpoken before.

## *Sect.* 632.

ET eſt aſcavoir, q̄ aſcuns tiels diſcontinuances ſont fait ſur condition, &c. et pur ceo ques les conditions ſont enfreints, &c. ou pur

And it is to be underſtood, That ſome ſuch diſcontinuances are made upon Condition, &c. and for that the conditions be broken, &c. or for

*Diſcontinuances fait ſur condition, &c.* Here is to be underſtood a diverſity between a condition in deed, whereof Littleton here ſpeaketh, and a condition in Law, whereof ſomwhat hath been ſaid before in this chapter, viz.

viz. where the feme is tenant for life, and the husband maketh a feoffment in fee, and the Lessor entreth for the Condition in Law.

¶ *Conditions ſont enfrients, &c.* Here is implied, or any cause given either by disability of the Feoffees, or by any condition performed on the part of the feoffor, or otherwise whereby the estate is in any sort avoided.

¶ *Come ſi le Baron ſoit ſeiſie de certaine terre en droit ſa feme, &c.* Here it appeareth, That for the Condition broken the heir of the husband may enter; for albeit no right descend from the husband to his heir, yet the title of entry by force of the Condition which the husband created upon the feoffment, and reserved to him and his heirs, doth descend to his heir; and Littleton saith truly, That so it hath been adjudged.

4.H.6.2.9.H.7.24.b. Lib.8.fol.43,44. Whittinghams case.

auters cauſes, ſolonque le courſe en la ley tiels eſtates ſont defeates, donques ſont les Diſcontinuances defeates, & ne tollent aſcun home per force de eux, de ſon entrie, &c. Come ſi le Baron ſoit ſeiſie de certe tre en droit ſa feme, et fait Feoffment en fee ſur condition, et devie, ſi le heire apres enter ſur le feoffee pur le Condition enfreint, lentrie la Feme eſt congeable ſur le heire, pur ceo que per lentre del heire le diſcontinuance eſt defeat, come eſt adjudge.

other cauſes, according to the courſe of Law, ſuch eſtates are defeated, then are the Diſcontinuances defeated, and ſhall not by force of them take any man from his entrie, *&c.* As if the husband be ſeiſed of certain land in right of his wife, and maketh a feoffement in fee upon condition, and dieth, if the heir after enter upon the feoffee for the condition broken, the entry of the wife was congeable upon the heir, for that by the entry of the heir the diſcontinuance is defeated, as is adjudged.

¶ *Sur le heire*, Note, When the heire in this caſe hath entred for the condition broken, and hath avoided the feoffment, the eſtate of the heir vaniſheth away, and preſently the eſtate veſteth in the Feme or her heirs, without any entry or claim by her or them; for the heir entreth in reſpect of the condition, upon the real contract, and not of any right, as hath been ſaid; and if the husband himſelf had re-entred, the eſtate had veſted in his wife. And therefore where Littleton and our Books ſay, That the wife ſhall enter upon the heir; the meaning is, that after the re-entry of the heir ſhe may enter,

Whittinghams caſe, ubi ſupra.

## *Sect.* 633.

Whittinghams caſe, ubi ſupra.

¶ The reaſon here rendred by Littleton, is, for that the husband cannot enter in his own right, but in the right of his wife; and the heir of the husband cannot enter, for no right or title deſcends unto him, and the wife in this caſe ſhall take benefit of the nonage of her husband, and enter into the land.

If an infant be Tenant for another mans life, and make a feoffment in fee, and Ceſty que vie dieth, the Infant himſelf ſhall not enter, becauſe he hath no right at all.

¶ Item, ſi Feme Inheritrix q̄ ad un Baron, quel Baron eſt deins age, & il eſteant deins age fait un feoffement de lēs Tenements ſon feme en fee, & moruſt, il ad eſte queſtion, ſi la feme poit enter, ou non, &c. Et il ſemble a aſcuns, que lentry la

ALſo, if a Woman Inheritrix hath a husband who is within age, and he being within age maketh a Feoffement of the Tenements of his wife in Fee, and dieth, it hath been a queſtion, if the Wife may enter or not, *&c.* And it ſeemeth to ſome, that the

Feme

feme apres la mort le baron, est congeable en cest cas. Car quand le baron sealoit tiel feoffment, &c. il puissoit bien enter, nient contrestéant tiel feoffment, &c. durãt la coverture, & il ne puissoit enter en son droit demesne, mes en le droit la feme. Ergo tiel droit que il avoit dẽtrer en droit la feme &c. cest droit dentrer demurt al feme apres son decease.

entry of the wife after the death of her Husband is congeable in this case. For when her husband made such feoffment, &c. he might well enter notwithstanding such feoffment, &c. during the coverture, and he could not enter in his own right but in the right of his wife. *Ergo* such right as he had to enter in the right of his wife, &c. this right of entrie remaineth to the wife after his decease.

If the husband within age taketh to wife feme tenant in taile general, and the husband make a gift in taile and dieth within age, in this case the wife may enter, as Littleton here holdeth; for the heire of the husband in respect of the new reversion descended unto him may enter. But if the heire enter, presently thereupon his estate vanisheth. If tenant in Taile being within the age of one and twenty years make a feoffment in fee, and after is attainted of felony and dieth, the entry of the issue is not lawful, for his entry is not lawful in respect of his estate only, but of his blood also which is corrupted; and therefore in that case he is driven to his Formedon.

If husband and wife be both within age, and they by Deed indented joyn in a feoffment reserving a rent, the husband dieth, the wife may enter, or have a Dum fuit infra ætatem. But if she were of full age, she shall not have a Dum fuit infra ætatem for the nonage of her husband, albeit they be but one person in Law. 14.E.3. Bre.282. 14.E. 3. Dum fuit infra ætatem 6.F.N.B.192.

## *Sect.* 634.

ET il y ad ẽe dit, que si deux joyntenants esteants deins age, font un feoffment en fee, & lun des enfants deby, & lauter survesquist, entant q̃z les ambideux enfants puissont ent joyntment en lour dies, cel droit accruis tout a luy que survesquist, & pur ceo celuy q̃z survesquist poit enter en lentiertie, &c. Et auxy lheire le baron que fist le feoffment deins age ne poit enter, &c. pur ceo que nul droit discendit a tiel heire en le cas avantdit, pur ceo que le baron navoit unques riens forsque en droit de la feme, &c.

AND it hath been said, that if two joyntenants being within age make a feoffment in fee, & one of the infants die, and the other surviveth, inasmuch as both the infants might enter joyntly in their lives, this right accrueth all to him which surviveth, & therefore he that surviveth may enter into the whole, *&c.* And also the heire of the husband which made the feoffment within age cannot enter, &c. because no right descendeth to such heir in the case aforesaid, for that the husband had never any thing but in right of his wife, &c.

¶ *Poit enter en lentiertie*, &c. And the reason hereof is implied in this (&c.) that they may joyn in a writ of right, and therefore the right shall survive. But they cannot joyn in a Dum fuit infra ætatem, because the nonage of the one is not the nonage For 21.E.3.50. 18.E.2. Bre. 831. 6.E.3.4.9.H.6.6. 13.H.6.6.29.H.6.42. 34.H.6.31.F.N.B.192.

nonage of the other. In this caſe, if one Joyntenant had made a feoffement in fee and died, the right ſhould not have ſurvived, for the Joynture was ſevered for a time. If two Joyntenants be, and the one is of full age, and the other within age, and both they make a feoffment in fee, and he of full age dieth, the infant ſhall enter, or have a Dum fuit infra ætatem, but for the moitie.

See of this in the Chapter of Joyntenants.

## Sect. 635.

¶ ET auxy quand un enfant fait un feoffment eſteant deins age, ceo ne luy greevera ne ledra, mes que il poit enter bien, &c. car ceo ſerroit encounter reaſon, que tiel feoffment fait per celuy que ne fuit able de faire tiel feoffment, grevera ou ledera auter, de toller eux de lour entre, &c. Et pur ceux cauſes il ſemble a aſcuns, que apres la mort de tiel baron iſſint eſteant deins age al temps de le feoffment, &c. que la feme bien poit enter, &c.

AND alſo when an infant makes a feoffment being within age, this ſhall neither grieve nor hurt him, but that he may well enter, *&c.* for it ſhould be againſt reaſon that ſuch feoffment made by him that was not able to make ſuch a feoffment, ſhall grieve or hurt another to take them from their entry, *&c.* And for theſe reaſons it ſeemeth to ſome, that after the death of ſuch husband ſo being within age at the time of the feoffement, *&c.* that his wife may well enter, *&c.*

Brit. fol. 14. Britton, fol. 88. a. Fleta, lib. 3. cap. 3.

¶ *MES que il poit enter bien*, &c. Here is implied, that he might enter either within age, or at any time after full age, and likewiſe after his death his heir may enter. Meliorem enim conditionem facere poteſt minor, deteriorem nequaquam.

Note, A ſpecial heire ſhall take advantage of the infancy of the Anceſtor. As if tenant in taile of an acre of the cuſtome of Borough English make a feoffment in fee within age, and dieth, the youngeſt ſonne ſhall avoid it, for he is privie in blood, and claimeth by diſcent from the infant.

And ſo, if Tenant in tail to him and the heirs females of his body, make a feoffment in fee and dieth within age, having iſſue a Sonne and a Daughter, the Daughter ſhall avoid the feoffment. And ſo note, that a cauſe to enter by reaſon of Infancie is not like to Conditions, Warranties and Eſtoppels, which ever deſcend to the heire at the Common Law.

The reſidue of this Section upon that which hath been ſaid is evident.

## Sect. 636.

*Surrender.*

Surſum redditio properly is a yielding up of an eſtate for life or years to him that hath an immediate eſtate in reverſion or remainder, wherein the Eſtate for life or years may drown by mutual agreement between them.

¶ ITem, ſi feme enheritrix prent baron, & ont iſſue fits, et l' baron mozust, & el prent auter baron, & le ſecond baron leſſa la terre que il ad en dower ſa feme a un auter

ALſo, if a woman inheritrix taketh huſband, and they have iſſue a ſonne, and the huſband dieth, and ſhe takes another Husband, and the Second Husband letteth the Land which he

ter pur terme de sa vie, et puis la feme morust, e puis le tenant a terme de vie surrendist son estate a le second baron, &c. Quære si le fits le sem poit enter en cest cas sur le second baron durant la vie le tenant a terme de vie, &c. Mes il est cleere ley, q̄ apres la mort le tenant a terme de vie, le fits la feme poit enter, pur ceo que le discontinuāce que fuit tantsolemēt pur terme de vie, est determine, &c. per la mort de mesme le tenant a terme de vie.

hath in right of his Wife to another for terme of his life, and after the Wife dieth, and after the Tenant for life surrendreth his estate to the second husband, *&c.* *Quære* if the sonne of the Wife may enter in this case upon the second Husband during the life of Tenant for life, *&c.* But it is cleer law, that after the death of the Tenant for life, the sonne of the Wife may enter, because the Discontinuance which was only for terme of life, is determined, *&c.* by the death of the same Tenant for life.

Note, there be three kind of surrenders, viz. a Surrender properly taken at the Common law, which is here before described, and whereof Littleton speaketh. Secondly, a surrender by custome of lands holden by Copy, or of Customary Estates, whereof you have read before, Sect. 74. and a Surrender improperly taken (as appears before, Sect. 550) of a deed. And so of a Surrender of a Patent, and of a rent newly created, and of a fee simple to the King. 2. Eliz. Dier. 176. 14. H. 7. 3. 27. Ass. 37. 49. E. 3. 2. 11. H. 4. 2. 12. H. 4. 21. 13. H. 4. 13.

A Surrender properly taken, is of two sorts, viz. a surrender in Deed, or by expresse words, (whereof Littleton here putteth an example) or a surrender in law wrought by consequent by operation of law. Littleton here putteth his case of a Surrender of an estate in possession, for a right cannot be surrendred. And it is to be noted, that a surrender in law is in some cases of greater force, than a Surrender in Deed. As if a man 14. H. 8. 15. 37. H. 6. 27. 21 H. 7. 6. 40. E. 3. 24. 31. Ass. 26. 50. E. 3. 6. 44. Ass. 3. 35. H. 8. Dier 37. 8. Ass. 20. 4. 4. Ma. Dier 141. 11. Eliz. Dyer 280. 6. H. 7. 9. 37. H. 6. 17. 21. H. 7. 6. 14. H. 7. 4. Lib. 6. f. 69. Sir Moyle Finches case.

make a lease for years, to begin at Michaelmas next, this future interest cannot be surrendred, because there is no Reversion wherein it may drown, but by a Surrender in Law it may be drowned. As if the Lessee before Michaelmas take a new lease for years either to begin presently, or at Michaelmas, this is a surrender in law of the former lease, Fortior & æquior est dispositio legis quam hominis.

Also there is a surrender without Deed, whereof Littleton putteth here an example of an estate for life of lands, which may be surrendred without Deed, and without livery of seisin, because it is but a yelding, or a restoring of the estate again to him in the immediate reversion or remainder, which are alwaies favoured in law. And there is also a surrender by deed, and that is of things that lie in grant, whereof a particular estate cannot commence without Deed, and by consequent the estate cannot be surrendred without deed. But in the example that Littleton here putteth, the state might commence without deed, and therefore might be surrendred without deed. And, albeit a particular estate be made of Lands by deed, yet may it be surrendred without deed: in respect of the nature and quality of the thing demised, because the particular estate might have been made without Deed: and so on the other side. If a man be tenant by the Courtesie, or Tenant in Dower of an Advowson. Rent or other thing that lies in grant, albeit there the estate being without Deed, yet in respect of the nature and quality of the thing that lies in grant, it cannot be surrendred without deed. And so if a lease for life be made of lands, the remainder for life, albeit the Remainder for life began without deed, yet because Remainders and Reversions, though they be of lands, are things that lie in Grant, they cannot be surrendred without deed. See in my Reports plentiful matter of Surrenders. 1. 98. 6. 33. 27. Ass. 46. 14. H. 7. 4. 1. H. 6. 1. Pl. Com. 341.

¶ *Quære si le fits la feme poit en'er*, &c. Here Littleton maketh a Quære. So as grave and learned men may doubt without any imputation to them, for the most learned doubteth most, and the more ignorant for the most part are the more bold and peremptory.

It is holden of some, that after the surrender the issue in taile during the life of a Tenant for life may enter, for that having regard to the issue, the state for life is drowned, and consequently the inheritance gained by the lease is the acceptance of the surrender banished and gone, as if tenant in taile make a lease for life, whereby he gaineth a new reversion (as hath

been ſaid) if Tenant for life ſurrender to the Tenant in taile, the eſtate for life being drowned, the reverſion gained by wrong is baniſhed and gone, and he is tenant in taile againe, againſt the opinion Obiter of Portington, 21. H. 6. 53.

21.H.6.53. But herein are two diverſities worthy of obſervation. The firſt is, that having regard to the parties to the ſurrender, the eſtate is abſolutely drowned, as in this caſe between the leſſee and the ſecond Baron. But having regard to ſtrangers, who were not parties or privies thereunto, leſt by a voluntary ſurrender they may receive prejudice, touching any right or intereſt they had before the ſurrender, the eſtate ſurrendred hath in conſideration of law a continuance. As if a reverſion be granted with warranty, and Tenant for life ſurrender, the Grantee ſhall not have Execution in value againſt the Grantor who is a ſtranger, during the life of tenant for life, for this ſurrender ſhall work no prejudice to the Grantee who is a ſtranger.

45.E.3.13.5.H.5.9. 9.E.4.18.

40.E.3.13.9.E.4 14. 1.H.6.1.24.E.3.77. 5.H.5.8.26.Aſſ.38. 7.H.6.2.b. So if tenant for life ſurrender to him in reverſion being within age, he ſhall not have his age, for that ſhould be a prejudice to a ſtranger, who is come Demandant in a real action.

If tenant for life grant a Rent-charge, and after ſurrender, yet the rent remaineth, for to that purpoſe he cometh in under the charge, Cauſa qua ſupra.

48.E.3.16. If a Biſhop be ſeiſed of a Rent charge in fee, the tenant of the land enfeoffe the Biſhop & his Succeſſors, the Lord enter for the Mortmain, he ſhall hold it diſcharged of the rent, for the entry for the Mortmain affirmeth the alienation in Mortmain, and the Lord claimeth under his eſtate, but if tenant for life grant a rent in fee, and after infeoffe the Grantee, and the leſſor enter for the forfeiture, the rent is revived, for the leſſor doth claime above the Feoffement. But if I grant the reverſion of my Tenant for life to another for terme of his life, & tenant for life attorne, now is the waſte of tenant for life diſpuniſhable. Afterwards I releaſe to the Grantee for life and his heirs, or grant the reverſion to him and his heirs, now albeit the tenant for life be a ſtranger to it, yet becauſe he attorned to the grantee for life the eſtate for life which the grantee had, ſhall have no continuance in the eye of the Law as to him, but he ſhall be puniſhed for waſte done afterward.

The ſecond diverſity is, that for the benefit of an eſtranger the eſtate for life is abſolutely determined. And if he in the reverſion make a leaſe for years, or grant a rent-charge, &c. and then the leſſee for life ſurrender, the leaſe or rent ſhall commence maintenant. So in the caſe of Littleton, firſt between the leſſee, and the ſecond husband, the eſtate for life is determined, and ſecondly, for the benefit of the iſſue it ſhall be ſo adjudged in law. Here note a diverſity, when it is to the prejudice of a ſtranger, and when it is for his benefit.

If a man make a leaſe to A. for life, reſerving a rent of 40 ſhillings to him and his heirs, the remainder to B. for life, the leſſor grant the reverſion to B. A. attorn, B. ſhall not have the rent, for that although the fee ſimple do drown the remainder for life between them, yet as to a ſtranger it is in eſſe, and therefore, B. ſhall not have the rent, but his heir ſhall have it.

Adjudge Mich. 16. & 17. Eliz. int. Turner Pl. & Gray def. in ejectione firmæ in Communi banco. Rot. 945. Sir Francis Flemmings caſe. (a) 6.H.4.7.Pl. Com. 418. (b) 32.H.8.B. ſurrender 52. A Maſter of an Hoſpital being a ſole Corporation, by the conſent of his brethren makes a leaſe for years of part of the poſſeſſions of the Hoſpital, afterwards the Leſſee for years is made maſter, the term is drowned, for a man cannot have a terme for years in his own right, and a free hold in auter droit to conſiſt together (as if a man leſſee for years take a feme leſſor to wife.) (a) But a man may have a freehold in his own right and a terme en auter droit, and therefore if a man leſſor take the feme leſſee to wife, the terme is not drowned, but he is poſſeſſed of the terme in her right during the Coverture. (b) So if the leſſee make the leſſor his Executor, the terme is not drowned. Cauſa qua ſupra.

But if it had been a Corporation aggregate of many, the making of the leſſee maſter had not extinguiſhed the terme no more than if the leſſee had been made one of the brethren of the Hoſpital.

## Sect. 637.

Vide Sect. 658. UN *foits.* Here it is to be obſerved that it is not neceſſary that the Tenant in taile be ever ſeiſed of an eſtate taile at the time when the Diſcontinuance of the whole eſtate is begun; as if tenant in taile make a leaſe

NOta que un eſtate taile ne poit eſtre diſcontinue, mes la ou celuy que fait l' diſcontinuance fuit unfoits ſeiſie per force de le taile, ſinon

NOte, that an eſtate Taile cannot be diſcontinued, but there where he that makes the diſcontinuance was once ſeiſed by force of the Tail, unleſſe it be

que

que soit per reason de garrantie, &c. Come ũ soit aiel, pier, & fits, et layel soit tenant en taile, & ell dissеisie per le pier que ell son fits, et le pier fait un feoffement de ceo sans garranty et devie, et puis laiel devie, le fits bien poit enter sur le feoffee, pur ceo que ceo ne fuit pas discontinuance, entant que le pier ne fuit seisie per force de le taile al temps del feoffm̃t, &c. mes fuit seisie en fee per le disseisin fait al ayel.

by reason of a warranty, &c. As if there be grandfather, father, and son, & the Grandfather is Tenant in Taile, & is disseised by the Father who is his son, and the father maketh a feoffement of this without warranty, and die, and afterwards the grandfather dies, the son may well enter upon the feoffee, because this was no discontinuance, inasmuch as the father was not seised by force of the entaile at the time of the feoffement, &c. but was seised in fee by the disseisin of the grandfather.

for life, whereby he gaineth, as hath been said, a free simple by wrong. In this case if he grant the reversion in fee, and the fellee dieth, the whole estate is discontinued, and yet at the time of the grant (by which the Discontinuance continueth) he was not seised by force of the taile, & therefore Lit. materially added these words (un fois) that is, that he was once seised by force of the estate taile, and seeing that (as hath been said) a Discontinuance is a privation, the rule of law agreeth well with the rule of Philosophie, that Omnis privatio præsupponit habitum; and therefore he cannot discontinue that estate which he never had.

Vide Sect. 592. 595. 527. 601. 640. 698.

¶ *Si mes que il soit per reason del garrantie*, &c. For in many cases a warranty added to a conveyance is said to make a discontinuance Ab effectu, although he that made the conveyance was never seised by force of the estate taile, because it taketh away the entry of him that right hath, as a discontinuance doth. As if tenant in taile be disseised and dieth, and the issue in taile release to the disseisor with warrantie, in this case the issue was never seised by force of the taile, and yet this hath the effect of a discontinuance by reason of the warranty, and the reason hereof appeareth before in this Chapter.

9. E. 4. 19. 12. E. 4. 11. 21. E. 4. 97.

¶ *Le fits poit enter.* But if the father that made the feoffment had survived the Grandfather, he should never have entred against his own feoffement; but albeit the father had survived, yet after his decease the Sonne should have entred for the reason here yielded by Littleton. But if the feoffement had been with warranty, then it had wrought the effect of a Discontinuance, and therefore Littleton saith Garranty, without warranty.

15. E. 4. Discont. 30. & entr. Cong. 21. 21. E. 4. 97. 9. E. 4. 19. 39. H. 6. 45. 21. H. 6. 52. 11. E. 4. 11. 2. Mar. Dy. 98.

## Sect. 638.

¶ ITem, si Tenant en Taile fait un lease a un auter pur terme de vie, & le Tenant en taile ad Issue et devie, et le reversiõn descendist a son Issue, et puis Issue granta le reversiõn a luy discendue a un auter en fee, et le tenant a terme de vie attorna & devie, et le Grantee del reversiõn enter, &c. & ell seisie en fee en la vie del Issue, & puis issue en le taile ad issue fits et devie, il sem-

ALso, if Tenant in taile make a lease to another for terme of life, and the Tenant in Taile hath Issue and dieth, and the Reversion descendeth to his issue, and after the issue granteth the reversion to him descended, to another in Fee, and the Tenant for life attorne and die, and the Grantee of the reversion enter, &c. and is seised in Fee in the life of the Issue, and after the Issue in taile hath

ble que ceo nest pas discontinuance a le fits, mes que le fitz poit enter, &c. pur ceo que son pier a que le reuersion de Fee simple discendist, &c. naboit unques riens en la terre, per force de le Taile, &c.

Issue a son and dieth, it seems that this is no discontinuance to the son, but that the Son may enter, *&c.* for that his father, to whom the reversion of the fee simple descended, had never any thing in the land by force of the entail, *&c.*

15.E.4. Discont.30.43. E.3.6.21. *H.*6.52.4.H. 7.17. 21.H.6.52.53.

¶ Of this opinion is Littleton in our Books.

¶ *Le Grantee del reversion enter*, &c. Here it is to be understood and observed, That in this case of the grant of the Reversion Littleton doth not say Sans garrantie, because if a warranty had been added, it had wrought no discontinuance, for that, (as hath been said) the discontinuance in judgment of Law was but for life; but when the addition of a warranty doth work a discontinuance, then Littleton saith, Sans garrantie, as you may observe often in this Chapter.

## *Sect.* 639.

¶ CAr ū home seisie en droit la feme, lessa mesme la Terre a un auter pur terme de vie, ore est le reuersiō de fee simple a le Baron, &c. Et ū le Baron mosust, vivant sa feme, & le Tenant a terme de vie, et le reuersion discendist al heire le Baron, ū le heire le Baron grant le reuersion a un auter en fee, et le tenant attorna, &c. et puis le tenant a terme de vie mosust, et le Grauntee del Reuersion en cest case enter: En cest case ceo nest pas Discontinuance a le Feme, mes la feme bien poit enter sur le Grantee, &c. pur ceo qr le grātor naboit riens al temps del Graunt, en le droit la Feme, quant il fist le graunt del reuersion.

FOr if a man seised in the right of his Wife, letteth the same land to another for terme of life, now is the reversion of the fee simple to the Husband, *&c.* and if the Husband dieth, living his Wife, and the Tenant for life, and the reversion descend to the heire of the Husband, if the Heire of the husband grant the reversion to another in fee, and the Tenant attorn, *&c.* and afterwards the Tenant for life dieth, and the grantee of the reversion in this case enter: In this case this is no Discontinuance to the wife, but she may well enter upon the grantee, *&c.* because the grantor had nothing at the time of the Grant, in the right of his Wife, when he made the Grant of the reversion.

14.E.3. Discont.5.18. Ass.p.2.18.E.3.54.38. E.3.32.22.H.6.24.21. H.6.52.53.15.E.4. Discont.30.

¶ *CAr si home seisie en droit sa feme, lessa*, &c. Here Littleton putteth his case where the Baron only makes a lease for life, for if he and his wife joyne in a lease by Deed, there the reversion is not discontinued. See before, Sect. 620. More need not to be said hereof, in respect the like case of Tenant in tayle hath been expressed before.

Sect.

## Sect. 640.

¶ Et iſſint il ſemble, coment que homes queux ſont inheritables per force de le Taile, et ils ne lueront unques ſeiſie per force de meſme le taile, que tiel feoffements ou grants p eux fait ſans clauſe de Garrantie, nē pas diſcontinuance a loue iſſues apres lour deceaſe, mes que lour Iſſues poyent bien enter, &c. coment que ceux queux fierēt tielz grants en lour dies fueront forbarres dentrer per lour Fait demeſme, &c.

AND ſo it ſeemeth, that men which are inheritable by force of an Entail, and never were ſeiſed by force of the ſame entail, that ſuch feoffments or grants by them made without clauſe of warrantie, is no diſcontinuance to their iſſues after their deceaſe, but that their iſſues may well enter, &c: albeit they which made ſuch Grants in their lives were forebarred to enter by their own Act, &c.

## Sect. 641.

¶ Et ſi le Tenant en Taile ad iſſue deux fits, et leigne diſſeiſiſt ſon pier, et ent fait feoffment en fee ſans clauſe de Garrantie, et debie ſans iſſue, e puis le pier debie, le puiſn fits poit bien enter ſur le feoffee, pur ceo que le feoffment ſon eigne frere ne poit eſtre diſcontinuance, pur ceo que il ne fuit unques ſeiſie per force de meſme le Taile. Car il ſemble encounter reaſon, que per matter en fait, &c. ſās clauſe de Garrantie, home poit diſcontinuer un fait, &c. que ne fuit unques ſeiſie per force de meſme le Taile.

AND if Tenant in Tail hath iſſue two Sonnes, and the eldeſt diſſeiſeth his Father, and thereof maketh a feoffment in Fee, without clauſe of Warrantie, and die without iſſue, and after the father die, the yonger ſon may well enter upon the feoffee, for that the Feoffement of his elder brother cannot be a diſcontinuance, becauſe he was never ſeiſed by force of the ſame taile. For it ſeemeth to be againſt reaſon, that by matter in fact, &c. without clauſe of Warrantie, a man ſhould diſcontinue a Deed, &c. that was never ſeiſed by force of the ſame Taile,

¶ NOte, there alſo in the two Sections appeareth, That (as hath been ſaid before) a Warrantie, though he were never ſeiſed by force of the Tatle, may work the effect of a Diſcontinuance. Vide Sect. 592, 596, 597, 601, 658.

¶ *Home poit diſcontinuer un fait*, &c. This is miſtaken, and ſhould be, Home poit diſcontinuer un taile, and ſo is the Original.

Sect.

## Sect. 642.

¶ NOta, ſi ſoit Sñr & tenant, & le tenant dona les tenements a un auter en taile, le remainder a un auter en fee, & puis le tenant en taile fait un leas a un home pur terme de vie, &c. ſavant le reverſion, &c. & puis granta le reverſion a un auter en fee, & le tenant a terme de vie, atturna, &c. et puis le grantee del reverſion mozuſt ſans heire, oze meſme le reverſion devient al ſeignioz per voy deſcheate. Si en teſt cas le tenant a terme de vie deviaſt, & le Seignioz per force de ſon eſcheat enter en la vie le tenant en le taile, & puis le tenant en le taile mozuſt, il ſemble en ceo cas que ceo neſt pas diſcontinuance al iſſue en le taile, ne a celuy en le remainder, mes que il poit bien enter pur ceo que le Seignioz eſt eins per voy deſcheat, & nemy per le tenant en le taile, &c. Mes ſecus eſſer, ſi le reverſion uſt eſte execute en le grantee, en le vie le tenant en le taile, car adonque uſt le grantee eſte eins en les tenements per le tenant en le tayle, &c.

NOte, if there be Lord and Tenant, and the Tenant giveth lands to another in taile, the remainder to another in Fee, and after the tenant in taile make a leaſe to a man for terme of life, *&c.* ſaving the reverſion, *&c.* and after granteth the reverſion to another in fee, and the Tenant for life attorne, *&c.* and after the grantee of the reverſion die without heire, now the ſame reverſion cometh to the Lord by way of eſchear, If in this caſe the Tenant for life dieth, and the Lord by force of his eſcheat enter in the life of Tenant in Taile, and after the tenant in Taile dieth, it ſeemeth in this caſe that this is no diſcontinuance to the iſſue in taile, nor to him in the remainder, but that he may well enter, becauſe the Lord is in by way of eſcheat, and not by the Tenant in taile: but otherwiſe it ſhould be, if the reverſion had been executed in the Grantee, in the life of Tenant in taile, for then had the Grantee been in the Tenements by the tenant in taile, *&c.*

Vide Sect. 620.

Lib. 1. fol. 136. Lib. 3. fol. 62, 63.

¶ The reaſon of this caſe is here rendred (as before it was in this Chapter) that albeit the reverſion be executed in the Lord by eſcheat in the life of Tenant in taile, yet becauſe he is in by the Tenant in tail but by the eſcheat, it worketh no Diſcontinuance. But if it had been executed in the life of tenant in taile in the Grantee which was in by Tenant in taile, then the Lord by the eſcheat ſhould have taken advantage of it. But of this ſufficient hath been ſaid before, in this Chapter.

## Sect. 643, 644, 645.

¶ PArcel de ſon Glebe, &c. In whom the fee ſimple of the

¶ ITem, ſi un parſon dun Eſgliſe, ou un Vicar un

ALſo, if a Parſon of a Church, or a Vicar of a Church alien

Eſgliſe

Eſglíſe, alien certaine terres, ou tenements parcel de ſon glebe, &c. a un auter en fee, et mozuſt, ou reſeigne, &c. ſon ſucceſſoz poit bien ent, nient contriſteat tiel alienation, come eſt dit e un Nota 2. H. 4. Terme Mich. quod ſic incipit.

certaine Lands or Tenements parcel of his Glebe, *&c.* to another in fee, and die or reſigne, *&c.* his ſucceſſor may well enter notwithſtanding ſuch alienation, as is ſaid in a *Nota* 2. *H.* 4. *Termino Mich.* which beginneth thus.

*Sect.* 644.

NOta quod dictum fuit pro lege en un briefe de accompt port per un maſter d un college, vers un Chapleine, que ſi un Parſon, ou un Vicar, graunt certaine terre, quel eſt de droit ſon Eſglíſe a un auter e debie, ou permute, le ſucceſſoz poit enter, &c. Et jeo croy que la cauſe eſt, pur ceo que l' Parſon, ou Vicar, que eſt ſeiſie, &c. come en droit de ſon Eſglíſe, nad pas droit de fee ſimple en les tenements, e le droit de fee ſimple de ceo demurt en aſcun auter perſon, et pur cel cauſe ſon ſucceſſ. poit bien enter, nient contriſteant tiel alienation, &c.

*Nota quod dictum fuit pro lege*, in a Writ of Account brought by a Maſter of a Colledge againſt a Chaplaine, that if a Parſon or Vicar grant certaine Lands, which is of the right of his Church to another, and die or changeth, the Succeſſor may enter, *&c.* And I take the cauſe to be, for that the Parſon or Vicar that is ſeiſed, &c. as in right of his Church, hath no right of the fee ſimple in the Tenements, but the right of the fee ſimple abideth in another perſon. And for this cauſe his Succeſſour may well enter, notwithſtanding ſuch alienation, *&c.*

glebe, is a queſtion in our Bookes: (a) ſome hold that it is in the Patron, but that cannot be for two reaſons. firſt, for that in the beginning the land was given to the Parſon and his Succeſſors, and the Patron is no Succeſſor. Secondly the words of the Writ of Juris utrum de, ſi ſit liberã Elemoſyna Eccleſiæ de D. and not of the Patron. Some others do hold that the fee ſimple is in the Patron and Ordinary, but this cannot be for the cauſes aboveſaid: e therefore of neceſſity the fee ſimple is in abeiance, as Littleton ſaith. And this was provided by the providence and wiſdome of the Law, for that the parſon and Vicar have Curam animarum, and where bound to celebrate Divine Service, and adminiſter the Sacraments; and therefore no act of the predeceſſor ſhould make a Diſcontinuance to take away the entrie of the Succeſſor, e to drive him to a reall action whereby he ſhould be deſtitute of maintenance in the mean time; upon conſideration of all our Bookes I obſerve this diverſity, that a parſon or Vicar, for the benefit of the Church and of his Succeſſor is in ſome caſes eſteemed in law to have a fee ſimple qualified, but to no any thing to the prejudice of his Succeſſor, in many caſes, the law adjudgeth him to have in effect but an eſtate for life, Cauſæ Eccleſiæ Publicis cauſis æquiparantur, and ſumma ratio eſt quæ pro religione facit. And Eccleſia ſungitur vice minoris, melioremfacere poteſt conditionem ſuam, deteriorem nequaquam.

(a) 8. H. 6. 24. 12. H. 8. 8.

Vide Regiſt. 307. a. 45. E. 3. tit. Eſchange. 12. H. 8. 9.

F. N. B. 19. L.

Bracton Lib. 4. fol. 246.

Brit. fol. 143.

As a parſon, Vicar, Archdeacon, prebend, Chantery, prieſt, and the like may have an Action of Waſte, and in the Writ ſhall be ſaid ad exhæreditationem Eccleſiæ, &c. ipſius B. or Præbendæ, ipſius A.

F. N. B. 55. D. & 57. E. P. 10. H. 7. 5.

And the parſon, &c. that maketh a leaſe for life, ſhall have a Confimili caſu during the

*Sect.* 645.

¶ CAr un Eveſq̃ poit aver bꝛe de dꝛoit de tenements de dꝛoit de ſon Eſgliſe, pur ceo que le dꝛoit eſt en ſon Chapiter, et le fee ſimple demarrant en luy et en ſ̃ Chapiter. En un Deane poit aver bꝛe de dꝛoit pur ceo que le dꝛoit demurt ẽ luy. Et un Abbe poit aver bꝛieſe de dꝛoit, q̃ ceo que le dꝛoit demurt en luy, et en ſon covent. Et un Maſter dun Hoſpital poit aver bꝛieſe de dꝛoit, pur ceo que le dꝛoit, pur ceo que le dꝛoit demurt en luy, et en ſes confreres, &c. Et ſic de aliis caſibus conſimilibus. Mes un parſon ou un Vicar ne poit aver bꝛieſe de dꝛoit, &c.

FOr a Biſhop may have a Writ of right of the tenements of the right of his Church, for that the right is in his Chapiter, and the fee ſimple abideth in him and in his Chapiter. And a Dean may have a Writ of right, becauſe the right remaines in him. And an Abbot may have a Writ of right for that the right remaines in him and in his covent. And a Maſter of an Hoſpital may have a Writ of right becauſe the right remaineth in him and in his confreres, *&c.* And ſo of other like caſes. But a Parſon or Vicar cannot have a Writ of Right, *&c.*

F.N.B.49.l.min.20.E. tit. Juris utrum. Temps E.3. Juris utrum.14.1. 14. E.3.ibid.4.F.N.B. 30. 30.E.3.26,21.E.11. tit. Entrie 10. F.N.B. 206. F. Regiſtr. 237. 4.E. 4.2.8.E.3. tit. Entrie. 3. 7.E.3.54,55.

the life of the Leſſee and a Writ of entrie ad communem legem after his death; or a Writ. Ad terminum qui præteriit, or a quod permittat in the debet, and none can maintaine any of theſe Writs, but a Tenant in fee ſimple or fee taile.

And a Parſon, &c. may receive homage, which tenant for life cannot do. Temps E.1. Incumbent 19.

(c) F.N.B.49.L.50.2.

(c) Likewiſe a Parſon, &c. ſhall have a Writ of meſne, and a Contra formam feoffamenti.

But a Parſon cannot make a Diſcontinuance as Littleton here teacheth, for that ſhould be to the prejudice of his ſucceſſor to take away his entry, and to drive him to a real action.

Alſo if a Parſon, &c. make a leaſe for yeares reſerving a rent, & dieth, the leaſes determined by his death; as if tenant for life had made a leaſe, no acceptance of the rent by the Succeſſor can make it good. Alſo in a real action a Parſon, Vicar, Archdeacon, Prebend, &c. ſhall have aid of the Patron and ordinary as tenant for life ſhall have. So as it is evident that to many purpoſes a Parſon hath but in effect an eſtate for life, and to many a qualified fee-ſimple, but the entry fee and right is not in him, and that is the reaſon that he cannot diſcontinue the Fee ſimple that he hath not, nor ever had; for as it hath been ſaid, Omnis privatio præſupponit habitum. And for the ſame cauſe he cannot have a writ of right, nor a writ of right in his nature, as a writ of Right ſur diſclaimer of cuſtomes & ſervices, Ne injuſtè vexes, rationalibus diviſis, quo jure, & the like.

20.E.3.tit.Aid.30.25. E.3.54.8.E.3.45.8.H. 6.24.11.H.6.9.6.E.3. 45.43. Aſſ.Pl.13.F.N.B 129.

But here it appeareth by Littleton, that ſuch bodies politike or corporate as have a ſole ſeiſin, and may have a writ of right for that the fee and right in them (albeit they cannot abſolutely convey away their Land, &c. without aſſent of others) may make diſcontinuance, as a Biſhop and Abbot, a Dean, or a maſter of a Hoſpital, and the like. But this is to be underſtood where a Dean, or a Maſter of an Hoſpital, &c. are ſolely ſeiſed of diſtinct poſſeſſions; for if the body that is ſeiſed be aggregate of many, as the Deane and Chapter, Maſter and Confreres, &c. then the Feoffement of the Deane or Maſter is ſo far from a diſcontinuance as it is a diſſeiſin.

44.E.3.11.11.H.4.68.9. E.4.16.18.E.3.7.6. E.3. 11.5.E.2.Aid.167.12. H.4.11.32.E 3.Aid.39. 38.E.3.19.14.E.3. Juris utrum 4.

And theſe that have the fee and right in them ſhall not have aid in reſpect of their high and large eſtate, albeit any of them be preſentable: but a Dean that is Collative ſhall have aid of the King.

And it is to be obſerved, that the remedie is ever agreeable to the right, and therefore the Biſhop, Dean, Maſter of an Hoſpital, that hath College and common Seale, or the like, ſhall have a Writ of right, which is the higheſt remedie, for that they have the higheſt eſtate.

Here

Here Littleton citeth the Book Caſe, Mich. 2. H. 4. as an Authority whereupon he groundeth his opinion. And it is to be obſerved, that the years of H. 4. were publiſhed before Littleton did write.

But at this day the Biſhop, Dean, Maſter of an Hoſpital, and the like, that have the fee and right in them, as hath been ſaid, cannot diſcontinue, neither can they, or any Parſon, Vicar, Archdeacon, Prebend, or any other having any Eccleſiaſtical living with aſſent of Dean and Chapter, Patron and Ordinary, or the conſent of any others, make any Leaſe, Gift, Grant or Conveyance, Eſtate, Charge or Incumberance, to bind his ſucceſſor, other than for term of one and twenty years, or three lives in poſſeſſion, whereupon the accuſtomed rent or more ſhall be reſerved. Theſe be excellent lawes, and have been well expounded for the maintenance of religion, and the good of Gods Church, for otherwiſe it is to be feared that holy Church would loſe more than it would gaine in theſe dates. Vide Sect. 5. 7. 593. &c. 1. Eliz. c. 18. 13. Eliz. ca. 20. 1. Jacobi cap. 3. Lib. 1. fo. 46. Lib. 4. fo. 76. and 10. Lib. 5. fol. 9. & 14. Lib. 6. fol. 37. Lib. 7. fo. 8. Lib. 11. fol. 67. 37. H. 8. 31. *H.* 8. 32. H. 8. 37. H. 8. 1. E. 6. &c.

But where Littleton in this and other Sections makes mention of Maſters of Hoſpitals, the Reader muſt know, that ſince Littleton wrote, there hath been a great alteration made by divers Acts of Parliament concerning Hoſpitals.

¶ *Maſter del Hoſpital.* Theſe points concerning Hoſpitals were reſolved (c) by the Juſtices. (c) Paſch. 24. Eliz. The Lord Cheneyes caſe. Lib. 2. fol. 48. 49. Eveſque de Canterburies caſe.

Firſt, That no Hoſpital was given to the Crown by the ſtatute of 27. H. 8. nor any Hoſpital is within the Statute of 31. H. 8. of Monaſteries, but only religious and Eccleſiaſtical Hoſpitals, and that no Lay Hoſpital was within thoſe Statutes.

Secondly, If upon the foundation of any lay Hoſpital, or after it was ordained, that one or divers Prieſts ſhould be maintained within the Hoſpital to celebrate divine ſervice to the poor, and to pray for the ſoule of the Founder, and all Chriſtian ſoules, or the like, & that the poor of ſuch Hoſpital ſhould make the like Maſſes, yet ſuch an Hoſpital is not within the ſaid Statutes, for the Hoſpital is lay, and not religious, and all or the moſt part of ancient lay Hoſpitals were founded or ordained after the ſame ſort, and the makers of thoſe ſtatutes never intended to overthrow works of Charity, but to ſave them by the advice.

Thirdly, That no Hoſpital was given to the King by the Statute of 37. H. 8. but in two caſes, where the Donors, Founders or Patrons, &c. had entred and expulſed the Diſſeiſee, Wardens, &c. between the fourth day of February, Anno 27. H. and the firſt day of December, Anno 37. H. 8. or where King Henry the eighth by commiſſion according to that act ſhould enter, and ſeiſe the ſame, but that determined by the death of that King. Lib. 1. f. 24. Potters caſe.

Fourthly, That the ſtatute of 1. E. 6. extended not to any hoſpital whatſoever, either lay or religious, as by the ſame appeareth. Porters caſe, ubi ſupra. Lib. 4. 111. 113. 114. 116. In Lamberts caſe.

And I was of Counſel with the Lord Cheney in this caſe, which ſeeing it may do good for maintenance of Charitable uſes, I thought good ſummarily to report it. To this I will adde, Panis pauperum vita pauperum, qui defraudat eos vir ſanguinis eſt. Eccleſiaſticus. c. 34. v. 22.

Nota, of Hoſpitals ſome are Corporations aggregate of many, as of Maſter & Wardens, &c. and his confreres: ſome where the Maſter is alone, both only the eſtate of Inheritance in him, and the Brethren or Siſters power to conſent having Colledge and Common Seale: ſome where the Maſter or Warden hath the ſtate in him, but hath no Colledge and Common Seale, and ſuch a Maſter or Warden ſhall have a Juris utrum, and of theſe Hoſpitals ſome be eligible, and ſome Donative, and ſome preſentable. 14. E. 3. Juris utrum, 4:

## *Sect.* 646.

MEs le pluis haut briefe q̃ ils poient aver eſt l' briefe de Juris utrum, le quel eſt graund proofe que le droit de fee nell en eux, ne en nul autres, &c. Mes le droit de fee ſimple eſt en abeyance, &c. ceo eſt adire, que il eſt tantſolement en le remembrance, entendment, & conſideration de la ley, &c. Car moy ſemble que tiel

BUt the higheſt Writ that they can have in the Writ of *Juris utrum*, which is a great proofe that the right of fee is not in them, nor in any others, &c. but the right of the fee ſimple is in abeyance, that is to ſay, that it is only in the remembrance, intendment and conſideration of the law, &c. for it ſeemeth to me, thoſe

choſe et tiel droit que eſt dit en divers Libers eſtre an abeyance, eſt a tant adire en Latine (ſ.) Talis res, vel tale rectum, quæ, vel quod non eſt in homine adtunc ſuperſtite, ſed tantummodo eſt, & conſiſtit in conſideratione & intelligentia Legis, & quod alii dixerunt, talem rem aut tale rectum fore in nubibus. Mes jeo ſuppoſe que ils intenderont per ceux parols, In nudibus, &c. come jeo aye dit adevant.

That ſuch a thing, and ſuch a right, which is ſaid in divers books to be in abeiance, is as much to ſay in Latine (ſ.) *Talis res, vel tale Rectum, quæ vel quod non eſt in homine adtunc ſuperſtite, ſed tantummodo eſt, & conſiſtit in conſideratione & intelligentia legis, & quod alii dixerunt, talem rem, aut tale rectum fore in nubibus.* But I ſuppoſe, that they mean by theſe words. (*In nubibus*, &c.) as I have ſaid before.

24.E.3.69. Vid. Sect. 648,649,650,651. Vide Sect.1.

¶ *En abeiance.* That is in expectation, of the French word Bayer to expect. For when a Parſon dieth, we ſay that the freehold is in Abeyance, becauſe a Succeſſor is in expectation to take it; & here note the neceſſitie of the true interpretation of words. If Tenant Per terme dauter vie dieth, the free hold is ſaid to be in Abeiance until the occupant entreth. If a man make a leaſe for life, the remainder to the right heires of I.S. the fee ſimple is in abeyance until I.S. dieth. And ſo in the caſe of the Parſon, the Fee and right is in the abeyance, that is in expectation, in remembrance, intendment, or conſideration of Law. 2. In conſideratione ſive intelligentia legis, becauſe it is not in any man then living; and the right that is in abeyance is ſaid to be In nubibus, in the Clouds, and therein hath a quality of fame wherevnto the Poet ſpeaketh.

Virg.4.Eneid.

Inſequiturque ſolo, & caput inter nubila condit.

## *Sect.* 647.

¶ Item, ſi un parſon dun egliſe devie, ore le franktenement del glebe del parſonage eſt en nulluy durant le temps que le parſonage eſt voide, mes in abeiance, ceſt aſcavoir, in conſideration & en le intelligence de la ley, tanque un auter ſoit fait parſon de meſme egliſe, & immediat quand un auter eſt fait parſon, le franktenement en fait eſt en luy come ſucceſſor.

Alſo, if a Parſon of a Church dieth, now the Freehold of the glebe of the Parſonage is in none during the time that the parſonage is void, but in abeiance, *viz.* in conſideration, and in the underſtanding of the law, until another be made Parſon of the ſame Church; and immediately when another is made Parſon, the freehold in deed is in him as Succeſſor.

¶ *Si un Parſon dun Egliſe devie*, &c. So it is of a Biſhop, Abbot, Deane, Archdeacon, Prebend, Vicar, and of every other ſole Corporation or body politike preſentative, elective or donative, which inheritances nut in abeiance are by ſome called Hereditaments decents, and ſome ſay: Que le fee eſt en beiaunce.

Bract.li.1.c.2. Brit.f. 249.

Sect.

## *Sect.* 648.

¶ Item, aſcuns peradventure voilēt arguer & dire, que entant que un parſon ove aſſent del patron & ordinarie poit granter un rent charge hors del Glebe del Parſonage en fee, & iſſint charger le glebe del Perſonage perpetualmēt, ergo, ils ont fee ſimple, ou deux, ou un de eux avoit fee ſimple al meins. A ceo poit eſtre reſpondue, que il eſt pryncyple en le ley, que de cheſcuns terres il y ad fee ſimple, &c. en aſcun home, ou autrement le fee ſimple eſt en abeyance. Et un autre pryncyple eſt, Que cheſcun terre de Fee ſimple poit eſtre charge de un Rent-charge en fee per un voy, ou per auter. Et quand tiel rent eſt graunt per le Fait le Parſon & le Patron; & ordinarie, &c. en Fee, nul avera prejudice ou parde p force de tiel Grant forſque les Grantors en lour vies, & les heires les Patron, & les ſucceſſors del Ordinary apres lour deceaſe. Et apres tiel charge, ſi le

ALſo, ſome peradventure will argue and ſay, that inaſmuch as a Parſon with the aſſent of the Patron and Ordinary, may grant a rent Charge out of the Glebe of the Parſonage in fee, and ſo charge the Glebe of the Parſonage perpetually, *ergo*, they have a Fee ſimple, or two, or one of them have a fee ſimple at the leaſt. To this may be anſwered: that it is a Principle in law, That of every land there is a Fee ſimple, &c. in ſome body, or otherwiſe the fee ſimple is in abeiance. And there is another Principle, that every Land of fee ſimple may be charged with a Rent charge in Fee by one way or other. And when ſuch Rent is granted by the Deed of the Parſon, and the Patron, and Ordinary, &c. in Fee, none ſhall have prejudice or loſſe by force of ſuch Grant, but the Grantors in their lives, and the Heirs of the Patron, and the ſucceſſors of the Ordinary after their deceaſe. And after ſuch charge

¶ *Il eſt un Principle en la Ley, &c.* Principium, quod eſt quaſi primum caput, from which many caſes have their original or beginning, which is ſo ſtrong, as it ſuffereth no contradiction; and therefore it is ſaid in our Books, that antient Pryncyples of the law (a) ought not to be diſputed. Contra negantem principia non eſt diſputandum. That which our Author here calleth a Pryncyple. Sect. 3. & 90. he calleth a Maxim. (a) 11. H. 4. Sect. 3. & 90.

Here Littleton in anſwer to an objection alledgeth two Pryncyples. Firſt.

¶ *Que de cheſcun terre il y ad fee ſimple, &c.* This is perſpicuè verum, and needeth no explanation. Secondly.

¶ *Cheſcun terre de Fee ſimple poit eſtre charge en Fee per un voy ou auter.* Hereby it appeareth, That albeit the right of the fee ſimple be in abeyance; yet it may be charged by one way or other. And ſo it may be aliened in Fee, albeit the right of the fee be in abeyance, or in conſideration of law. And herein is a diverſity worthy the obſervation to be made. That when the right of the fee ſimple is perpetually by judgement of Law in abeyance, without any expectation to come in eſſe, there he that hath the qualified fee concurrentibus his quæ in jure requiruntur, may charge or alien it, as in the caſe of Parſon, Vicar, Prebend, &c. But where the fee ſimple is in abeyance, and by poſſibility may every hour come in eſſe, there the fee ſimple cannot be charged untill it cometh in eſſe; As if a Leaſe for life be made, the remainder to the right heirs of I. S. the Fee ſimple cannot be charged

charged till I. S. be dead. And ſo is Littleton to be underſtood, viz. that either it may be charged in præſenti, or in futuro.

¶ *Cheſcun terre de Fee ſimple.* And ſo it is of Lands entailed, for they may be charged in Fee alſo, for the Eſtate Taile may be cut off by fine or recovery. Alſo the Eſtate taile may continue, and yet Tenant in tayle may lawfully charge the land and binde the iſſue in taile. As if a Diſſeiſor make a gift in Taile, and the Donee in conſideration of a releaſe by the diſſeiſee of all his right to the Donee, granteth a rent charge to the diſſeiſee and his heirs, proportionable to the value of his right, this ſhall binde the Iſſue in taile: Vide Sect. 1. Bridgewaters Caſe: which Lands by the rule of Littleton may be charged: and therefore if the owner of thoſe thirteen acres grant a Rent charge out of thoſe thirteen Acres generally, lying in the Meadow of eighty, without mentioning where they lie particularly, there as the ſtate in the land remoues, the charge ſhall remove alſo. But ſince our Author wrote, all Eccleſiaſtical perſons are diſabled to charge in fee any of their Eccleſiaſtical poſſeſſions, as before hath been ſpoken of at large.

44. E. 3. 21. 22.

Vide Sect. 1. Bridgewaters caſe, & 59.

Vide Sect 593.

¶ *En quant tiel rent eſt grant, &c.* This is an excellent interpretation and limitation of the ſaid Principle, viz. That none ſhall have prejudice or loſſe by any ſuch grant, but ſuch as are party or privy thereunto, as the Patron and his heirs, the Ordinary and his ſucceſſors, and the Parſon and his Succeſſors: which Succeſſors of the Parſon are to be preſented by the Patron or his heirs, and admitted and inſtituted by the Ordinary of his Succeſſors. The like is to be ſaid of an Archdeacon, Prebend, Vicar, Chauntry-Prieſt, and the like.

31. E. 1. tit. Grant. 93. 8 R. 2. Annuit. 53.

Parſon devie, ſon ſucceſſour ne poit bener a le dit Eſglíſe ou eſtre Parſon de meſme le Eſglíſe per la Ley, forſque per preſentment del Patron & admiſſion & inſtitution del Ordinary. Et pur cel cauſe il covient, que le Succeſſor ſoy teigne content, & agre de ceo que ſon Patron & Lordinarie loyalment feſoyent adebant, &c. Mes ceo nest proofe que le Fee ſimple, &c. eſt en le Patron & Lordinary, ou en alcun deux, &c. Mes la cauſe que tiel grãt de Rent charge eſt bone, eſt pur ceo que ceux queux averont intereſt, &c. en la dit Eſglíſe, ſ, le Patron ſolonque la Ley temporal, & Lordinarie ſolonque la Ley ſpiritual, fueront aſſentus, ou parties a tiel charge, &c. Et ceo ſemble eſtre la verie cauſe que tiel Glebe poit eſtre charge en perpetuitie, &c.

if the Parſon die, his ſucceſſor cannot come to the ſaid Church to be Parſon of the ſame by the Law, but by the preſentment of the Patron, and admiſſion and inſtitution of the Ordinary. And for this cauſe the Succeſſour ought to hold himſelf content, and agree to that which his Patron and the Ordinary have lawfully done before, &c. But this is to prove that the fee ſimple, &c. is in the Patron and the Ordinary, or in either of them, &c. but the cauſe that ſuch grant of rent charge is good is, for that they who have the intereſt, &c. in the ſaid Church, *viz.* the Patron according to the Law Temporal, and the Ordinary according to the Law ſpiritual, were aſſenting, or parties to ſuch charge, &c. And this ſeemeth to be the true cauſe why ſuch glebe may be charged in perpetuity, &c.

¶ *Per le Fait le Parſon, et Patron, et Lordinarie, &c.* Yet if the Parſon die, and in time of vacation the Patron of the aſſent of the Ordinary, or the Patron and Ordinary grant an annuity or rent charge out of the Glebe, this ſhall (as hath been ſaid) binde the ſucceeding Parſons for ever.

16. E. 3. Annuit. 24. 40. E. 30. 3. E. 3. 17. Reg. 38.

If there be Parſon, Patron, and Ordinary, and the Parſon by the Ordinary and aſſent of

of the Ordinary grant an Annuity to another, having quid pro quo inconsideration thereof, this shall bind the Successor of the Parson, without the consent of the Patron.

¶ Church Parochial may be donative and exempt from all ordinary jurisdiction, and the Incumbent may resign to the Patron, and not to the Ordinary, neither can the Ordinary visit: but the Patron by commissioners to be appointed by him: and by Littletons rule, the Patron and Incumbent may charge the Glebe, and albeit it be donative by a Lay-man, yet mere laicus is not capable of it; but an able Clerk infra sacros Ordines is, for albeit he come in by Lay donation, and not by admission or institution, yet his Function is spiritual; and if such a Clerk donative be disturbed, the Patron shall have a Quare impedit of this Church donative, and the writ shall say, Quod permittat ipsum præsentare ad Ecclesiam, &c. and declare the special matter in his Declaration. And so it is of a Prebend, Chantery, Chappel donative and the like, and no Laps shall incur to the Ordinary, except it be so specially provided in the foundation. But if the Patron of such a Church, Chantery, Chappel, &c. donative, doth once present to the ordinary, and his Clerk is admitted and instituted, it is now become presentable, and never shall be donative after; and then Laps shall incur to the Ordinary, as it shall of other Benefices presentable. But a presentation to such a donative by a Stranger, and admission and institution thereupon, is meerly void; and all this was resolved by the whole Court of Kings Bench, for the Rectory Parochial donative of Saint Burian in the County of Cornwal.

6.E.3.44.55.7.E.3.40.41 F.N.B.152.7.E.3.32.39. E.3.17. 8.11.H.4 98.8. H.3.23. Vi.Sect.33. 530.11.E.3. fur.utr.3.8.Ass.29.31. 13.Ass.2. 14.H.3.Quar.Imp.183. 17.E.3 12.64.14.H.4.11 F.N.B.3.c.16.c.3.bre. 660. 13.E.4.3.6.H.7.14. Vide Sect.530. 22.H.6.26.F.N.B.37.41

Hil.1.Jac. coram Reg. rot.50.inter Will. Fairchild, Pl.& Will.Gayer def.in Trespas.

It appeareth by our Books, and by divers Acts of Parliament, That at the first all the Bishopricks in England were of the Kings foundation, and donative per traditionem baculi (id est) the Crosier which was the Pastorall staffe, & annuli, the Ring whereby he was married to the Church. And King Henry the 1. being requested by the Bishop of Rome to make them elective, refused it: but King John by his charter bearing date quinto Junii, anno decimo septimo, granted that the Bishopricks should be eligible. If the King doth found a Church, Hospital, or free Chappel donative, he may exempt the same from ordinary Jurisdiction, and his Chancellor shall visit the same. May if the King do found the same without any special exemption, the Ordinary is not, but the Kings Chancellor, to visit the same. Now as the King may create Donatives exempt from the visitation of the Ordinary, so he may by his charter license any Subject to found such a Church or Chappel, and to ordain that it shall be donative, and not presentable, and to be visited by the Founder, and not by the Ordinary. And thus began Donatives in England, whereof common Persons were Patrons.

17.E.3.40.6.E.3.10. 25.E.3.ca.unico de Provisor Mat. Par. pa. 10, & 62.

¶ *Ordinarie.* Ordinarius is he that hath ordinary jurisdiction in causes Ecclesiastical, immediate to the King and his Court of Common law, for the better execution of Justice, as the Bishop or any other that hath exempt and immediate jurisdiction in causes Ecclesiastical.

¶ *Ley temporel*, which consisteth of three parts, viz. First, On the Common Law, expressed in our Books of Law, and judicial records. Secondly, on Statutes contained in Acts and Records of Parliament. And thirdly, On customs grounded upon reason and use time out of minde; and the construction and determination of these do belong to the Judges of the Realm.

¶ *Ley spiritual, &c.* That is, the Ecclesiastical Laws allowed by the Laws of this Realm, viz. which are not against the common Law (whereof the Kings Prerogative is a principal part) nor against the Statutes and customs of the Realm, and regularly according to such Ecclesiastical Laws, the Ordinary and other Ecclesiastical Judges do proceed in causes within their Conusance. And this Jurisdiction was so bounded by the antient common Laws of the Realm, and so declared by Act of Parliament.

The statute of 25.H.8. c.19 33.H.34.32.H.6.28

¶ *Admission & Institution.* In propriety of speech, Admission is, when the Bishop upon examination admitteth him to be able, and saith, Admitto te habilem. (d) Institution is, when the Bishop saith, Instituo te rectorem talis Ecclesiæ cum cura animarum, & recipe Curam tuam & meam. (e) But sometimes in a more large sense, admissus doth include Institutus also. Cujus præsentatus sit admissus, i. institutus. And it is to be observed, That Institution is a good plenarty against a common person, (but not against the King, unlesse he be inducted) and that is the cause that regularly plenarty shall be tried by the Bishop, because the Church is full by institution, which is a spiritual act, but void or not void, shall be tried by the Common Law.

(d) Lib.4.4.f.75.& 79. Lib.6.f.49. Lib.7.f.46. (e) W.2.cap.5.13.E.1. 22.H.6.27 38.F.2.4.

If the common Law, if an estranger hap presented his Clerk, and hap been admitted and instituted to a Church, whereof any Subject had been lawful Patron, the Patron had no other remedy to recover his advowson, but a writ of Right of Advowson, wherein the

Glanvil. lib.13.c.18,19. 20.Mirror.cap.5 Sect.5. Bract.l.4 f.238.242. 244.&c.291.Flet. l.5. c.11.16,17.Brit.f.222, 223,224.

6.E.3.28.39.52.139.E.3. 24.43.E.3.25.45.E.3. Quar.imp.139.10.E.2. Com.22.31.E.1.Quar. imp.186.

Incumbent was not to be removed: and ſo it was at the common Law, if an uſurpation had bad upon an infant or Feme Covert, having an Advowſon by diſcent, or upon Tenant for life, &c. the Infant, feme Covert, and he in the reverſion were driven to their Writ of Right of Advowſon; for at the Common Law, if the Church were once full, the incumbent could not be removed, and plenarty generally was a good Plea in a Quare impedit, or Aſſiſe of Darreine preſentment, and the reaſon of this was, to the intent that the incumbent might quietly intend and apply himſelf to his ſpiritual charge. And ſecondly, the Law intended, that the Biſhop that had cure of ſouls within his Dioceſſe, would admit & inſtitute an able man for the diſcharge of his duty and his own; and that the Biſhop would do right to every Patron within his Dioceſſe. But at the common Law, if any had uſurped upon the King, and his preſentee had been admitted, inſtituted, and inducted, (for without induction the Church had not been full againſt the King) the King might have removed him by a Quare impedit, and been reſtored to his preſentation, for therein he hath a Prerogative, Quod nullum tempus occurrit Regi, but he could not preſent, for the plenarty barred him of that, neither could he remove him any way but by action, to the end the Church might be the more quiet in the mean time: * Neither did the King recover damages in his Quare impedit, at the common Law. But the ſaid Statute (a) hath altered the common law in the caſes aforeſaid, as namely Quod hoc, quod ſi pars rea accipiat de plenitudine Eccleſiæ per ſuam propriam præſentationem non poſſet illam plenitudinem remaneat loquela, dummodo breve infra tempus ſemeſtre impetretur, &c. And alſo hath provided remedy in other caſes, as by the ſaid act appeareth.

F.N.B.36.k.143.a.35.E 3.ca.3.13.R.2.ca.1 4. H.4.ca.21.1.H.f.19.

* Li.6.f.51.Li.f.19. 3.H.6.Dam.17.34.H.6. 28.12. E. Chimperty 9. 18.E.3.2.Temps E.1. Quar.imp.181.

(a) W.2.ca.5.13.E.1. (g) 45.E.3.35.38.E.3.4. 25.E.3.47.13.El. Dy. 292.Reg.302.&c.18. El.Dy.348.14.E.4.2. 7.H.4.32.31.E.1.Quar. Imp.185.W.2.ubi ſupr. (h) 17.E.3.64.

(a) And if the King do preſent to a Church, and his Clerk is admitted and inſtituted, yet before induction the King may repeal and revoke his preſentation. But regularly no man can be put out of poſſeſſion of his advowſon, but by admiſſion and inſtitution upon an uſurpation by a preſentation to the Church. Cum aliquis jus præſentandi non habens præſentaverit, &c. and not by the collation of the Biſhop: (h) And therefore if the Biſhop collate without title, and his Clerk is inducted, this ſhall not put the rightful Patron out of poſſeſſion, for it ſhall be taken to be only proviſionally made for celebration of divine ſervice until the Patron do preſent; and therefore he is not driven to his Quare impedit, or Aſſiſe of Darreine preſentment in that caſe, but an uſurpation by collation ſhall take away the right of collation that is in another.

9.H.6.32.& 56.19.H.6. 68. 18.E.2.Preſentment 20.

It is to be obſerved, that an uſurpation upon a preſentation ſhall not only put out of poſſeſſion him that hath right of preſentation, but right of collation alſo. Therefore at this day the Incumbent ſhall be removed in a Quare impedit, or Aſſiſe of Darreine preſentment, if there be not a plenarty by ſix moneths before the Teſte of the writ; but then the Incumbent muſt be named in the Writ, or elſe he ſhall never be removed: yet at the common Law, if the Ordinary refuſed to admit and inſtitute the Clerk of the Patron, or when any diſturbed him to preſent, ſo as he could not prefer his Clerk, he might have his Quare impedit, or Aſſiſe de Darreine preſentment; and if the Church were not full, have a writ to the Biſhop, to admit his Clerk: but ſo odious was Simony in the eye of the common Law, that before the Statute of W. 2. he recovered no damages. At the common law, if hanging the Quare impedit againſt the Ordinary for refuſing his Clerk, and before the Church were full, the Patron brought a Quare impedit againſt the Biſhop, and hanging the ſuit, the Biſhop admit and inſtitute a Clerk at the preſentation of another, in this caſe if judgment be given for the Patron againſt the Biſhop, the Patron ſhall have a writ to the Biſhop, and remove the incumbent that came in pendente lite by uſurpation, for pendente lite nihil innovetur, and therefore at the common Law it was good policy to bring the Quare impedit againſt the Biſhop as ſpeedily as might be. And it is to be obſerved, that albeit the Clerk that comes in pendente lite, by uſurpation, ſhall be removed; yet if the rightful Patron, being a ſtranger to the writ, preſent pendente lite, and his Clerk is admitted, and inſtituted, he ſhall not be removed, for elſe by the bringing of ſuch Quare Impedit againſt the Ordinary, the rightful Patron might be defeated of his Preſentation: and therefore ever after the Statute of Weſtm. 2. amongſt other things it was inquired ex Officio if the Church were full, and of whoſe preſentation, &c. and if the Plaintiff ſhould have a writ to the Biſhop, and his Clerk admitted, as in moſt caſes he ought, yet may the rightful Incumbent have his remedy by Law.

50.E.3. Encumbent 10. 21.H.7.8.a & b.9 El. Dyer.260.F.N.B.32.14. H.8.31.19.E.2.Dar. Preſ. 21.10.E.3.17.9.H.6.31 30.E.3.tit.Quar.imp. Stath.46.E.3 15.9.H.6. 32.56.19.H.6.68 L.5. E.4.115.9 E.4.30.

And as it was good policy (as hath been ſaid) to bring a Quare impedit as ſpeedily as might be againſt the Biſhop, ſo it is good policy at this day to name the Biſhop in the Quare impedit, for then he ſhall not preſent by Laps. But ſeeing the Biſhop ſhall not preſent by Laps, becauſe he is named in the writ, what then, after that the time be devolved to the Metropolitan, ſhall not he preſent by laps, becauſe he is not named? To this it is anſwered, that he ſhal not in that caſe preſent by laps, for the Metropolitan ſhal never preſent or collate by laps after ſix months, but when the immediate Ordinary might have collated by laps within the ſix months and had ſurceaſed his time. And ſo it is, if the time be devolved to the King

11.H.4 80.

for

for the firſt ſtep or beginning faileth, and in humane things. Quod non habet principium, non habet finem. And all theſe points were reſolved (*) in a writ of Error brought by Richard Biſhop of London, and John Lancaſter againſt Anthony Lowe upon a judgment given againſt them in a Quare impedit in the common pleas for the Church of Windebiſhe. But now let us hear what our Author will ſay unto us. (*) Mich.3.Jacobi.

## *Sect.* 649.

ITem, ſi fe en taile ad iſſue & ſoit diſſeiſie, & puis il releſſa per ſon fait tout ſon droit a le diſſeiſor, en ceſt caſe nul droit de taile poit eſtre en le tenant en taile, pur ceo que il avoit releas tout ſon droit. Et nul droit poit eſtre en iſſue en le taile durant le vie ſon pere. Et tiel droit del enheritance en le taile neſt pas tout ouſterment expire p force de tiel releas, &c. Ergo, il eſt obient que tiel droit demurt en abeiance, ut ſupra, durant la vie le tenant en taile, que releſſa, &c. & apres ſon deceaſe donque eſt tiel droit maintenant en ſon iſſue en fait, &c.

ALſo, if Tenant in tail hath iſſue and is diſſeiſed, and after he releaſeth by his Deed all his right to the Diſſeiſor. In this caſe no right of taile can be in the tenant in taile, becauſe he hath releaſed all his right. And no right can be in the iſſue in taile during the life of his father. And ſuch right of the Inheritance in the taile is not altogether expired by force of ſuch releaſe, &c. *Ergo*, it muſt needs be that ſuch right remain in abeiance, *ut ſupra*, during the life of Tenant in taile that releaſeth, &c. and after his deceaſe ſuch right preſently is in his iſſue in deed, &c.

¶ LIttleton having declared where a fee is in abeiance, and where a freehold and fee is in abeiance by act in law; and where a fee that is in abeiance may be charged; here he putteth two caſes where a right of an eſtate tail may be in abeiance by the act of the party; which are ſo clear and evident, as there needs no further proof or argument, then Littleton hath juſtly and artificially made: albeit ſome objections of no weight have been made againſt it: If tenant in tail of lands holden of the King be attainted of felony, and the King after office ſeiſeth the ſame, the eſtate tail is in abeiance, there ſaid to be in ſuſpence. Pl. Com. fol. 562, 563. in Walſinghams caſe. 14.E.3.Diſcont.5. 19.H.6.60.29.Aſſ.p. Walſinghams caſe, ubi ſupra.

¶ *Grant ſon eſtate, concedit ſtatum ſuum.* Eſtate or eſtate ſignifieth ſuch inheritance, freehold, term for years, tenancy by ſtatute Merchant, Staple, Elegit or the like, as any man hath in lands or tenements, &c. And by the grant of his eſtate, &c. as much as he can grant ſhall paſſe, as here by Littletons caſe appeareth. Tenant for life, the remainder in tail; the remainder to the right heirs of tenant for life, tenant for life grants ſuum ſtatum ſuum to a man and his heirs, both eſtates do paſſe. Vide Sect.65,524,525, 526.44.E.3.10.14.Aſſ. 28.43.Aſſ.8,5,H.7.30. 44.Aſſ.28.44.E.3.16.

## *Sect.* 650.

EN meſme le maner eſt, lou tenant en tail grant ſa tout ſon eſtate a un auter, en ceſt cas le graūtee nad eſtate forſque pur terme de

IN the ſame manner it is where tenant in taile grant all his eſtate to another; in this caſe the grantee hath no eſtate but for term of life of the Tenant

¶ *Right.* Jus five rectum (which Littleton often uſeth) ſignifieth properly, and ſpecially in writs & pleadings, when an eſtate is turned to a right, as by diſcontinuance, Diſſeiſin, &c. where it ſhall be ſaid, Quod jus deſcendit & non terra. But (right) doth alſo include the eſtate 20.H.6.9.

Vide Sect.465. Pl.Com. 484. Lib.8.fol.153. Althams caſe, 39.H.6.38.

eſtate in eſſe in conveyances; and therefore if Tenant in fee ſimple make a leaſe for years, and releaſe all his right in the land to the leſſee and his heirs, the whole eſtate in fee ſimple paſſeth.

And ſo commonly in fines, the right of the land includeth and paſſeth the ſtate of the Land, as *A.* cognovit tenementa prædicta eſſe jus ipſius *B.* &c. And the Statute (a) ſaith, Jus ſuum defendere, (which is) ſtatum ſuum. And note that there is Jus recuperandi, jus intrandi, jus habendi, jus retinendi, jus percipiendi, jus poſſidendi.

(a) W.2.cap.3. Pl.Com.484.& 487.

Title properly (as ſome ſay) is when a man hath a lawful cauſe of entry into Lands whereof another is ſeiſed, for the which he can have no action, as title of condition, title of Mortmain, &c. But legally this word (Title) includeth a right alſo as you ſhall perceive in many places in Littleton: and title is the more general word, for every right is a title, but every title is not ſuch a right for which an action lieth; and therefore Titulus eſt juſta cauſa poſſidendi quod noſtrum eſt, and ſignifieth the means whereby a man cometh to land, as his title is by fine or by feoffment, &c. And when the Plaintiff in aſſiſe maketh himſelf a title, the tenant may ſay, Veniat Aſſiſa ſuper titulum, which is as much to ſay, as upon the title which the Plaintiff hath made by that particular conveyance; Et dicitur titulus a tuendo, becauſe by it he defendeth and defendeth his land; and as by a releaſe of a right a title is releaſed, ſo by releaſe of a title a right is releaſed alſo. See more hereof in Fitzherbert and Brooks abridgements, in the title of Title.

Vide Sect.429,659,&c.

6.H.7.8.2. Althams caſe, ubi ſupra.

¶ *Intereſt.* Intereſſe is vulgarly taken for a term or chattle real, and more particularly for a future term; in which caſe it is ſaid in pleading, that he is poſſeſſed De intereſſe termini. But Ex vi termini, in legal underſtanding, it extendeth to eſtates, rights and titles, that a man hath of, in, to, or out of Lands: for he is truly ſaid to have an intereſt in them: and by the grant of totum intereſſe ſuum in ſuch land, as well reverſions as poſſeſſions in fee ſimple ſhall paſſe. And all theſe words ſingularly ſpoken are nomina collectiva, for by the grant of totum ſtatum ſuum in lands, all his eſtates therein paſſe. Et ſic de cæteris.

Pl.Com.f.374. in Seignior Zouches caſe, & fol. 487.& 448. in Nichols caſe.

32.H.8.Taile Br.23. 35.H.8.Grant.Br.150. Vide 16.El.Dyer.325.b. Titulum.

¶ *Ne unques avera briefe de waſte, &c.* So it is, if Tenant for life be, the remainder in taile, and he in the remainder releaſe to the tenant for life, all his right and ſtate in the land. Hereby it is ſaid in our Books, that the eſtate of the leſſee is not inlarged, but the releaſe ſerveth to this purpoſe, to put the eſtate tail into abeiance, ſo as after that he in the remainder cannot have an action of waſte; yet in that caſe (ſaving reformation) the Leſſee for life hath an eſtate for the life of Tenant in taile expectant upon his own life. But if tenant in fee releaſe to his Tenant for life all his right, yet he ſhall have an Action of waſte. And if Tenant in taile make a Leaſe for his own life, he ſhall have an action of waſte.

43.Aſſ.p.13.41.E.3.tit. Waſte.83.11.H.4.67. 13.H.7.10.Pl.Com.482. Per Dier.27.H.8.20.

24.E.3.23.

F.N.B.60.H.4.1.E.3. Waſte 83.42.E.3.18.

vie del tenant en le taile, et le reverſion de le taile neſt pas en le tenant en taile, pur ceo que il a voit graunt tout ſon eſtate & ſon droit, &c. Et ſi le tenant a que le graunt fuit fait fiſt waſt, le tenant en le taile ne unque avera briefe de waſt, pur ceo que nul reverſion eſt en luy. Mes le reverſion & le inheritance de le taile, durant le vie le tenant en le taile, eſt en abeiance, teſtata-voir tantſolement en le remembrance, conſideration, & intelligēce de la ley.

in taile, and the reverſion of the taile is not in the tenant in taile, becauſe he hath granted all his eſtate and his right, &c. And if the Tenant to whom the grant was made make waſte, the Tenant in taile ſhall not have a writ of waſte, for that no reverſion is in him: but the reverſion and inheritance of the taile, during the life of the Tenant in taile, is in abeiance, that is to ſay, only in the remembrance, conſideration, and intelligence of the Law.

## Sect. 651.

¶ ITem, ſi un Eveſque alien terres que ſont parcel de ſon Eveſquery, & devie, ceo eſt un diſcontinuance a ſon ſucceſſor, pur ceo q̄ il ne poit enter, mes eſt mis a ſon briefe De ingreſſu ſine aſſenſu capituli.

ALſo, if a Biſhop alien lands which are parcel of his Biſhoprick, and die, this is a diſcontinuance to his ſucceſſor, becauſe he cannot enter, but is put to his Writ of *De ingreſſu ſine aſſenſu capituli.*

Of this ſufficient hath been ſaid (how the law ſtandeth at this day) before in this Chapter.

## Sect. 652.

¶ ITem, ſi un Dean alien terres queux il aveu droit de luy & ſon chapiter, & morust, ſon ſucceſſor poit enter. Mes ſi le Deane eſt ſole ſeiſie come & droit ſon Deanry, donque ſon alienation eſt diſcontinuance a ſon ſucceſſor, come eſt dit avedant.

ALſo, if a Deane alien lands which he hath in right of him and his Chapter, and dieth, his ſucceſſor may enter. But if the Dean be ſole ſeiſed as in right of his Deanry, his alienation is a diſcontinuance to his ſucceſſor, as is ſaid before.

¶ HEre alſo that which was neceſſary is before ſaid in this Chapter, and Littletons own words are plain and evident. 22.E.4. tit. Feoffments & fairs 29. 21.E.4.85.86.

## Sect. 653, 654, 655, & 656.

¶ ITem, peradventure aſcuns voilont arguer & dire, que ſi un Abbe & ſon Covent ſont ſeiſes en lour demeſne, come de, fee de certaine terres a eux & a lour ſucceſſors, &c. & Labbe ſans aſſent de ſon Covent alien meſmes les terres a un auter, & devie, ceo eſt un diſcontinuance a ſon ſucceſſor, &c.

ALſo, peradventure ſome will argue and ſay, that if an Abbot and his Covent be ſeiſed in their demeſne, as of fee, of certain lands to them and to their ſucceſſors, &c. and the Abbot without the aſſent of his Covent alien the ſame lands to another, and die, this is a diſcontinuance to his ſucceſſor, &c.

## Sect. 654.

¶ PEr meſme le reaſon ils voilent dire, que lou un Dean & Chapiter ſont ſeiſies de certain terre a eux & a lour ſucceſſors, ſi le Deane alien meſme la terre, &c.

BY the ſame reaſon they will ſay, that where a Dean and Chapter are ſeiſed of certaine land to them and their ſucceſſors, if the death alien the ſame lands,

ceo

ceo serroit un discontinuance a son successour issint que son successor ne poit enter, &c. A ceo poit estre respondue que il y ad grand diversitie perenter les deux cases.

&c. this shall be a discontinuance to his successor, so as his successor cannot enter, &c. To this it may be answered, that there is a great diversity between these two cases.

Sect. 655.

CAr quand un Abbe & le Covent sont seisies, uncore sils sont disseisie, Labbe avera assise en son nosme demesne, sans nosmer le covent, &c. Et si alcun voile suer Præcipe quod reddat, &c. de mesmes les terres quand ils sueront en le maine Labbe & Covent, il covient que tiel action real soit sue envers Labbe solement sans nosme la Covent, pur ceo que touts sont mozts persons en la ley sozsque Labbe que est le soveraigne, &c. Et ceo est per cause del soveraignty; Car autrement il serroit sozsque come un de les auters Moignes de le Covent, &c.

FOr when an Abbot, and the covent are seised, yet if they be disseised, the Abbot shall have an assise in his own name without naming the Govent, &c. And if any will sue a *Præcipe quod reddat, &c.* of the same lands when they were in the hands of the Abbot and Covent, it behoveth that such action real be sued against the Abbot only without naming the Covent, because they are all dead persons in law, but the Abbot who is the soveraign, &c. and this is by reason of the soveraignty; For otherwise he should be but as one of the other Monkes of the Covent, &c.

Sect. 656.

MEs un Dean & le Chapiter ne sont mozts persõs en la ley, &c. car chescun de eux poit aver actiõ per soy & divers cases. Et de tiels terres ou tenemẽts q̃z le Deane & Chapiter ont en common, &c. sils soient disseisies, le Deane & Chapiter averont un assise, & nemy le Deane sole, &c. Et si auter voile aver action real de tiels terres ou tenements envers le Deane, &c. il covient de suer envers le Deane & Chapiter, & nemy envers le Deane sole, &c. & issint il

BUt Dean and Chapter are not dead persons in Law, &c. for every of them may have an action by himself in divers cases. And of such lands or tenements as the Dean and Chapter have in common, &c. if they be disseised, the Dean and Chapter shall have an assise, and not the Dean alone, &c. And if another will have an action real for such lands or tenements against the Dean, &c. he must sue against the Dean and Chapter, and not against the Dean alone, &c. and so there appeareth a

appiert

appiert grand diverſitie perenter les deux cases, &c.

great diverſity betweene the two caſes, &c.

¶ Theſe are apparent and need no explanation. Saving in the 655. Section mention is made of the Præcipe quod reddat, which (in this place is intended of a real action whereby land is demanded, and is ſo called of the words in every ſuch writ.

Vide Sect. 200.

And the reaſon of this diverſity between the caſe of the Abbot and Covent, and Dean and Chapter is; for that (as hath been ſaid) the Monks are regular, and civilly dead, and the Chapter are ſecular and perſons able and capable in law. But by the policy of Law the Abbot himſelf (here termed the ſoveraign) albeit he be a Monk and regular, yet hath he capacity and ability to ſue and be ſued, to enfeoff, give, demiſe and leaſe to others, and to purchaſe and take from others, for otherwiſe they which right have, ſhould not have their lawful remedy, nor the houſe remedy againſt any other that did them wrong; neither could the houſe without ſuch capacity and ability ſtand. And the Covent have no other ability or capacity, but only to aſſent to eſtates made to the Abbot, and to eſtates made by him, which for neceſſities ſake, though they be civilly dead, they may do.

8.E.3.27.11.H.4.84. 21.E.4.84.11.H.7.22.

## *Sect.* 657.

¶ Item, ſi le Maſter dun Hoſpital diſcontinue certaine terre de ſon Hoſpital, ſon ſucceſſor ne poit enter, mes eſt mis a ſõ brieſe de ingreſſu ſine aſſenſu confratrum & conſororum, &c. Et touts tiels brieſes pleinement appearõt en le Regiſter, &c.

Alſo, if the Maſter of an Hoſpitall ſhall diſcontinue certain Land of his Hoſpital, his ſucceſſor cannot enter, but is put to his writ of *De ingreſſu ſine aſſenſu confratrum & conſororum, &c.* And all ſuch writs fully appear in the Regiſter, &c.

¶ This muſt alſo be underſtood, where the Maſter of the Hoſpital hath ſole and diſtinct poſſeſſions, and not where he and his brethren are ſeiſed, and as a body politick aggregate of many. And here Littleton (as divers times before) doth cite the Regiſter.

## *Sect.* 658.

¶ Item, ſi terre ſoit leſſe a un home pur terme de ſa vie, le remainder a un auter en le taile, ſavant le reverſion al leſſor, & puis celuy en le remainder diſſeiſt le tenant a terme de vie, & fait un feoffement a un auter en fee, & puis morust ſans iſſue, & le tenant a term de vie morust, il ſemble en teſt cas, que celuy en la reverſion bien poit enter ſur le feoffee, pur ceo que celuy en le remainder que fit le feoffment, ne fuit unque ſeiſie en le taile per force de meſme le remainder, &c.

Alſo, if land be let to a man for term of his life, the remainder to another in taile, ſaving the reverſion of the Leſſor, and after he in the remainder diſſeiſeth the Tenant for term of life, and maketh a feoffment to another in fee, and after dieth without iſſue, and the Tenant for life dieth, It ſeemeth in this caſe that he in the reverſion may well enter upon the feoffee, becauſe he in the remainder which made the feoffment was never ſeiſed in taile by force of the ſame remainder, &c.

Here

Vide Sect. 637,592,596, 597,601,640,641. Vide Sect.637.

¶ HEre it appeareth, That albeit the Feoffor hath an Eſtate Taile in him expectant upon an eſtate for life, yet his Feoffment worketh no Diſcontinuance. wherein Littleton doth adde a limitation to that which in this Chapter he had generally ſaid, viz. That an eſtate taile cannot be diſcontinued; but where he that maketh the Diſcontinuance was once ſeiſed by force of the Taile, which is to be underſtood, when he is ſeiſed of the Freehold and inheritance of the eſtate in taile, and not where he is ſeiſed of a remainder or a reverſion expectant upon a freehold: which freehold (as often hath been ſaid) is ever much reſpected in Law.

## CAP. 12. Of Remitter: Sect.659.

¶ HEre our Author having next before treated of a Diſcontinuance, very aptly beginneth this chapter with a deſcription of a Remitter.

¶ *Remitter eſt un antient terme en la Ley*, and is derived of the Latine Verbe Remittere, which hath two ſignifications, either, To reſtore and ſet up again, or to ceaſe. Therefore a Remitter is an operation in law upon the meeting of an antient right remediable, and a later ſtate in one perſon where there is no folly in him, whereby the antient right is reſtored and ſet up again, and the new defeaſible eſtate ceaſed and vaniſhed away. And the reaſon hereof is, for that the Law preferred a ſure and conſtant right, though it be little, before a great eſtate by wrong and defeaſible; and therefore the firſt and more antient is the moſt ſure and more worthy title; Quod prius eſt, verius eſt, & quod prius eſt tempore, potius eſt jure: (a) Therefore many Books inſtead of Remitter, ſay, That he is en ſon primer eſtate, or en ſon melior droit, or En ſon melior Eſtate, or the like.

(a) 25 Aſſ.pl.4. 35. Aſſ. pl.11.26.E.2.69.11.H.4 50.2.41.E.3.17 b.& tit. Remit.11.6.E.3 17.

¶ *Lou home a deux Titles.* Here this word (Titles) is taken in the largeſt ſenſe, including rights, for being properly taken, (b) as in caſe of a condition, mortmain,

(b) V. Sect.429. & 659. &c.34.H.8.tit.Remitt. Br.50.44.E.3.Attaint. 22.38 Aſſ.pl.7.

¶ REmitter en un antient terme en la Ley, & eſt lou home ad deux titles a terres ou tenits, ſ. un pluis antient title, & un auter title pluis darrein, & ſil vient a la terre per le pluis darreine title; uncore la Ley luy adjugera eins per force del pluis eigne title, pur ceo que le pluis eigne title eſt le pluis ſure title & pluis deigne title. Et donque quand home eſt adjudge eins per force de ſon eigne title, ceo eſt a luy dit un remitter, pur ceo que la ley luy mitter deſtre eins en la terre per le pluis eigne & ſure title. Sicome tenant en le taile diſcontinua la taile, & puis il diſſeiſiſt ſ̄ diſcontinuee, & iſſint mourt ſeiſie, per que les tenements diſcendont a ſon iſſue ou coſine, inheritable

REmitter is an antient term in the Law, and is where a man hath two titles to lands or tenements, *viz.* one a more antient title, and another a more latter title; and if he come to the land by a latter title, yet the law will adjudge him in by force of the elder title, becauſe the elder title is the more ſure and more worthy title. And then when a man is adjudged in by force of his elder title, this is ſaid a Remitter in him, for that the law doth admit him to be in the land by the elder and ſurer title. As if Tenant in Taile diſcontinue the Taile, and after he diſſeiſeth his diſcontinuee and ſo dieth ſeiſed, whereby the tenements deſcend to his Iſſue or Coſine inheritable by

per

per force de le Taile: en cest case, ceo est a luy a que les Tenements discendont qr ad droit per force de le taile un remitter a la Taile, pur ceo que la Ley luy mitte & adjudge destre eins per force de le taile, qr est son eigne title: car sil serroit eins per force de le discent, donques le discontinuee puisſoit aver Briefe de Entre sur disseisin en le Per envers luy, & recoveroit les tenements & les dammages, &c. Mes entant que il est eins en son remitter per force de le Taile, le title & le interest le discontinuée est tout ousterment anient & defeat, &c.

force of the Taile: In this case this is to him to whom the Tenements descend, who hath right by force of the Taile, a Remitter to the taile, because the Law shall put and adjudge him to be in by force of the Taile, which is his elder Title; for if he should be in by force of the discent, then the discontinuee might have a Writ of Entry *Sur Disseisin* in the *Per* against him, and should recover the tenements and his damages, &c. but inasmuch as he is in his remitt' by force of this tail, the title and interest of the discontinuee is quite taken away and defeated, &c.

assent to a Ravisher, and the like, there is no Remitter wrought unto them, because these are but bare titles of entry, for the which no Action is given, but a Remitter must be to a precedent right. And Littleton in this Chapter putteth all his cases only of Remitters, to Rights remediable.

¶ *Et un auter Title pluis darreigne, &c.* Here is to be observed, that an Estate must work a Remitter to an antient right, for albeit two rights do descend, there can be no Remitter, because one right cannot work a Remitter to another: for regularly to every remitter there be two incidents, viz. an antient right, and a defeasible estate of Freehold coming together. 10.H.6.59.78 45.tit. Entre Cong.3.Pl. Com. 2.6.2.

¶ *Le pluis eigne Title est le pluis sure Title, et pluis digne Title.* So as the eldest title is worthily (as hath been said) preferred, because it is the more sure and more worthy.

¶ *Sicome l'enant en Taile discontinue le taile, &c.* Here our Author according to his accustomed manner, to illustrate his description putteth an example of a remitter where the law preferreth the antient estate by right, before a new Estate defeasible. And this Remitter is wrought by an Estate cast upon the Issue in taile by discent, which is an act in Law; and the discent of the Land in possession, and the right of Estate taile descend together. 19.H.6.61,62.

¶ *Est tout ousterment anient et defeat, &c.* Here be two things implied and to be understood: First, That this Remitter is wrought in this case by operation of Law upon the freehold in Law descended without any entry. Secondly, That the Law so favoureth a Remitter, (being a restoring to right) that if the discontinuee be an Infant or a Feme Covert, and tenant in taile after a Discontinuance disseise them and die disseised, the Issue shall be remitted without any respect of the privilege of Infancy or Coverture; and therefore our Author said, Le title & interest le Discontinuee est tout ousterment anient & defeat. 11.E.4.1.

¶ *Donques le Discontinuee, &c.* Here is a reason added in this particular case, that sitteth not other cases of Remitter, for in this case, and many other, the law that abhorreth Suits of vexation, doth avoid circuity of action, for the rule is, Circuitus est evitandus. 11.E.3.3.tit.Af.85.4.E. 4.35.11.R.2.Bar.242. 30.E.3.8.6.E.3.7.19.H. 6.63.24.E.3.70.14.H.4. 27.10.H.7.11.F.N.B. Meſne & Waſte.

## *Sect.* 660.

ITem, si tenant en Taile enfeoffa son fits

ALso, if Tenant in Taile Infeoffe his Sonne in Fee,

¶ OUr Author having put one example where both the rights descend together, now Temps E.1.Remit.13. 11.E.3.Age.5.38.E.3.7 24.40.E.3.43.21.E.4.19

now puts another example where the iſſue in taile claimeth by purchaſe in the life of Tenant in taile, and the antient right deſcendeth after to the ſame Iſſue.

¶ *Car coment que tiel Heire fuit de pleine age al temps del mort, &c.* The reaſon is, becauſe no folly can be adjudged in the Infant at the time of the acceptance of the Feoffment. Therefore the law reſpecteth the time of the feoffment, and not the time of the death: and albeit he might have waived the eſtate which he had by the feoffment at his full age; yet here it appeareth, that the right of the eſtate taile deſcended to him either within age, or of full age, ſhall work a Remitter in him; for that the waiver of the ſtate ſhould have been to his loſſe and prejudice.

27.H.8.c.10. of Uſes. 35.H.8.Dy.54.b.6.E.6. ib.77.1.& 2.P.& M.116. 2.& 2.P.& M.129.191. 28.H.8.23.b.Pl.Com. Amy Townſhends caſe, fol.34.H.8.tit.Remit. Br.49.

Since Littleton wrote, and after the Statute of 27.H.8. cap. 10. if Tenant in taile make a feoffment in Fee to the uſe of his Iſſue being within age, and his Heirs, and dieth, and the right of the Eſtate Taile deſcend to the Iſſue being within age; yet he is not remitted, becauſe the Statute executeth the poſſeſſion in ſuch plite, manner and forme as the uſe was limited: Et ſic de ſimilibus, ſo as there is a great change of Remitters ſince Littleton wrote.

Pl.Com.ubi ſupra.

But if the Iſſue in Taile in that caſe waive the poſſeſſion, and bring a Formedon in the deſcender, and recover againſt the Feoffees, he ſhall thereby be remitted to the Eſtate Taile; otherwiſe the Lands may be ſo incumbred, as the iſſue in Taile ſhould be at a great inconvenience: but if no Formedon be brought, if that iſſue dieth, his iſſue ſhall be remitted, becauſe a ſtate in fee ſimple at the common law deſcendeth unto him.

¶ *Eſteant de pleine age il charge per ſon fait*

en fee, ou ſon Coſine inheritable per force de le taile, lequel fits ou coſin al temps de feoffement eſt deins age, & puis le tenant en le taile debia, & celuy a que le feoffment fuit fait en ſon heire per force de le Taile, ceo eſt un remitter al heire en le taile a que le feoffement fuit fait. Car coment que durant la vie le Tenant en le taile que fiſt le feoffement, tiel heire ſerra adjudge eins per force de le feoffement, uncore apres la mort le tenant en le taple, heire ſerra adjudge eins per force de le taile, & nemy p force de le Feoffement. Car coment que tiel heire fuit de pleine age al temps de le mort de le Tenaunt en le Taile que fiſt le Feoffement, ceo ne fait aſcun matter, ſi heire fuit deins age al temps del feoffment fait a luy. Et ſi tiel heire eſteant deins age al temps de tiel Feoffement, vient al pleine age vivant le Tenant en le taile, que fiſt le Feoffement, & iſſint eſteant de pleine age, il charge per ſon fait meſme la Terre obe

or his Coſine inheritable by force of the Taile, which Son or Coſine at the time of the feoffment is within age, and after the Tenant in taile dieth, and he to whom the Feoffment was made in his heir by force of the Taile, this is a remitter to the heir in tail to whom the Feoffment was made: for albeit that during the life of the Tenant in Taile who made the Feoffment, ſuch heir ſhal be adjudged in by force of the feoffement, yet after the death of tenant in tail, the heir ſhall be adjudged in by force of the Tail, and not by force of the feoffment. For although ſuch heir were of full age at the time of the death of the tenant in tail who made the feoffment, this makes no matter, if the heir were within age at the time of the feoffment made unto him. And if ſuch heir being within age at the time of ſuch feoffment cometh to ful age, living the tenant in tail that made the feoffment, & ſo being of full age he charges by his deed

un

un common de paſture, ou one un rent charge, & puis le tenant en le taile muſt, ore il ſemble q̄ le terre eſt diſcharge del common, et de le rent, pur ceo que le heire eſt eins de auter eſtate en la terre, que il fuit al temps de le charge fait, entant que il eſt en ſon remitter per force d̄ le tayle, et iſſint leſtate, que il avoit al temps de le charge, eſt oulterment defeat, &c.

the ſame Land with a common of paſture or with a rent charge, and after the Tenant in taile dieth, now it ſeemeth that the Land is diſcharged of the common, and of the rent, for that the heir is in of another Eſtate in the Land than he was at the time of the charge made, in as much as he is in his Remitter by force of the Taile, and ſo the eſtate which h: had at the time of the charge is utterly defeated, *&c.*

*&c.* The reaſon is, becauſe the Grantor had not any right of the eſtate in tail in him at the time of the grant, but only the eſtate in fee ſimple gained by the Feoffment, which (as Littleton here ſaith) is wholly defeated. And the ſtate of the land out of which the rent iſſued being defeated, the rent is defeated alſo.

But if Tenant in taile make a leaſe for life, whereby he gaineth a new reverſion in fee, ſo long as Tenant for life liveth, and he granteth a rent charge out of the Reverſion, and after Tenant for life dieth, whereby the Grantor becometh Tenant in taile again, and the Reverſion in fee defeated, yet becauſe the Grantor had a right of the entail in him, cloathed with a defeaſible fee ſimple, the rent charge remaineth good againſt him, but not againſt his iſſue: 11.H.7.21. Edriches caſe.

which diverſity is worthy of obſervation, for it openeth the reaſon of many Caſes.

If the heir apparant of the diſſeiſee diſſeiſe the diſſeiſor, and grant a rent charge, and then the diſſeiſee dieth, the Grantor ſhall hold it diſcharged, for there a new right of entry doth deſcend unto him, and therefore he is remitted.

So if the father diſſeiſe the Grand-father, and granteth a rent-charge, and dieth; now is the entry of the Grand-father taken away, if after the Grand-father dieth, the ſon is remitted, and he ſhall avoid the charge. So as where our Author putteth his example of a fee tail, it holdeth alſo in caſe of a fee ſimple.

¶ *Un common de paſture, ou un rent charge*, &c. Here Littleton putteth his caſe of things granted out of the land. But what if the iſſue at full age by deed indented, or deed poll, make a leaſe for years of the land, and after by the death of tenant in tail he is remitted, whether ſhall he avoid the leaſe or not? And it is holden he ſhall not, becauſe it is made of the land it ſelf, and the land is become by the leaſe in another plight, then it is in the caſe of a grant of a rent-charge, which I gather out of our Authors own words in another place. 33.H.8. Dyer 5.b. Vide Sect. 289.

¶ *La terre eſt diſcharge del rent*, &c. Littleton doth adde theſe two words materially, becauſe the whole grant is not thereby avoided, but the land diſcharged of the rent charge, for the Grantee ſhall have notwithſtanding a writ of Annuity, and charge the perſon of the Grantor. Li.2.f.3.6.b. Wards caſe.

## *Sect.* 661.

¶ ITem, un principal cauſe pur que tiel heire en les caſes avandits, & auters caſes ſemblables, ſerra dit en ſon remitter, eſt pur ceo or il ny ad aſcun perſon envers que il poit ſuer ſon briefe de

ALſo, a principal cauſe why ſuch heire in the caſes aforeſaid, and other like caſes, ſhall be ſaid in his Remitter, is for that there is not any perſon againſt whom he may ſue his writ of *Formedon*. For againſt

¶ *UN principall cauſ pur que*, *&c.* And of this opinion is (d) Littleton in our Books. (d) 12.E.4.20. 41.E.3.18.11.H.4.50.

¶ *Il nad aſcun perſon envers que & ſi come il avoit loialment recover meſme la terre vers un auter*, &c. Here it is to be underſtood, that regularly a man ſhal not be remited to a right

Lib.3.f 3. the Marquess of Winchesters case.

right remediless, for the which he can have no action, for Littleton here saith, that there is no person against whom the issue (when he cometh to the land without tolly) may bring his Action, and saith also, that this is the principal cause of the Remitter; for neither an Action without a right, nor a right without an action can make a remitter. So if tenant in tail suffer a common recovery in which there is error, and after Tenant in tail disseiseth the recovery and dieth; here the issue in tail hath an action, viz. a Writ of Error, but as long as the recovery remaineth in force, he hath no right; and therefore in that case there is no Remitter.

Formedon. Car envers luy mesme, il ne poit suer, & il ne poit suer envers nul auter, car nul auter est tenant del franktenement, en pur cel cause la ley luy adjudge eins en son remitter, s. ē tiel plite, come il avoit loialment recover mesme la terre envers un auter, &c.

himself he cannot sue, and he cannot sue against any other, for none other is Tenant of the freehold; and for this cause the law doth adjudge him in his Remitter, s. in such plite, as if he had lawfully recovered the same Land against another, &c.

If B. purchase Advowson, and suffereth an usurpation, and six moneths to pass, and after the usurper granteth the Advowson to B. and his heirs, B. dieth, his heir is not remitted because his right to the Advowson was remediless, v z. a right without an Action.

5.H.7.35. Tenant in tail of a Mannor whereunto an Advowson is appendant maketh a discontinuance, the Discontinuee granteth the Advowson to Tenant in tail and his heirs, tenant in tail dieth, the Issue is not remitted to the Advowson, because the Issue had no Action to recover the Advowson before he recovered the Mannor whereunto the Advowson was appendant. And so it is of all other Inheritances, regardant, appendant, or appurtenant, a man shall never be remitted to any of them before he recontinueth the Mannor, &c. whereunto they are regardant, appendant, or belonging.

Britton, fol.126. Car nul ne poit claimer droit en les appurtenances ne en les accessories, que nul droit ad en le principal

(c) Bract.li.4.fo.243.b. (c) Item excipi potest, &c. quamvis jus habeat in tenemento & pertinentiis, primo recuperare debet tenementum ad quod pertinet advocatio, & tunc postea præsentet & non ante, & de hac materia in Rotulo de Termino Sancti Michaelis, anno Regis Henrici tertii in comitatu Norff. de Thoma Badoise.

8.R.2.Quare Imp.199. 2.H.4.18.14.H.6.15,16 8.H.6.17.33.H.6.15. F.N.B.25.& 36.F. 24 E.3.Discont.16. 33.H.3.Dyer 48.b. But on the other side, if a man be remitted to the principal, he shall also be remitted to the appendant or accessory, albeit he were severed by the discontinuee, or other wrong-doer. And therefore if tenant in tail be of a Mannor, whereunto an Advowson is appendant, and infeoffeth A. of the Mannor, with the appurtenances, A. re-enfeoffeth the Tenant in tail, saving to himself the advowson, Tenant in tail dieth, his issue being remitted to the Mannor, is consequently remitted to the Advowson, although at that time it was severed from the Mannor. So it is in the same case, if tenant in tail had been disseised, and the Disseisor suffer an usurpation, if the Disseisee enter into the Mannor, he is also remitted to the advowson.

## Sect. 662.

ITem, si terre soit taile a un home & a la feme, et a les heires de lour deux corps engendres, les queux ont issue file, et le feme deby et le baron prent auter feme, & ad issue un auter file, & discontinua le taile, & puis disseisie le discontinuee & issint morust seisie, ore le terre discen-

ALso, if Land be entailed to a man and to his wife, and to the Heires of their two bodies begotten, who have issue a daughter, and the wife dieth, and the Husband taketh another wife, and hath issue another daughter, and discontinue the taile, and after he disseiseth the Discontinuee and

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dera a les deux files. Et en ceſt caſe, quant al eigne file, que eſt inheritable per force de le taile, ceo neſt un remitter forſque de le moity. Et quant al auter moity, el eſt mis a ſuer ſon action de formedon envers ſa ſoer. Car en ceſt cas les deux ſoers ne ſont pas tenants en parcenary, mes ſont tenants en common pur ceo qr ils ſont eins per divers titles. Car lun ſoer eſt eins en ſon remitter per force de le taile quāt a ceo qr a luy affiert, & lauter ſoer eſt eins quant a ceo que a luy affiert en fee ſimple per l' diſcent ſon pier, &c.

ſo die ſeiſed, now the land ſhall deſcend to the two daughters. And in this caſe, as to the eldeſt daughter, who is inheritable by force of the taile, this is no remitter, but of the moity. And as to the other moity, ſhe is put to ſue her action of *Formedon* againſt her ſiſter. For in this caſe the two ſiſters are not tenants in parcenary, but they are Tenants in common, for that they are in by divers titles. For the one ſiſter is in her remitter by force of the entail, as to that which to her belongeth, and the other ſiſter is in as to that to her belongeth in fee ſimple by the diſcent of her father, *&c.*

¶ *Eo neſt remitter forſque pur le moitie*, &c. Here Littleton putteth a caſe where the iſſue in tail ſhall be remitted to a moity, becauſe but a moity of the land deſcended unto her, and there cannot be any remitter, for ſo much as cometh to the iſſue by diſcent, or by any other means without his folly; and in this caſe by act in law the Coparcenary is defeated, for the daughters are in by ſeveral titles, viz. the eldeſt daughter is Tenant in Tail per formam doni, by the remitter of the one moity, and the youngeſt ſiſter in fee ſimple by diſcent of the other moity, againſt whom the other ſiſter in tail may have her Formedon. 44. E. 3. 27. 19. H. 6. 59.

## Sect. 663.

EN Meſme le manner eſt, ſi tenant en tayle enfeoffa ſon heire apparant en le tayle eſteant l'heire deins age, & il auter jointenāt en fee, et le tenāt in taile mozuſt, ore l' heir e taile eſt e ſon remitter quāt a lun moity, & quāt a lauter moitie il eſt mis a ſon briefe de Formedon, *&c.*

IN the ſame manner it is, if Tenant in tail enfeoffe his heir apparant in tail, (the Heire being within age) and another jointenant in fee, and the Tenant in tail dieth; now the heir in taile is in his Remitter as to the one moity, and as to the other moity he is put to his Writ of *Formedon*, &c.

¶ *Le heire, &c. eſt eins ſon remitter quant a lun moitie*, &c. Hereby it appeareth, that albeit joyntenants be ſeiſed pro indiviſo per my & per tout; yet each of them hath in judgment of Law but a right to a moitie; and therefore the iſſue in tail in this caſe is remitted but to a moitie, and is tenant in Common, but with the other Feoffee. And ſo it is, if the Diſcontinuee after the death of Tenant in tail make a Chartet of feoffment to the iſſue in taile being within age who hath right, and to a ſtranger in fee, and make livery to the infant in name of both: the iſſue is not remitted to the whole, but to the half. For firſt he taketh the fee ſimple, and after the remitter is wrought by operation of Law, and therefore can remit him but to a moity. But of this ſufficient hath been ſaid, in the Chapter of Joyntenants. vide Sect. 288.

## Sect. 664.

¶ Item, ſi ten en taile enfeoffa ſon heire apparant, l' heire eſteant de pleine age al temps de feoffment, & puis le ten en taile mozult, ceo nest remitter al heir, pur ceo que il fuit ſa folly, que il eſteant de pleine age voile prender tiel feoffment, &c. Mes tiel folly ne poit eſtre adjudge en l' heire eſtant deins age al temps del feoffment, &c.

ALſo, if Tenant in taile enfeoffe his heir apparent, the heir being of full age at the time of the feoffment, and after Tenant in tail dieth; this is no Remitter to the heir, becauſe it was his folly, that being of full age he would take ſuch feoffment, &c. but ſuch folly cannot be adjudged in the heir being within age at the time of the feoffment, &c.

40. E. 3. 44. 18. E. 4. 25.

¶ By this feoffment albeit the heir apparant hath ſome benefit in the life of his Anceſtor, yet is he thereby (beſides his own) ſubject during his life to all charges and incumbrances made or ſuffered by his Anceſtor. And therefore our Author ſaith well, Que il fuit ſon folly que il eſteant de pleine age voille prender tiel feoffment, but folly ſhall not be judged in one within age in reſpect of his tender years and want of experience.

## Sect. 665.

¶ HEre Littleton putteth a Caſe where the husband within age by the intermarriage may be remitted, albeit he gaineth but a freehold during the Coverture en autr droit.

Alſo here is to be obſerved, that the eſtate which doth in this caſe work the Remitter, could not have continuance after the decaſe of the wife. And ſo on the other ſide if the husband make a diſcontinuance, and take back an eſtate to him and his wife, during the life of the husband; this is a Remitter to the wife preſently, albeit the eſtate is not by the limitation to have continuance after the decaſe of the husband; which caſe is proved by the reaſon of the caſe which our Author here putteth. And here our Author obſerveth the diverſity when the husband is within age, and when he is of full age; for when he is within age, no folly can be adjudged in him, as in this Chapter hath been often ſaid.

¶ Item, ſi tenant en taile enfeoffa un feme en fee & mozult, et ſon iſſue deins age prent meſme la feme a feme, ceo eſt un remitt al enfant deins age, & la feme donq̃ nad rien, pur ceo que le baron & la feme ſoit forſque come un perſon en ley. Eten ceſt cas le baron ne poit ſuer briefe de Formedon, ſinon que il voiloit ſuer en bez̃ luy meſm. le quel ſerroit enconvenient, & pur cel cauſe la ley adjudgera l' heire en ſon remitter, pur ceo que nul folly poit eſtr adjudge en luy, eſteat

ALſo, if Tenant in Taile enfeoffe a woman in fee, and dyeth, and his iſſue within age taketh the ſame woman to wife; this is a Remitter to the Infant within age, and the wife then hath nothing, for that the huſband and his wife are but as one perſon in Law. And in this caſe the husband cannot ſue a writ of *Formedon*, unleſs he will ſue againſt himſelf, which ſhould be inconvenient; and for this caſe the Law adjudgeth the heir in his Remitter, for that no folly can be adjudged in him being

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deins age al temps deſpouſels, &c. Et ſi heire ſoit en ſon remitter per force de le taile, il enſuit per reaſon, q̄ la feme nad riens, &c. Car entant que le barō & ſa feme ſont com un perſon, la terre ne poit eſtre lebere per moities, & pur cel cauſe l'barō eſt en ſō remitter de lentiertie: Mes autermēt eſt ſi tiel heir̄ fuit de pleine age al temps de les eſpouſels, car donques le heire nad riens forſque en droit ſa feme, &c.

within age at the time of the Eſpouſals, *&c.* And if the Heir be in his remitter by force of the entail, it followeth by reaſon that the wife hath nothing, *&c.* for in as much as the Husband & wife be as one perſon the land cannot be parted by moities, & for this cauſe the huſband is in his remitter of the whole. But otherwiſe it is if ſuch Heir were of full age at the time of eſpouſals, for then the heir hath nothing but in right of his Wife, *&c.*

Here is alſo to be noted, that preſently by the marriage within age, the husband is remitted, and the freehold and Inheritance of the wife baniſhed clean away.

¶ *Priſt meſme la feme al feme.* Here it is good to be ſeen what things are given to the Husband by marriage. Firſt, it appeareth here by Littleton, that if a man taketh to wife a woman ſeiſed in fee (f) he gaineth by the intermarriage an Eſtate of Freehold in her right, which eſtate is ſufficient to worth a Remitter, and yet the eſtate which the Husband gaineth dependeth upon uncertainty, and conſiſteth in privity; (g) for if the wife be attainted of felony, the Lord by Eſcheat ſhall enter and put out the Husband; otherwiſe it is if the felony be committed after iſſue had. Alſo if the Husband be attainted of felony, the King gaineth no Freehold but a pernancy of the profits during the Coverture, and the freehold remaineth in the wife. (h) Secondly, if ſhe were poſſeſſed of a term for yeers, yet he is poſſeſſed in her right, but he hath power to diſpoſe thereof by Grant or Demiſe; and if he be outlawed or attainted, they are gifts in Law.

(f) 13.H.4.6. Stanf.l.7. b. 18.E.4.5.11 H.7.19. 10.H.6.11.7.H.6.9.b.

Vide Sect.58.

(g) 4. Aſſ.P.4. 4.E.3.Aſſ.166.

(h) Pl.Com.f.260.b. Dame Hales caſe. 50.Aſſ.5,38 H.6.23. 21.E.4.35 7.E.4.6. 7.H.7.2.16.H.6.11.

(*) Upon an Execution againſt the Husband for his debt, the Sheriff may ſell the term during her life: but the Husband can make no diſpoſition thereof by his laſt will. Alſo if he make no diſpoſition or forfeiture of it in his life; yet it is a gift in Law unto him if he do ſurvive his wife; but if he make no diſpoſition and die before his wife, ſhe ſhall have it again; and the ſame Law is of Eſtates by Statute Merchant, Statute Staple, Elegit, Wardſhips and other Chattels reals in poſſeſſion.

(*) Mich.26.& 27.El. inter amnor & Lodington in brieſe de error adjudge in both Courts; lib.8 fol.96.Mat. Mannings caſe, 7.H.6.fol.2.

But if the Husband charge the Chattel real of his Wife, it ſhall not bind the wife if ſhe ſurvive him.

If a feme ſole be poſſeſſed of a Chattel real, and be thereof diſpoſſeſſed, and then taketh Husband, and the Wife dieth, and the husband ſurviveth, this right is not given to the Huſband by the intermarriage, but the executors or adminiſtrators of the wife ſhall have it; ſo it is if the Wife have but a poſſibility.

Vide Sect.58.

In the ſame manner it is, if the wife be poſſeſſed of Chattels reals in auter droit, as Executrix or Adminiſtratrix, or as Gardein in Socage, &c. and ſhe intermarrieth, the law maketh no gift of them to the husband, although he ſurviveth her. In the ſame manner, if a woman grant a term to her own uſe, taketh Husband, and dieth, the Husband ſurviving ſhall not have this truſt, but the Executors or Adminiſtrators of the wife, (i) for it conſiſteth in privity; and ſo hath it been reſolved by the Juſtices. Chattels reals conſiſting meerly in Action, the Husband ſhall not have by the intermarriage, unleſſe he recovereth them in the life of the Wife, albeit he ſurvive the Wife, as a writ of Right of Ward, a valore maritagii, a forfeiture of marriage, and the like, whereunto the wife was intituled before the marriage.

Pl.Com.fol 294. Osbornes caſe, and there f.192.b. Wrotesleys caſe

(i) Paſch.22. El.in Cancellar. in Wailthams caſe. Hill.38.El.in Cancel. in Waterhouſes caſe. Wrotesleys caſe, ubi ſup.

But Chattels reals being of a mixt nature, viz. partly in poſſeſſion, and partly in Action, which happen during the Coverture, the Husband ſhall have by the intermarriage, if he ſurvive his wife, albeit he reduceth them not into poſſeſſion in her life time; but if the wife ſurviveth him, ſhe ſhall have them. As if the husband be ſeiſed of Rent ſervice, Charge, or Seck, in the right of his wife, the rent become due during the coverture, the wife dieth, the husband ſhall have the arrerages; but if the wife ſurvive the husband, ſhe ſhall have them, and not the Executors of the Husband. So it is of an Advowſon, if the Church become void during the Coverture, (k) he may have a Quare impedit in his own name, as ſome hold: but the Wife ſhall have it if ſhe ſurvive him, and the Husband, if he ſurvive her. Et ſic de ſimilibus.

13.E 3 Quare imp.57. 14.H.4.12.38.E.35.b. 50.E.3.13. 10.H.6.11.F.N B.21. 22.H.6.25.29.E.3 40. 11.R 2.Account.49. 12.R 2.Briefe 639. 5 E.3.Execut.99. (k) 50.E.3.13.28.H.6.9. 7.H.7.2.

But if the arrerages had become due, or the Church had fallen void before the marriage, there they were meerly in action before the marriage; and therefore the husband should not have them by the common Law, although he survived her. And so it is of reliefes, Mutatis mutandis: (l) But now by the Statute of 32.H.8.cap. 37. if the husband survive the wife, he shall have the arrerages as well incurred before the marriage, as after.

But the marriage is an absolute gift of all Chattels personals in possession in her own right, whether the husband survive the wife or no; but if they be in action, as debts by Obligation, contract, or otherwise, the husband shall not have them unlesse he and his wife recover them. And of personal goods en auter droit, as Executrix or Administratrix, &c. the marriage is no gift of them to the husband, although he survive his wife.

(m) If any Estray happen within the Manor of the Wife, if the husband die before seisure the Wife shall have it, for that the property was not in the Wife before seisure.

But as to personal goods there is a diversity worthy of observation, between a property in personal goods (as is aforesaid) and a bare possession; for if personal goods be bailed to a Feme, or if she find goods, or if goods come to her hand as Executrix to a Bailiff, and taketh a Husband, this bare possession is not given to the Husband, but the Action of detinue must be brought against the Husband and Wife.

But now let us hear Littleton.

¶ *Le quel serra inconvenient.* This argument ab inconvenienti, our Author hath used in many places.

26.E.3.64.10.H.6.11. F N.B.121.22.H.6.25. (l) Li.4.fol.51.in Ognels case, Hil.17.El.Rot 157 in Com.Banco, Sharps case.

Vide Sect.87.&c.

21.E.4.4.21.H.7.29. 11.H.7.4.26.H.8.7. 43 E.3.10.3.H.6.23.37. 4.H.6.5.14 E.2.Det.73 5.E.2.ib.169.30.E.3. 48.E.3.12.12.R.3.Bre. 638.639.16.E.4.8. 16.E.6.Bre.939. (m) 43.E.3.8.V.10.H. 6.11.39.E.17.

## Sect. 666.

¶ Item, si Feme seisie de certaine terre en fee prent baron, le quel aliena mesme la terre a un auter en Fee, la lienee lessa mesme la terre al baro & la Feme pur terme de lour deux vies, lavant le reversion al Lessor & a ses heires, en cest cas la Feme est eins en son Remitter, & el est seisie en Fait en son demesme come de Fee, si come el fuit advant pur ceo qr le repris del Estate serra adjudge en Ley le Fait le Baron, & nemy le Fait la feme, isint nul folly poit estre adjudge en la feme, que est covert en tiel Case, & en cest case le Lessor nad rien en le reversio, pur ceo que la Feme est seisie en Fee, &c.

ALso, if a woman seised of certain Land in fee, taketh Husband, who alieneth the same Land to another in fee, the Alienee letteth the same Land to the husband and wife for terme of their two lives, saving the reversion to the Lessor and to his Heirs: In this case the Wife is in her Remitter, and she is seised in Deed in her Demesne as of Fee, as she was before, because the taking back of the estate shall be adjudged in law the fact of the Husband, and not the fact of the Wife, so no folly can be adjudged in the wife which is Covert in such case. And in this case the Lessor hath nothing in the Reversion, for that the wife is seised in fee, *&c.*

21.E.3.26,29.E.3.43. 41.E.Remit.11.19.E.3. Remit.14.35.Ass.12. 38.E.3.24.39.E.3.29.20 41.E.3.17 46.E.3.20.B. 26.E.3.69.Vid.Sect 676 11.R.2.Remit.12,44.E. 3.17.

¶ *A feme est son Remitter.* By this it appeareth, That albeit there be no moities between husband and wife, yet this is a remitter, presently, and standeth not upon the survivor of the wife, as some have thought: for if the estate gained by intermarriage be a sufficient Estate to work a Remitter, à fortiori, an estate made to the husband and wife shall work a Remitter in the Wife. And so it is if tenant in tail infeoffe his Issue being within age, and his wife in Fee, and dieth, this is a remitter to the Issue presently, by the death of Tenant in tail, though some have thought the contrary.

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Here alſo it appeareth, That no folly in this caſe can be adjudged in a feme covert, for the taking back of the eſtate ſhall be adjudged in law the act of the husband. The Marqueſſe of Winch. caſe, ubi ſupr.

Note in the caſe of the Feme Covert, ſhe may be remitted in the life of the Diſcontinuor, becauſe ſhe hath a preſent right: but in the caſe of tenant in tail, the iſſue cannot be remitted in the life of the Diſcontinuor, becauſe the Iſſue hath no right until his deceaſe.

## *Sect.* 667.

¶ MEs en cē caſe ſi le Leſſour voile ſuer Action de Waſt vers le Baron & ſa Feme, pur ceo que le Baron avoit fait Waſt, le Baron ne poit barrer le leſſor pur monſtre ceo, que l' reprisel dl eſtat fait a luy & a ſon feme, fuit un Remitter a ſa feme, pur ceo que le Baron eſt eſtoppe adire ceo que eſt encounter ſ feoffment, & ſon reprisel demeine del eſtate p terme de vie a luy & a ſa feme. Et uncore le Leſſor nad un Reverſion, pur ceo que le fee ſimple eſt en la feme. Et iſſint home poit veier un matter en ceo caſe, que home ſerra eſtoppe per un matter en fait, comēt que nul Eſcripture ſoit fait per Fait indent ou auterment.

But in this Caſe if the Leſſor will ſue an Action of Waſte againſt the husband and his wife, for that the husband hath committed waſte, the husband cannot barre the Leſſor by ſhewing this, that the taking back of the Eſtate to him and to his wife, was a Remitter to his wife, becauſe the husband is ſtopped to ſay that which is againſt his own Feoffment and taking back of the Eſtate for terme of life to him and to his Wife. And yet the Leſſor hath no reverſion, for that the Fee ſimple is in the Wife. And ſo a man may ſee one thing in this caſe, That a man ſhall be ſtopped by matter in Fact, though there be no Writing by Deed indented, or otherwiſe.

¶ *Pur ceo que baron eſt eſtoppe adire, &c.*

¶ *Eſtoppe* cometh of the French word Eſtoupe from whence the Engliſh word Stopped: and it is called an Eſtoppell or Concluſion, becauſe a mans own Act or acceptance ſtoppeth or cloſeth up his mouth to allege or plead the truth: and Littletons caſe here proveth this deſcription. Lib. 2. f. 4 b. Goddards caſe. vide Sect. 41, 693, 695, 679.

Touching eſtoppels, which is an excellent & curious kind of learning, it is to be obſerved, that there be three kinds of Eſtoppels, viz. By matter of Record, by matter in writing, and by matter in Paiis.

(a) By matter of Record, viz. By Letters Patents, Fine, Recovery, Pleading, taking of continuance, Confeſſion, Imparlance, Warrant of Attorney, Admittance. (a) 43. Aſſ. 29. 8. H. 4. 7. 8 22. Aſſ. 54. 15. E. 3. Eſtop. 239. 4 E. ib. 133.

(b) By matter in writing, as by Deed indented, by making of an Acquitance by Deed indented, or Deed poll, (c) by Defeaſance by deed indented or deed poll. (b) 4. H. 4. 1. 8. H. 7. 6. 13. H. 7. 24. 15. E. 4. 28. 41. E. 3. Eſtop. 12. 12. R. 2. ib. 212. (c) 8. R. 2. Eſtop. 283. 35. H. 6. 18. 3. H. 6. 16. 16. H. 7. 5. 34. H. 6 19. 14. H. 4. 29.

By matter in Paiis, as by Livery, by Entry, by acceptance of Rent, by partition, and by acceptance of an Eſtate, as here in the caſe that Littleton putteth, whereof Littleton maketh a ſpeciall obſervation, that a man ſhall be eſtopped by matter in the Country, without any Writing. (d) 33 H 6. 29. 50. 30. H. 6. 2. 10. E. 3. Eſtop. 240. 33. Aſſ. 11. 30. Aſſ. 51. 14. Aſſ. 9. 18. E. 4. 1.

To make the Reader more careful of the learning of Eſtoppels, theſe few rules, amongſt others, are to be known.

(d) Firſt, that every Eſtoppel ought to be reciprocal, that is, to bind both parties, and this is the reaſon, that regularly a ſtranger ſhall neither take advantage, nor be bound by the Eſtoppel. (e) Privies in blood, as the Heir, Privies in Eſtate, as the Feoffee, Leſſee, &c. Privies in Law, as the Lords by eſcheat: Tenant by the Courteſie, Tenant in Dower, the (e) 8. Aſſ. 53. Br. Fines 73. 8. H. 6. 17. 12. E. 3. 35. 38. E. 31. 20. E. 3. Eſtop. 187.

Incumbent

Incumbent of a Benefice, and others that come under by act in Law, or in the Poſt, ſhall be bound and take advantage of Eſtoppels, and that a rebutter is a kind of Eſtoppel.

(f) 21.E.4.4.23.Aſſ.14. 17.H.6.*Eſtop.*273.18. E.3.30,7.*H.*7.6.& 16.

(f) Secondly, that every Eſtoppel, becauſe it concludeth a man to alledge the truth, muſt be certain to every intent, and not to be taken by argument or inference.

(g) 46.*E.*3.33.29.Aſſ.38 Pl.Com.398.

(g) Thirdly, every Eſtoppel ought to be a preciſe affirmation of that which maketh the Eſtoppel, and not be ſpoken impersonally; as if it be ſaid, Ut dicitur, quia impersonalitas non concludit, nec ligat: impersonalis dicitur, quia ſine perſona. (h) Neither doth a recital conclude, becauſe it is no direct affirmation.

(h) 35.H.6.33.46,E.3. 12.49-E.2.14.8.Aſſ.3.45 Aſſ.5.5.El.Dy.196.11. *El.*ib.280.9.H.6.60.

(i) Fourthly, a matter alledged that is neither traverſable, nor material, ſhall not eſtoppe.

(i) 5.E.4.8.*E.*4.19.10. E.4.12.22,E.4.38.32. Aſſ.9.35.*H.*6.20.

(k) Fiftly, regularly a man ſhall not be concluded by acceptance or the like, before his Title accrued.

(k) 33.H.6.16.4.E.3.22. 6.H.4.7.31.E.1.Gard. 155.F.N.*B.*142 E.

(l) Sixthly, Eſtoppel againſt eſtoppel doth put the matter at large.

(l) 12.H.7.4.20.H.6.29. 3 H.4 9,41 *E.*3.4.11,H. 4.30.

(m) Seventhly, matters alledged by way of ſuppoſal in Count ſhall not conclude after Non-ſuit: otherwiſe it is after judgment given and after Non-ſuit, albeit the ſuppoſal in the Count ſhall not conclude, yet the Bar, Title, Replication, or other pleading of either party, which is preciſely alledged, ſhall conclude after Non-ſuit; and hereby are the Books reconciled.

(m) 2.R.3,14.2.R.2.Eſtoppel.20.40.E.3.21 12 E.4.13.18.E.3.31.35.44 E.3.45.17. Aſſ.27.45.E. 3.2.21.H.7.24.5. E 4.7. 7.E.4.19.3 E.4 81.4.E. 3.54.7.E.6.Br. *Eſtop.* 162,11.H.4.30.30.E.3. 21.31.Aſſ.14.14.

Eighthly, where the verity is apparent in the ſame record, there the adverſe party ſhall not be eſtopped to take advantage of the truth, for he cannot be eſtopped to alledge the truth, when the truth appeareth of Record. (n) If a Fine be levied without any original, it is voidable, but not void; but if an Original be brought, and a Retraxit entred, and after that a Concord is made, or a fine levied, this is void, in reſpect the verity appeareth of Record. (o) An Impropriation is made after the death of an incumbent, to a Biſhop and his Succeſſors, the Biſhop by indenture demiſeth the Perſonage for forty yeers, to begin after the death of the Incumbent, the Dean and Chapter confirmeth it, the Incumbent dieth, the Demiſe ſhall not conclude, for that it appeareth that he had nothing in the Impropriation till after the death of the Incumbent.

(n) 37.Aſſ.17.38 *H.*6.12 5.El.*Dy.*222.

(o) El.Dy.244.

(p) Bract.f.420.26.Aſſ. 64.33.Aſſ.10.11.H.4. 84.7.H.6.32.Aſſ.5.11. E.3.Eſtop.229.21.E.3. 39.19.R.3.Eſtop.282. 3.E.3.ib.23.33.E.3 Eſtop.Stath.*Leſtat.*de 9.*H.*6.cap.11.20,*H.*6.2 Doct.& Stud.69.34.H. 6.39.18.E.4.1,b.10.*E.* 4.16.

(p) Ninthly, Where the Record of the Eſtoppel doth run to the diſability or legitimation of the perſon, there all ſtrangers ſhall take benefit of that Record, as Outlawry, Excommengement, Profeſſion, Attainder of Præmunire, of Felony, &c. Baſtardy, Mulierty, and ſhall conclude the party, though they be ſtrangers to the Record, Vide Littleton in cap. Villenage, Sect. 196, 197, &c. But of a record concerning the name of the perſon, quality or addition, no ſtranger ſhall take advantage, becauſe he ſhall not be bound by it. But Note, Reader, That in caſe of the Mulierty, prima facie, an ſtranger ſhall take benefit of it, &c. But yet becauſe he may be a Mulier by the Eccleſiaſtical Law, and a baſtard by the common Law; therefore againſt ſuch a certificate pleaded, the adverſe party may alledge the ſpecial matter, and confeſſe the certificate of the Biſhop according to the Eccleſiaſtical law, and alledge further the ſpecial matter according to the common Law, whereunto the adverſe party muſt anſwer; and ſo are the Books that treat of this matter, to be reconciled. But now let us return to Littleton.

## *Sect.* 668.

"*LA Feme pria deſtre reſceive & ſoit reſceive.* Receipt, Receptio, cometh of the Latine Verb Recipere, ſo called becauſe the wife upon the default of her huſband, is received as a feme ſole alone, without her husband, to defend her right, and it is alſo called Defenſio juris: and in this caſe the wife may be received by the (a) Statute, and yet (b) antient Authors who wrote before the Statute, do ſpeak of a kind of Receit at the Common Law. The Civilians call Reſceit, Admiſſionem tertii pro ſuo intereſſe; which more properly is reſembled to the receit of him in the reverſion, or remainder, that is no party to the writ.

20.E.1.Defenſio juris.

(a) W.2.cap.3.

(b) Bract.f.393.Mir. Lib.3.cap.Exceptions.

"MEs ſi en action de Waſt le baron fait default a le graund diſtreſſe, & la feme pria deſtre receive, receive ſoit receive, el monſtra bien tout le matter, & coment el eſt en ſon Remitter, & el barrera le Leſſor d ſon Action, &c.

But if in the Action of Waſte the husband make default to the grand Diſtreſſe, and the Wife pray to be received, and is received, ſhe may well ſhew the whole matter, and how ſhe is in her remitter, and ſhe ſhall bar the Leſſor of his Action, *&c.*

*Sect.*

## *Sect.* 669.

¶ CAr en chescun cas lou feme est receive p̄ default son baron, el pledera e avera ñ ladvantage en plee pledant, come el fuissoit feme sole, &c. Et coment q̄ lalienée fit le leas al baron e a sa feme, p̄ fait endent, uncore ceo est remitter a la feñ. Et auxy coment que lalienée rendit meisme la terre al baron e a sa feme p̄ fine p̄ terme de lour vies, uncore ceo est un remitter al feme, pur ceo que feme covert que p̄nt estate per fine, ne serra my examine per les Justices, &c.

FOr in every Case where the Wife is received for default of her husband, she shall plead and have the same advantage in pleading, as she were a woman sole, *&c.* and albeit that the alienee made the lease to the husband and wife by deed indented, yet this is a Remitter to the wife: and also albeit the alienee rendereth the same land to the husband and his wife by fine for term of their lives, yet this is a Remitter to the wife, because a feme covert which takes an estate by fine shall not be examined by Justices, *&c.*

¶ *Come el fuissoit feme sole, &c.*

In this Section four things are to be understood.

First, when a feme covert is received, that she shall plead as if she were sole. And this is regularly true, yet holdeth not in all cases, (c) for if a feme covert be received in an assise, and plead a record and fail, therefore she shall not be adjudged a Disseisor, as she should be if she were sole, &c. So if a feme covert only levie a fine executory, and a scire facias is brought against her and her husband, if she be received upon the default of her husband, she shall bar the Conusee, which if she had been sole she could not do, and in some other cases.

(c) 37. Ass. 1.

17. Ass. 17. 29. E. 3. 43. 5. E. 3. Vouch. 178.

Secondly, that though the estate taken back be by deed indented, yet that shall not hinder the Remitter in case of a Feme covert, or an Infant.

Thirdly, that though it be by fine surrender'd, yet that shall not hinder the remitter, because a feme covert is not to be examined upon any fine, but when she and her husband pass some estate or interest, or release her right by a fine of Land or tenements.

Fourthly, if the husband levie a fine of his wives Lands, and the Conusee grant and render the land to the husband and wife, although the wife be not party to the original, nor to the Conusance, and therefore she ought not by the law to take any present estate but by way of remainder only: yet here it is proved by Littleton, that the grant and surrender de facto to the wife in præsenti is not void, for then it could not work a Remitter, but voidable by writ of Error, and that avoidable estate doth work a Remitter.

¶ *Ne serra my examine per les Justices, &c.* The examination of a feme Covert ought to be secret, and the effect is to examine her whether she be content to levie a fine of such lands (naming them particularly and distinctly, and the state that passeth by the fine) of her own voluntary free will, and not by threats, menaces, or any other compulsory means.

Trin. 27. El. Inter Owen & Morgan, Rot. 276. in Banco Com. Lib. 3. f. 5. the Marquess of Winchesters case. 7. E. 3. 64. 13. E. 3. Voucher, 119.

## *Sect.* 670.

¶ ET hic nota, que quand alcū chose passera de la feme que est covert de baron per force

AND here note, that when any thing shall pass from the wife which is covert of a husband by dur

dun fine, ſicome le baron et la feme ſeſont un conuſance de droit a un auter, &c. ou ſeſoyent un grant & render a un auter, ou releſſent per fine a auter, & ſic de ſimilibus, lou le droit del feme paſſeroit del feme p force de meſme le fine, en touts tiels cales la feme ſerra examine devaunt q̄ la fine ſoit accept pur ceo q̄ tiels fines concluderont tiels femes coverts a touts jours, &c. Mes lou riens eſt move en le fine forſq; tantſolement que le baron & la feme preignont eſtate per force de meſme le fine, ceo ne concluder la feme, pur ceo que en tiel cas el jammes ne ſerra myz examine, &c.

force of a fine: As if the husband and wife make a conuſance of right to another, &c. or make a grant and render to another, or releaſe by fine unto another, *& ſic de ſimilibus*, where the right of the wife ſhall paſs from the wife by force of the ſame fine; in all ſuch caſes the wife ſhall be examined before that the fine be taken, becauſe that ſuch fines ſhall conclude ſuch femes coverts for ever. But where nothing is moved in the fine, but only that the husband and wife do take an eſtate by force of the ſaid fine; this ſhall not conclude the wife, for that in ſuch caſe ſhe ſhall not be at all examined, *&c.*

(d) 15.E.4.28.24.E.3. 31.42.E.6.3.H.6.32. 20.E.3.tit.Cui in vita 10. (*) 29.E.3.43.46.E.3.5.

"Quant aſcun choſe paſſera de la Feme covert, &c. *per force dun fine*, &c. And of this opinion is (d) Littleton in our Books.

* Therefore if the husband and wife be tenants in ſpecial tail, and they levie a fine at the common Law, and after the husband and wife take back an eſtate to them and their heirs; in this caſe the eſtate tail is not barred; and yet againſt a fine levied by her ſelf ſhe cannot be remitted, becauſe thereupon ſhe was examined; but in that caſe, if the Land deſcend to her iſſue, ſhe ſhall be remitted.

## Sect. 671.

"Item, ſi tenant en taile diſcontinua le taile, & ad iſſue file, & mozuſt, & la file eſteant de pleine age prent baron, & le diſcontinuée fait un releas de ceo al baron & a ſa feme pur terme de lour dies, ceo eſt un Remitter al feme, & la feme eſt eins per force de le taile, Cauſa qua ſupra.

Alſo, if tenant in tail diſcontinue the tail, and hath iſſue a daughter and dieth, and the daughter being of full age taketh huſband, and the diſcontinuee make a releaſe of this to the husband and wife for term of their lives; this is a remitter to the wife, and the wife is in by force of the taile, *Cauſa qua ſupra*, &c.

"Et la file eſteant de plein age prent baron, *&c.* Here it appeareth that her full age when ſhe took Baron is not material, but her coverture at the taking back of the eſtate. And ſo note a diverſity between a Remitter & a Diſcent. For if a woman be diſſeiſed, and being of full age taketh husband, and then the Diſſeiſor dieth ſeiſed; this Diſcent ſhall bind the wife, albeit ſhe was covert when the diſcent was caſt, becauſe ſhe was of full age when ſhe took husband, as appeareth before in the Chapter of Diſcents. But albeit the wife that hath an ancient right, and being of full age taketh a husband, and the Diſcontinuee letteth the land to the Husband and wife for their lives, this is a remitter to the wife. For remitters to ancient rights are favoured in law.

Sect.

## *Sect.* 672.

¶ Item, ſi terre ſoit done a le baron & a ſa feme, a aver & tener a eux & a les heires de lour deux corps engēdres, & puis l'baron aliena la terre ē fee, & repient eſtate a luy & a la feme pur terme de lour deux vies, en ceſt cas il eſt remitter en fait a le baron & a ſa feme maugre l'baron. Car il ne poit eſtr un remitter en ceſt cas a la feme, ſinon que ſoit un remitter a la Baron, pur ceo que le baron & ſa feme ſont tout un meſme perſon en ley, tanent q̄ le baron eſt eſtopper de claymer. Et pur ceo, ceo eſt un remitter en luy encounter ſon alienation & ſon repriſel ſa demeſne, coment eſt dit avedant.

ALſo, if land be given to the husband and to his wife, to have and to hold to them and to the heirs of their two bodies begotten, and after the husband alien the land in fee, and take back an eſtate to him and to his wife for term of their two lives; in this caſe this is a Remitter in deed to the husband and to his wife, maugre the husband. For it cannot be a Remitter in this caſe to the wife, unleſs it be a Remitter to the husband, becauſe the husband and wife are all one ſame perſon in law, though the husband be ſtopped to claim it. And therefore this is a Remitter againſt his own alienation and repriſel as is ſaid before.

¶ Here it appeareth that the husband againſt his own alienation, if he had taken the eſtate to him alone, could not have been remitted. But when the eſtate is made to the husband and wife, albeit they be but one perſon in Law, and no moities between them, yet for that the wife cannot be remitted in this caſe, unleſs the husband be remitted alſo; and for that remitters, as hath been often ſaid, are favoured in Law, becauſe thereby the more ancient and better rights are reſtored again: therefore in this caſe, in judgment of law, both husband and wife are remitted, which is worthy of great obſervation.

## *Sect.* 673.

¶ Item, ſi terre ſoit done a un feme en taile, le remainder a un auter en taile, le remainder a le tierce en taile, le remainder al quart en fee, & la feme prent baron, & le baron diſcontinua la terre en fee, per cel diſcontinuance touts les remainders ſon diſcontinues. Car ſi la feme deviaſt ſans iſſue, ceux en le remainder naveront aſcun remedie forſque de ſuer lour briefs de Formedon en le remainder

ALſo, if land be given to a woman in tail, the remainder to another in tail, the remainder to the third in taile, the remainder to the fourth in fee, and the woman taketh husband, and the husband diſcontinue the land in fee; by this Diſcontinuance all the remainders are diſcontinued. For if the wife die without iſſue, they in the remainder ſhall not have any remedie but to ſue their writs of *Formedon* in the remainder, when quand

quand il auient a lour tẽps. Mes si apres tiel discontinuance, estate soit fait a le baron & sa feme pur terme de lour deux dies, ou pur terme dauter vie, ou auter estate, &c. pur ceo que ceo est un remitter al feme, ceo est auxy un remitter a touts ceux en le remainder. Car apres ceo que la feme que est en son remitter morust sans issue ceux en le remainder poyent enter, &c. sans aſcun action suer, &c. En meisme le maner est de ceux que ount la reuersion apres tiel tailes.

it comes to their times. But if after such discontinuance, an estate be made to the husband and wife for terme of their two lives, or for terme of another mans life, or other estate, &c. for that this is a remitter to the wife, this is also a remitter to all them in the remainder. For after that the wife which is in her remitter be dead without issue, they in the remainder may enter, *&c.* without any action suing, *&c.* In the same manner is it of those which have the reversion after such entails.

41. E. 3. 17. 41. Ass. 1. 36. Ass. p. 4.

LIt. vpon having spoken of Remitters to the issue in tail, who is privy in blood, and to the wife who is privy in person; now he speaketh of Remitters to them in reversion or remainder expectant, upon an estate tail who are privy in estate. And this case proveth the wife is remitted presently, for the equity of the law requireth, that as the discontinuance of the estate in tail is a discontinuance of the reversion or remainder, so that the Remitter to the estate in tail should be a remitter to them in the reversion or remainder.

44. Ass. p. 15. 44. E. 3. 30.

Tenant for life, the remainder to A. in tail, the remainder to B. in fee. Tenant for life is disseised, a collateral Ancestor of A. releaseth with warranty and dieth, whereby the estate tail is barred; the tenant for life re-entreth, the disseisor hath an estate in fee simple determinable upon the state tail, and the remainder of B. is revested in him; and so note in this case, the estate for life, and the remainder in fee are revested and remitted, and an estate of inheritance left in the disseisor.

20. E. 3. Aid. 29.

If a lease be made for grant & render to one for life or in tail, the remainder in fee; if tenant for life or in tail, execute the estate for life or in tail, this is an execution of the remainder.

Vid. Pl. Com. 489. Nicholas case & fol. 553. in Walsinghams case. 17. Eliz. Dier 344. 25. E. 3. 48. tit. Resceit 28. 49. E. 3. 16.

Where in tail is made to B. the remainder to C. in fee, B. discontinueth and taketh back an estate in tail, the remainder in fee to the King by deed inrolled, tenant in tail dieth, his issue is remitted, and consequently the remainder, as Littleton here saith, and the diversity is (a) between an act in law, for that may devest an estate out of the King, and a tortious act, or entry, or a false and a feigned recovery against tenant for life or in tail, which shall never devest any estate, remainder or reversion out of the King. (b) But a recovery by good title against tenant for life, or in tail, where the remainder is to the King by defeasible title, shall devest the remainder out of the King, and restore and remit the right owners.

(a) Seignior Stafford's case, Lib. 8. fol. 76. b. (b) Chomleys case, l. 2. 53. 7. R. 2. Aide le Roy. 61. 22. E. 3. 7.

## Sect. 674, 675.

¶ *Feint & faux action.* 1. Actio ficta & falsa. But hereof Littleton speaketh himself in this Chapter.

¶ *Quod ei deforceat*, is a Writ that is given by (c) Statute to any Tenant for life, or in taile, upon a recovery by default against them in a Præcipe, and lieth against the

(c) W. cap. 4.

¶ Item, si home lessa un mease a un feme pur terme de sa vie, sabāt l' reversion al lessour, & puis un suist un feint & faux action envers la feme, & recoverast le mease envers luy per default, issint que

ALso, if a man let a house to a woman for term of her life, saving the reversion to the Lessor, and after one sue a feigned and false action against the woman, and recovereth the house against her by default; so as the

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la feme poit aver enuers luy un Quod ei deforceat, ſolonque le Statute de Weſtm. 2. oꝛe le reuerſion le leſſoꝛ eſt diſcontinue, iſſint que il ne poit aver aſcun action de waſt. Mes en ceſt caſe ſi la feme pꝛent baron & celuy oꝛ recoverast leſſa le meaſe al baron & a ſa feme pur term de lour deux vies, la feme eſt eins en ſon remitter per force del pꝛimer leaſe.

woman may have againſt him a *Quod ei deforceat*, according to the ſtatute of Weſtm. 2. now the reverſion of the leſſor is diſcontinued, ſo that he cannot have an action of waſte. But in this caſe if the woman take huſband, and he which recovereth let the houſe to the huſband and his wife for terme of their two lives, the wife is in her remitter by force of the firſt leaſe.

recoveroꝛ and his heires, in which caſe the particular Tenant was without remedy at the common Law, becauſe he could not have a Writ of right. And it is called a quod ei deforceat, foꝛ that they are part of the woꝛds of that Writ, viz. Præcipe A. quod, &c. reddat B. unum meſuagium, &c. quod clamat eſſe jus & maritagium ſuum, & quod idem A. ei injuſtè deforceat. Bracton, lib. 4. 367. Fleta, lib. 5. cap. 22. & lib. 6. cap. 14. 7. E. 3. 62. F.N.B. 155.

*Sect.* 675.

¶ ET ſi le baron et la feme ſont waſt, l' pꝛimer leſſoꝛ avera envers eux bꝛe de waſt, pur ceo que entant que la feme eſt en ſon remitter, il eſt remiſe a ſon reverſion. Mes ſemble en ceſt cas ſi celuy que recoverast per l' faux action, voile pozter auter bꝛe de waſt envers le Baron & ſa Feme, le baron nad auter remedy envers luy mes de faire default a la graund diſtres, &c. & cauſer la feme deſtre receive, & de pleder cel matter envers le ſecõd leſſoꝛ, & monſtrer coment laction per que il recoverast fuit faux & feint & ley &c. iſſint l' feme poit luy barrer, &c.

And if the huſband & wife make waſte, the firſt Leſſor ſhall have a writ of Waſte againſt them, for that inaſmuch as the wife is in her remitter, he is remitted to his reverſion. But it ſeemeth in this caſe, if he that recovereth by the falſe action will bring another writ of waſte againſt the huſband & his wife, the huſband hath no other remedy againſt him but to make default to the grand diſtreſſe, *&c.* & cauſe the wife to be received, & to plead this matter againſt the ſecond Leſſor, & ſhew how the action whereby he recovered was falſe & fained in law, &c. ſo the wife may bar him.

¶ *Recoveraſt*, &c. *per default*: There hath been a queſtion in our books upon theſe woꝛds (by default) as foꝛ example, whether a recovery had by default in an action of Waſte againſt Tenant in Dower, oꝛ by the courteſie, a quod ei deforceat lieth by the ſaid Statute. And divers hold opinion, that in that caſe no quod ei deforceat, lieth, foꝛ that judgment is not given by default; foꝛ notwithſtanding the default, there goeth out a wꝛit to inquire De vaſto facto, & quod vaſtum prædictus A. (le defendant) fecit. So as the defendant may give evidence, and the Juroꝛs may find foꝛ the defendant, that no Waſte was done: as in the aſſiſe albeit it be awarded by default, yet may the Tenant give evidence, and the Recognitoꝛs of the Aſſiſe may find foꝛ the Tenant; and therefoꝛe in thoſe caſes, the Defendant oꝛ tenant Non admittit per defaltam, as the Statute and Littleton ſpeaketh, and they cite F.N.B. in the point. W. 2. cap. 46 F.N.B. fol. 155. E.

Secondly, they hold that a quod ei deforceat lieth where the Tenant can have no remedy by attaint; but in this caſe (ſay they) an attaint doth lie. 2. H. 4. 2. 21. H. 6. 16. 4. E. 3. 8. 3. H. 6. 29. 22. E. 3. 19.

Thirdly, they hold, that in an action of Waſte, although

though it be brought against a tenant in Dower or tenant by the courtesie that have a freehold, yet the dammages are the principal, for they were recoverable against tenant in dower and by the courtesie by the common law; and the statute of Glocester gave the place wasted but for a penaltie, so as the nature of the action (say they) remaineth still to be personal, for that the damages are the principal (d); and in proof hereof they cite divers authorities in Law. And if two bring an action of waste, the release of one of them is a good bar against the other; (e) and so resolved by the whole Court: which proveth (say they) that the dammages are the principal; for if the land were the principal, the release of one of them should not bar the other, no more than in an assise, a Writ of Ward, and Ejectione firmæ, &c.

(d) 34. H 6.7.40.E.3. 37. & 38.3.
(e) 9.H.5 15.
30.H.6.tit.Bar.59.

Lastly, they say, that in actions where dammages are to be recovered, and the land is the Principal, the Demandant never counteth to damages, and yet shall recover them: but in an action of waste the Plaintiff cometh to his dammage; and if the dammages be the Principal, then cleerly no Quod ei deforceat lieth.

Others do hold the contrary; and as to the first they say, that albeit that in the writ of Waste judgement is not only given upon the default, yet the default is the principal, and the cause of awarding of the writ to inquire of the waste as an incident thereunto: and the law allwaies hath respect to the first and principal cause, and therefore upon such a recoverie (*) a writ of deceit lieth, and that writ lieth not but where the recoverie is by default. So in an action of wast against the husband & wife, upon the default of the husband the wife shall be received, and yet the statute there speaketh also per defaltam. So upon such a recovery in Waste against the Baron and Feme by default, the wife shall have a Cui in vita by the Statute, and it speaketh where the recoverie is per defaltam. And albeit the Defendant may give in evidence, if he knoweth it, yet when he makes default the law presumeth he knoweth not of it, and it may be that he in truth knew not of it; therefore it is reason, that seeing the Statute, that is a beneficial Statute, hath given it him, that he be admitted to his quod ei deforceat, in which writ the truth and right shall be tried. And so it is of a recoverie by default in an assise, albeit the Recognitors of the assise give a verdict, a quod ei deforceat lieth. And all this as to this point was resolved by the whole Court of common pleas, and so the doubt in 41. E 3 8. well resolved. Note, if tenant for life make default, after default, and he in the reversion is received and plead to issue, and it is found by verdict for the demandant, the default and the verdict are causes of the judgement, and yet the tenant shall have a quod ei deforceat.

(*) 17.E.3.58.29. E.3. 42 F.N.B.98.b.12. H.4. 4 19.E.2 Disceit 56.
W.2 cap.3.3.H.4 fol.1.
W.2.cap.3.9.E 4.6.
41.E.3.8.b.2.H.4.2. 21.H.6.56.44.E.3.42. Br.tit. Quod ei defor. 4 Pasch.33.El.Ro.1125 inter Ed. Elmer. & El. fa.feme ten.en Dower demandants & Wil. Thacker ten.in Quod ei deforceat.

As to the second objection, That the Defendant may have an attaint, first, it was utterly denied of the other part, (f) that an attaint did lie in this case; for though it be taken by the Oath of twelve men, yet it is but an enquest of office, whereupon no attaint did lie on either partie, as upon an enquire of collusion, although it be by one Juris, nor upon a verdict in a quare jus. Secondly, Admitting that an attaint did lie in that case, yet it followeth not ex Consequenti, that a quod ei deforceat did not lie; (g) for if an assise be taken by default, a quod ei deforceat doth lie, and yet the party may have an attaint, for this is no Enquest of Office, but a recognition by the Recognitors of an assise, who were returned the first day, and not returned upon the awarding of the assise by default. And as to the second objection, of this opinion was the whole Court in Edward Elmers case above mentioned. As to the third Objection, That the dammages should be the principal, because they were at the common law, that is an argument (say the other side) that they are more ancient, but not that they are more principal, and treble damages were not at the common law, (for the common law never giveth more dammage then the losse amounteth unto) but are given by the Statute of Glocester; but the place wasted is worthier being in the realty, than dammages that be in the personalty; Et omne magis dignum trahit ad se minus dignum, quamvis minus dignum sit antiquius, & à digniori debet fieri denominatio. And it is confessed, that in an action of Waste against tenant for life, or for years, the place wasted is the principal, because the Statute of Glocester doth give the place wasted and treble dammages at one time: for no prohibition or action of waste lay against them at the common law; and in an action of waste, if the Defendant confesse the action, the plaintiff may have judgment for the place wasted, and release the dammages, which proveth (and so Fitzherbert collecteth) that the dammages are not the principal, for a man shall never release the principal, and have judgment of the accessorie: and an action of waste against Tenant for life is as real as an action against Tenant in dower. And as to the case of 9.H.5. cited on the other side, it was answered, that it was an action in the Tenuit, which is only in the personalty, and then the release of the one doth bar both, neither could summons and severance lie in that case (h) but in an action of waste (in the Tenet) either against Tenant for life or for years, the release of the one doth not bar the other, and in both those cases summons and severance doth lie; and this point was also resolved accordingly in Edward Elmers case. But when these three points were resolved by the Court for the Demandant, then the councel of the tenant moved in arrest of judgment another point,

(f) 33.E.3.quod ei defer. Pl.ult.F.N.B.156. V.Flet.l.5.c.21.48.E.3. 19.40. Ass.23.33.H.6. 25.39.H.6.1. F.N.B. 107.
(g) 17.E.2. Attaint.69. 21.H.6.56.34.H.6.12.
34.H.6.7.Wast.50.
(h) 6.F.3.47.48.E.3.19.

viz.

viz that the judgement was given upon a Nihil dicit, which is alwaies after appearance, and not per defaltam, and thereupon judgment was stayed.

But to return to Littleton. Here he openeth a secret of Law for the cause of this remitter is for that the Tenant for life in this case might have Quod ei deforceat, for so Littleton saith: Istum que il poit aver Quod ei deforceat: Now it appeareth by our Books, that the Tenant for life at the Common Law was remediless, because he could not have (as hath been said) a writ of right, and consequently the feme covert in this case could not be remitted by the taking of an estate to her husband and her, because her right was remediless, and could have no action. But when an act of Parliament or a custome doth alter the reason and cause thereof, thereby the Common law it selfe is altered, if the act of Parliament and custome be pursued, for Alterata causâ & ratione Legis, alteratur & Lex, & cessante causa seu ratione Legis cessat & Lex: as in this case the Statute of W. 2. giving remedy to the Feme tenant for life, in this it giveth her ability to be remitted, because her right is now remediless, but she hath an action to recover it. Vide for the cases upon this ground 14.H.7. 11. per fineux. 27.H.8.4.b. aid. 35.H.6.Gard.72. 29.E.3.5. per Willbie Custome Lib.3.fo.86. Justice Winghams cases a. & b.

And Littleton warily putteth his case, that the recovery was had against the Feme while she was sole, for there was a time when it was a question, whether a recovery being had by default against the husband and wife (the wife being Tenant for life) the said Statute gave a Quod ei deforceat to the husband and wife, for that the Statute gave it against tenant in dower and tenant for life, &c. and here the husband is not tenant for life, but seised in the right of his wife, and therefore out of the Statute: and of this opinion is one (g) Book, but (Apices juris non sunt jura, & parùm differunt quæ re concordant) the contrary hath been adjudge, and so that point is now in peace; and the like in case of recein for him in reversion. But if the husband and wife lose by default, and the husband die, the wife shall not have a quod ei deforceat, for a Cui in vita is given to her in that case by a former Statute, viz. W. 2. cap. 3. These things are worthy of due observation, and points of excellent learning, and Littleton in our books speaks of another kind of a quod ei deforceat at the common Law, upon a disseisin, which you may read. But now let us hear him in his Book. (g) 4.E.3.83.33 E.3. avowrie 255. 5.E.3.41. 33.E.3.avowrie 255. F.N.B.156.a.5.E.3.5. 2.E.4.13.F.N.B.156.G. 33.H.6.46.2.E.4.81.19. E.4.2.

*Le reuersion est discontinue, issint que il ne pust aver Action de Waste.* 45.E.3.21.44. E.3.34. 35 F.N.B. 60.23.H.8. tit.Waste.Be.138.

Here it appeareth, That when the reversion is devested, the Lessor cannot have an action of waste, because the writ is, that the lessee did waste ad exhæredationem of the lessor, and that Inheritance must continue at the time of the action brought: and it is to be observed, That in an action of waste brought by the lessee against the lessee, the lessee in respect of the priviticie cannot plead generally, Riens en le Reverhon, viz. (h) That the lessor hath nothing in the reversion, but he must shew how, and by what means the reversion is devested out of him: and this holdeth (as hath been said) between the lessor and the lessee: but if the Grantee of a reversion bringeth an action of waste, the lessee may plead generally, That he hath nothing in the reversion. And yet in some special cases an action of waste shall lie, albeit the lessor had nothing in the reversion at the time of the waste done. As if tenant for life make a feoffement in fee upon condition, and waste is done, and after the lessee re-enter for the condition broken, in this case the lessor shall have an action of waste. And so if a Bishop make a lease for life or years, and the Bishop die, the lessee, the See being void, doth waste, the Successor shall have an action of waste. So if lessee for life be disseised, and waste is done, the lessee re-enter, an action of waste shall be maintained against the Lessee, and so in like cases: and yet in none of these cases the Plaintife in the action of waste had any thing in the reversion at the time of the waste made, but these especial cases have their several and especial reasons, as the learned Reader will easily espe out. (h) 46.E.3.20.8.H.6. 13.H.6.7.

Here note, That albeit the action be false and feigned, yet is the recovery so much respected in law, as it worketh a discontinuance. (i) But if tenant for life suffer a common Recovery, or any other recovery, by covine and consent between the tenant for life and the recoveror, this is a forfeiture of his estate, and he in the Reversion may presently enter for the forfeiture. Since our Author wrote, the Statute of 14.El.cap.8. hath been made concerning this matter, which is to be considered, (k) and hath been well construed and expounded, and needs not here to be repeated. (i) 5.Ass.Pl.3.5.E.3. Ent.Cong.42.15. E.3. Age 95.41.E.3.18. per Finchden 22.E.3.2.b. Lib.1.fol.15.8ir Will. Pelhams case 14.El.c.8. (k) Li.3.fo.60.1.1.f.15.

And it is to be observed, that although the discontinuance groweth by matter of Record, yet the remitter may be wrought by matter in Pais: and of the residus of these two Sections sufficient hath been said before.

## Sect. 676.

¶ ITem, ſi le baron diſcontinua le terre de ſa feme, & puis repryſt eſtate a luy & a ſa feme, & al tierce perſon, pur terme de lour vies, ou en fee, ceo neſt un remitter a la feme, forſque quant a la moity, & pur lauter moity el covient apres la mort ſon baron de ſuer un bꝛeue de Cui in vita.

ALſo if the husband diſcontinue the land of his wife, and after taketh back an eſtate to him and to his wife, and to a third perſon, for terme of their lives, or in fee, this is no remitter to the wife; but as to the moity, and for the other moitie ſhe muſt after the death of her husband ſue a writ of *Cui in vita*.

44.E.3 17.44.Aſſ.2.43. Aſſ.3. Vid.Sect.666.

¶ *Ceo neſt remitter forſque quant al moitie*, &c. Albeit there is Authoritie in our Books to the contrary, yet the law is taken, as Littleton here holdeth it: and as before it appeareth in the like caſe in this Chapter, and for the reaſon therein expreſſed.

## Sect. 677.

¶ *ET puis le baron reviens & agrea*, &c. In this caſe the eſtate is in the Feme Covert preſently by the livery before any agreement by the husband; and of this opinion is Littleton in our Books.

15.E.4.1.b.7.H.4.17. 1.H.7.16.b.39. E.3.30. 27.H.8.24.

¶ *A launſter le mere*: If he had been within the Realm, it doth not alter the caſe.

¶ *Quære en ceſt caſe, ſi le baron*, &c. Here is a queſtion moved by Littleton, whether the diſagreement of the husband ſhall outſte the wife of her remitter. And it ſeemeth that the diſagreement ſhall not devеſt the Remitter: Firſt, becauſe the ſtate made to the wife which wrought the remitter is vaniſhed and wholly defeated, and therefore no diſagrement of the husband can devеſt the ſtate gained by the leaſe, which by the remitter was devеſted before.

Secondly, for that the Law having once reſtored her ancient and better right will not ſuffer the diſagreement of the husband to devеſt it out of her, and to revibe the Diſ-

¶ ITem, ſi le baron diſcontinue la tẽ ſa feme, & a la ouſter le mere, & le diſcontinuee leſſa meſme la terre al feme pur termi de ſa vie, & liver a luy ſeiſin, & puis le baron revient, & agrea a tel liverie de ſeiſin, ceo eſt un Remitter a la Feme, & uncore ſi la Feme fuiſſoit ſole al temps de le leas fait a luy, ceo ne ſerroit a luy un Remitter. Mes entant que el fuit covert de baron al temps de la leas, & de le liverie de ſeiſin fait a luy, coment que el prift ſolement le liverie de ſeiſin, ceo fuit un Remitter a luy pur ceo que feme covert ſerra adjudge

ALſo, if the huſband diſcontinue the land of the wife, & goeth beyond ſea, and the diſcontinuee let the ſame land to the wife for terme of her life, & deliver to her ſeiſin, and after the husband cometh back, and agreeth to this livery of ſeiſin, this is a Remitter to the wife; and yet, if the wife had been ſole at the time of the leaſe made to her, this ſhould not be to her a remitter, but inaſmuch as ſhe was covert baron at the time of the leaſe, & liverie of ſeiſin made unto her, albeit ſhe taketh only the livery of ſeiſin, this was a remitter

ſicome

grome enfant deins age en tiel cas, &c. Quære en cest cas, si le baron quand il revient voil disagree a le leas & livery de seisin fait a son feme en son absence, si ceo oustera son feme de son Remitter, ou nemy, &c.

to her because a Feme covert shall be adjudged as an infant within age in such a case, &c. *Quere*, in this case, if the husband when he comes back will disagree to the lease & livery of seisin made to his wife in his ablence, if this shal oust his wife of her remitter, o. nor, *&c.*

of the estates she will. As if Lands be given to the Husband and wife, and their heires, the husband make a feoffement in fee, the feoffee giveth the Land to the husband and wife, the heires of their two bodies, the husband dieth. In this case the wife may elect which of the estates she will, for both estates are waivable, and her time of election and power of waiver accrewed to her first after the decease of her husband. If lands be given to a man and the heires females of his body, and he maketh a feoffement in fee and take back an estate to him and his heires, and dieth having issue a daughter, leaving his wife grossement enseint with a sonne and dieth, the daughter is remitted; and albeit the Sonne be afterward born, he shall not devest the Remitter.

continuance and revest the wrongful estate in the Discontinue.

Thirdly, for that remitters tending to the advancement of ancient rights are favoured in Law.

And so it is for the same causes, if the wife survive her husband, she cannot claime in by the purchase made during the coverture, but the Law adjudgeth her in her better right. But if both estates be waivable, there albeit the wife prima facie is remitted, yet after the decease of her husband, she may elect which 41.E.3.18.

and wife, and their heires, the 18.Eliz. Dier 351.

## Sect. 678.

¶ ITem, si le baron discontinua les tenements son feme & le discontinuee est disseisie, & puis le disseisor lessa mesmes les tenements a le baron & a son feme pur terme de vie, ceo est un remitter a la feme. Mes si le Baron & son feme fueront de covin & consent que le disseisin doit estre fait, donques il nest Remitter a son feme pur ceo que il est disseise resse: Mes si le baron fuit de covin & consent a le disseisin, & nemy la feme, donque

ALso, if the Husband discontinue the Lands of his wife, and the discontinuee is disseised, and after the Disseisor letteth the same lands to the husband and Wife for terme of life, this is a Remitter to the wife. But if the husband & his wife were of covine and consent that the disseisin should be made, then it is no remitter to his Wife, because she is a disseisoresse: But if the husband were of covin & consent to the Disseisin, and not the wife

¶ *ET puis le disseisor lessa mesme les tenements*, &c. Note, so much are remitters favoured in law that the state made by the disseisor (which cometh to the land by wrong, and upon whom the entry of the discontinuee is lawful) doth remit the wife, & devesteth all out of the discontinuee, albeit he hath a warranty of the land. 18.E.4.2.b.

¶ *Mes si le Baron & feme fuer' de covin & consent*, &c. Here it appeareth that covin and consent of the husband and wife doth hinder the remitter of the wife; for covine and consent in many cases to do wrong, doth choak a meer right, and the ill manner doth make a good matter unlawful. 18.E.4.ubi supra.

¶ *Covin.* Covine cometh of the French word Co- nuine, and is a secret assent (c) Pl. Com. 516. in Wimbishes case.

determined in the hearts of two or more to the defrauding and prejudice of another.

44.E.3.46.11.H.4.60. 44.Ass.29.19.H.8.12. 18.H.8.5.11.E.4.2. 7.H.7.11.

A womans lawfully intitled to have dower, and she is of covine & consent, that one

tiel leas fait al feme est un remitter, pur ceo que nul default fuit en la feme.

then such lease made to the wife is a remitter, for that no default was in the wife.

shall disseise the Tenant of the Land, against whom she may recover her lawful Dower, all which is done accordingly, the Tenant may lawfully enter upon her, and avoid the recovery in respect of the covine. But if a Disseisor, Intrudor, or abator, do endow a woman that hath lawful title of Dower, that is good, and shall bind him that right hath, if there were no such covine or consent before the Disseisin, Abatement or Intrusion.

41.Ass.p.28.25.Ass.p.1. 27.Ass.74.15.E.4.4.2. 12.Ass.p.10.

And so it is in all cases where a man hath a rightful and just cause of Action, yet if he of covine and consent do raise up a Tenant by wrong against whom he may recover, the covine doth suffocate the right, so as the recovery, though it be upon a good title, shall not bind, or restore the demandant to his right.

11.E.4.2.5. E.4.23. 14.H.8.12.33. H.6.5. 12.E.4.21.b.

If tenant in taile and his issue disseise the discontinuee to the use of the Father, and the Father dieth, and the Land discendeth to the Issue, he is not remitted against the Discontinuee in respect he was privie and party to the wrong; but in respect of all others he is remitted, and shall deraigne the first warranty. And so note, a man may be remitted against one, and not against another.

F.N.B.179.g. 12.E.4.9.35.Ass.5. 44.E.3.9.23.13.Ass.1. Temps E.1.Waste 128. 16.Ass.p.7.21.E.4.53. 21.H.7.35.3.H.4.17.

A. and B. Joyntenants be intitled to a real action against the heire of the disseisor, A. cause the heir to be disseised, against whom A. and B. recover and sue execution, B. is remitted for that he was not partie to the covine, and shall hold in common with A. but A. is not remitted, for the reason that Littleton here sheweth.

¶ *Pur ceo que el est disseisoresse.* Note, It is regularly true that a feme Covert cannot be a disseisoresse by her commandement or procurement precedent, nor by her assent or agreement subsequent, but by her actual entry or proper act, she may be a Disseisoresse. And therefore some do hold that Littleton must be intended, that the husband & wife were present when the disseisin was done; and others do hold that Littleton is good law, albeit she were absent, for that if her procurement or agreement be to do a wrong, to cause a remitter unto her, in this special case she shall taile of her end, and remitted she shall not be, but in this special case he shall be holden as a Disseisoresse by her covine and consent quateus to hinder the Remitter. And here it appeareth, that albeit the husband be of covine and consent, &c. yet if the wife were not of covine and consent also, she shall be remitted. because as Littleton saith, there was no default in the wife.

## Sect. 679.

¶ Item, si tiel discontinuée feisoit estate de franktenement al baron & a son feme per fait endent, sur condition, &c. reservant al discontinuée un certaine rent, & pur default de payment un reentry, & pur ceo que le rent est aderere, le discontinuée enter, donques de cel entrie le feme avera un Assise de Novel disseisin, apres la mort son baron enders le discontinuée, pur ceo que le condition fuit tout outterment aniente, entant que la feme fuit en &c remitter, untore le baron obesque sa

Also, if such discontinuee make an estate of freehold to the husband and wife by deed indented upon condition, &c. reserving to the discontinuee a certain rent, and for default of payment a re-entrie, and for that the rent is behind the discontinuee enter, then for this entrie the wife shall have an assise of *Novel disseisin*, after the death of her Husband, against the Discontinuee, because the condition was altogether taken away, inasmuch as the wife was in her remitter, yet the husband with his wife can-

feme

feme ne poient aver Assise, pur ceo que le baron est estoppe, &c.

not have an assise because the husband is estopped, *&c.*

IT is hereby to be observed, that the wife is presently remitted, and that the conditions, and rents, and all other things annexed to, or reserved upon the state (that is vanished and defeated by the remitter) are defeated also.

Pl. Com. in Amy Townshends case. 12. R. 2. tit. Remitter. 12.

## *Sect.* 680, 681.

¶ ITem, ſi le baron diſcontinua les tenements ſa feme, & repriſt eſtate a luy pur terme de ſa vie, le remainder apres ſon deceaſe a ſa feme pur terme de ſa vie, en ceſt cas ceo neſt un remitter a la feme durant la vie le baron, pur ceo que durant la vie le baron, la feme nad riens en le franktenement. Mes ſi en ceo cas la feme ſurdeſquiſt le baron, ceo eſt un remitter a la feme, pur ceo que un franktenement en ley eſt ject ſur luy maugre le ſoen. Et entant que el ne poit aver action envers nul auter perſon, et envers luy meſme el ne poit aver action, pur ceo el eſt en ſ Remitter. Car en ceſt cas, coment que la feſm ne entra pas en les tenemẽts, uncore un eſtrange qꝛ ad cauſe de aver action, poit ſuer ſon actiõ envers la feme de meſmes les tenements, pur ceo que el eſt tenant en ley, coment que el ne ſoit tenãt en fait.

ALſo if the husband diſcontinue the tenements of his wife, and take back an eſtate to him for life, the remainder after his deceaſe to his wife for terme of her life, in this caſe this is no remitter to the wife during the life of the husband, for that during the life of the husband the wife hath nothing in the freehold. But if in this caſe the wife ſurviveth the husband, this is a remitter to the Wife, becauſe a freehold in law is caſt upon her againſt her will. And inaſmuch as ſhe cannot have an action againſt any other perſon, & againſt her ſelfe ſhe cannot have an action, therefore ſhe is in her remitter. For in this caſe, although the wife doth not enter into the tenements, yet a ſtranger which hath cauſe to have an action, may ſue his action againſt the wife for the ſame tenements, becauſe ſhe is Tenant in Law, albeit that ſhe be not Tenant in deed.

## *Sect.* 681.

¶ CAr ſ de franktenement en fait eſt celuy, que ſi ſoit diſſeiſie de franktenement, il poit aver aſſiſe. Mes tenant de franktenement en ley devant ſon entre en fait, navera my aſſiſe. Et ſi home ſoit ſeiſie de certeine terre, et ad iſſue fits quel prent

FOr tenant of freehold in deed is he, who, if he be diſſeiſed of the freehold, may have an Aſſiſe, but tenant of freehold in law before his entrie in deed, ſhall not have an Aſſiſe. And if a man be ſeiſed of certaine Land, and hath iſſue a ſonne who taketh wife, and

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ſeme, et le pier debie ſeiſie, et puis le fits debie devant alcun entrie fait pur luy en la terre, la ſeme fits ſerra endowe en le fre, & uncore il naboit nul franktenemēt en fait, mes il aboit un fee & franktenement en ley. Et iſſint nota, que Præcipe quod reddat poit auxibien eſtre maintenus envers celuy que ad franktenement en ley, ſicome envers celuy que ad le franktenement en fait.

the father dieth ſeiſed, & after the ſon dies before any entry made by him into the Land, the wife of the ſonne ſhall be endowed in the land, and yet he had no freehold in Deed, but he had a fee and freehold in Law. And ſo note, that a *Præcipe quod reddat* may as well be maintained againſt him that hath the free hold in Law, as againſt him that hath the freehold in Deed.

18.H.8.3.

Vide Sect. 447. Bracton lib.4.fol.206. 237. Britton 83.b. Fleta, Lib.3.cap.15.

¶ Here five things are to be obſerved: Firſt, that a remainder expectant upon an eſtate for life worketh no remitter, but when it fall in poſſeſſion: for before his time he can have no action, and no freehold is in him. Secondly, though the woman might waive the remainder, yet becauſe ſhe is preſently by the death of the husband tenant to the Præcipe, it is within the rule of Remitter, and her power of waiver, is not material. Thirdly, that a freehold in law being caſt upon the woman by act of law, without any thing done or aſſented to by her, doth remit her, albeit ſhe be then ſole, and of full age. Fourthly, that a Præcipe lieth againſt one that hath but a freehold in law. Fifthly, that a woman ſhall be endowed where the husband hath the inheritance, and but a freehold in law, as hath been ſaid in the Chapter of Dower.

## *Sect.* 682.

¶ Item, ſi tenant en taile ad iſſue deux fits de pleine age, & il leſſa la terre taile al eigne fits pur terme de ſa vie, le remainder al fits puiſne pur term̄ de ſa vie, & puis le tenant en taile morust, en ceſt cas leigne fits neſt pas en ſon remitter, pur ceo que il prent eſtate de ſon pier. Mes ſi leigne fits morust ſauns iſſue de ſon corps, donque ceo eſt un remitter al puiſne frere, pur ceo que il eſt heire en le taile, & un franktenemēt en le ley eſt eſcheat, et jecte ſur luy per force de le remainder, & il y ad nul envers que il poit ſue ſon action.

ALſo, if tenant in tail hath iſſue two ſons of full age, and he letteth the land tailed to the eldeſt ſon for terme of his life, the remainder to the younger ſonne for terme of his life, & after the tenant in taile dieth, in this caſe the eldeſt ſon is not in his remitter, becauſe he took an eſtate of his father. But if the eldeſt die without iſſue of his body, then this is a remitter to the younger brother, becauſe he is heire in taile, and a freehold in law is eſcheated and caſt upon him by force of the remainder, and there is none againſt whom he may ſue his action.

(a) 12.E.4.20. (b) Sect.684,685.

¶ Of this opinion is (a) Littleton in our books; and of this ſufficient hath been ſaid in the next Section before. See hereafter (b) ſome explanation hereof.

Sect.

## Sect. 683.

¶ En meisme le maner est, lou home soit disseisie, & le dissesor mozust seisie, et les tenits discendont a son heire, & lheire le dissesor fait un leas a un home de meismes les tenements pur terme de vie, le remainder a le Dissesse pur term de vie, ou en taile, ou en fee, le tenant a terme de vie morust, ore ceo est un remitter al dissesee, &c. Caus à qua supra, &c.

¶ In the same manner it is where a man is disseised, and the disseisor dieth seised, and the tenements discend to his heir, and the heir of the disseisor make a lease to a man of the same tenements for term of life, the remainder to the Disseisee for terme of life, or in tail, or in fee, the tenant for life dieth, now this is a remitter to the disseisee, &c. Causa qua supra, &c.

¶ And this runneth upon the same reason that is before in the two Sections next following.

## Sect. 684.

¶ Nota, si tenit en taile enfeoffa son fits et un autre per son fait de la terre taile en fee, & livery de seisin est fait a lauter accordant al fait, & le fits rien conisant de ceo agreea a le feoffment, & puis celuy que prist le livery de seisin deby, & le fits ne occupia la terre, ne prent aucun profit del terre durant la vie le pier, & puis le pier morust, ore ceo est un remitter al fits, pur ceo qe le franketenement est ject sur luy per le survivor: Et nul default fuit en luy, pur ceo que il ne unque a-

Note, if tenant in taile enfeoffeth his sonne and another by his deed of the land intailed in fee, and Livery of seisin is made to the other according to the Deed, and the son not knowing of this agreeth to the feoffement, and after he which took the Livery of seisin dieth, and the son doth not occupie the land, nor taketh any profit of the land during the life of the Father, and after the Father dieth, now this is a remitter to the sonne, because the freehold is cast upon him by the survivor. And no default was in

¶ If you should turn by this words that this was an addition to Littleton, but it is of Littletons own words, and agreeth with the Originall begun this Section thus, Item si tenant en taile, &c.

¶ Et livery de seisin, &c. That Livery of seisin is made by speech, by the deed, for if a man intendeth to (b) make a feoffment by parol to A. & B. & he and A. enter upon the land A. being absent, and make livery to B. the same doth not B. and A. and the title passeth this shall enure only to B. for neither can a man absent take Livery, nor make Livery without deed.

¶ Et livery de seisin est fait a sauter accordant al fait, &c. Note, livery being made by one according to the Deed suffices as such, because the Deed in respect of the livery referred is made to both, for all one as if

(b) Temps H.8. Feoffements Br. 72. 40. E. 3. 41. 10. 10. E. 4. 1. 2. 15. E. 4. 18. 18. E. 4. 12. 22. H. 6. 12.

¶ *Et le fits nient conusant de ceo, ne agree a le feoffement.* Here it appeareth, that if the ſon be Conuſant, & agreeth to the feoffment, &c. this is no remitter to him. And therefore if the Feoffement were made by deed indented, and the ſonne with the other ſealeth the counterpart, and then the Feoffor maketh Livery to the other according to the deed, and the other dieth, the ſon is not remitted, becauſe he was conuſant of the Feoffment, and agreed to the ſame; and Littleton ſaith in the caſe that he putteth, That there was no default in the ſonne, becauſe he agreed not to the Feoffement in the life of the Father: And ſo it ſeemeth, that if A. be ſeiſed in taile, and have Iſſue two ſons, and by deed indented between him of the one part, and the ſons of the other part, maketh a leaſe to the eldeſt for life, the remainder to the ſecond in Fee, and dieth, & the eldeſt ſon dieth without iſſue, the ſecond ſon is not remitted, becauſe he agreed to the remainder in the life of the father, or if the like eſtate had been made of parol, if in the life of the father the Tenant for life had been impleaded, and made default, and he in the remainder had been received, and thereby agreed to the remainder, after the death of the Father and the eldeſt ſon without iſſue, the ſecond ſon ſhould not be remitted, becauſe he agreed to the remainder in the life of the Father; all which is well warranted by the reaſon yielded by our Author in this Section.

greea, &c. en la vie ſon pier, & il ad nul envers luy, or il poit ſuer Briefe de Formedon, *&c.*

him, becauſe he did never agree, *&c.* in the life of his Father, and he hath none againſt whom he may ſue a Writ of *Formedon*, &c.

Vid. Sect. 682.

## Sect. 685.

¶ CAr ſi home ſoit diſſeiſie de certaine terre, & le Diſſeiſor fait un fait de Feoffement, per que il infeoffa B. C. & D. & le liverie de ſeiſin eſt fait a B. & C. Mes D. ne fuit al Liverie de ſeiſin: ne unqes agreea a le feoffement, ne unque voile prender les profits, &c. & puis B. & C. deviſeront, & D. eux ſurveſquiſt, & le Diſſeiſee port ſon briefe ſur diſſeiſin en le Per, envers D. il monſtra tout le matter, coment il ne unques agreas a le feoffement, & iſſint il diſchargera luy de damages, iſſint que le demandant ne recovera aſcuns dammages envers luy, coment que il ſoit Tenant del franktenemẽt del terre. Et uncore le ſtatute de Glouceſter cap. 1. dоit, que le Diſſeiſee recovera damages en briefe de Entre ſoundue ſur Diſſeiſin vers celuy que eſt trove tenant. En ceo eſt un preove en lauter caſe, que entant

FOr if a man be diſſeiſed of certaine land, and the Diſſeiſor make a deed of feoffment, whereby he enfeoffeth B. C. and D. and Livery of ſeiſin is made to B. and C. but D. was not at the Liverie of Seiſin, nor ever agreed to the feoffment, nor ever would take the profits, *&c.* & after B. and C. die, and D. ſurvive them, and the diſſeiſee bringeth his Writ upon diſſeiſin in the *Per* againſt D. he ſhall ſhew all the matter, how he never agreed to the feoffement, and he ſhall diſcharge himſelfe of Dammages, ſo as the Demandant ſhall recover no damages againſt him, although he be tenant of the freehold of the land: And yet the Statute of *Glouceſter*, *cap.* 1. will, That the Diſſeiſee ſhall recover dammages in a Writ of Entrie founded upon a Diſſeiſin againſt him which is found Tenant. And this is a proof in the other Caſe,

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que liſſue en le Taile avient a le Franktenement, & nemy per ſon Fait, ne per ſon agrément, mes apres la mort ſon pier, ceo eſt un Remitter a luy, entant que il ne poit ſuer Action de Formedon envers nul auter perſon, &c.

that foraſmuch as the iſſue in taile came to the freehold, and not by his act, nor by his agreement, but after the death of his father, therefore this is a remitter to him, inaſmuch as he cannot ſue an Action of *Formedon* againſt any other perſon, *&c.*

¶ This caſe ſtandeth upon the ſame reaſon that the next precedent caſe doth.

¶ *Mes celuy que eſt trove Tenant*, &c. Here it appeareth, that Acts of Parliament are to be ſo conſtrued, as no man that is innocent or free from injury or wrong, be by a literal conſtruction puniſhed or endammaged: & therefore in this caſe, albeit the letter of the Statute is generally to give dammages againſt him that is found tenant, and the caſe that Littleton here putteth, D. being ſurvivor, is conſequently found tenant of the land, yet becauſe he waived the Eſtate, and never agreed to the Feoffement, nor took any profits, he ſhall not be charged with the dammages.

## *Sect.* 686, 687.

¶ ITem, ſi un Abbe aliena la terre de ſon meaſon a un auter en fee, & Lalienee per ſon fait charge la Terre ove un rent charge en fee, & puis lalienée infeoffa Labbe ove licence, a aver & tener al Abbe & a ſes ſucceſſors a touts jours, & puis Labbe morust, & un auter eſt eſſieu, & fait Abbe: en ceſt caſe labbe que eſt le ſucceſſor, & ſon Covent, ſont en lour remitter, & tiendront la terre diſcharge, p̄ ceo que meſme labbe ne poit aver alcū action, ne briefe Dentre ſine aſſenſu Capituli, de meſme la terre envers nul auter perſon.

ALſo, if an Abbot alien the land of his houſe to another in Fee, and the alienee by his deed charge the land with a rent charge in fee, and after the Alienee infeoffe the Abbot with licence, to have and to hold to the Abbot & to his ſucceſſors for ever, and after the Abbot die, and another is choſen, and made Abbot: in this caſe the Abbot that is the ſucceſſor, and his Covent, are in their Remitter, and ſhall hold the land diſcharged, becauſe the ſame Abbot cannot have an action nor a writ of *Entre ſine aſſenſu Capituli*, of the ſame land againſt any other perſon.

## *Sect.* 687.

¶ EN meſme le maner eſt, lou un Evelque, ou un Deane, ou auters tiels Perſons aliena, &c. ſans aſſent, &c. & Lalienee charge la terre, &c. & puis Leveſque repris eſtate de meſme la Terre per licence, a luy & a ſes

IN the ſame manner it is, where a Biſhop or a dean, or other ſuch perſons alien, *&c.* without aſſent, &c. and the Alienee charge the land, *&c.* & after the Biſhop takes back an eſtate of the ſame land by Licence, to him and his Succeſ-

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Successors, & puis le vesque devie, son Successor est en son Remitter, come en droit de son Esglise, & defeatera le charge, &c. Causa qua supra, *&c.*

sours, and after the Bishop dieth, his successor is in his remitter as in right of his Church, and shall defeat the charge, *&c. Causa qua supra.*

¶ OVr author having spoken of Remitters to singular or natural persons, as Issues in Taile, and to seme Coverts, and to their heirs, and to them in reversion or Remainder, and their Heirs; now he speaketh of Remitters to bodies politick & incorporate, as to Abbots, Bishops, Deans, &c. And as discents do remit the heire which comes in the Per, so succession doth remit the Successor, albeit he cometh in the Post. And so in other cases, where the Issue in tail of full age shall be remitted, there in the like case shall the Successor be remitted also, and defeat all main charges and incumbrances.

¶ *Ove Licence*, &c. That is, of the King and the Lords immediate and mediate to dispense with the Statutes of mortmain, whereof see more before, Sect. 140.

## *Sect.* 688.

¶ ITem, si home suist faux action envers le Tenant en Taile, sicome home voile suer envers luy un briefe Dentre en le post, supposant per ſ̃ briefe que le tenant en taile nad pas entre, sinon per A. de B. que disseisit layel le Demandant, & ceo est faux, & il recover envers le Tenant en le Taile per default, & suist execution, & puis le Tenant entaile mozust, son Issue poit aver Briefe de Formedon envers luy que recovera, & sil voile pleader le recoverie envers le tenant en taile, lissue poit dire, que le dit A. de B. ne disseisit point layel celuy que recoverast, en le maner come son briefe suppose, & issint il sauxera le recoverie. Auxy Posito, que ceo suit voyer, que le dit A. de B. disseisit layel le demandant que recoverast, & que apres le disseisin, le demandant, ou son Pier, ou son ayel per un fait avoyent relesse al tenant en taile, tout le droit que il avoit en la Terre, &c. et ceo nient contristee-

ALso, if a man sue a false action against tenant in taile, as if one will sue against him a Writ of Entrie in *Post*, supposing by this writ, that the Tenant in Taile had not his entry, but by A. of B. who disseised the Grandfather of the Demandant, and this is false, and he recovereth against the Tenant in tail by default, and sueth Execution, and after the Tenant in taile dieth, his issue may have a Writ of *formedon* against him which recovereth; and if he will plead the Recovery against the Tenant in tail, the issue may say, That the said A. of B. did not disseise the grandfather of him which recovered in manner as his Writ supposeth, and so he shall falsifie his recoverie. And admit this were true, That the said A. of B. did disseise the Grandfather of the Demandant which recovered, and that after the disseisin, the demandant, or his Father, or his Grandfather by a deed had released to the Tenant in Taile all the right which he had in the

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ant il ſuiſt un Briefe Dentre en le Poſt envers le Tenant in Taile, en le manner come eſt avauntdit, & le Tenant en Taile pleda a celuy, Que le dit A. de B. ne diſſeiſiſt pas ſon ayel, en le manner come ſon Briefe ſuppoſa, & ſur ceo ſont a Iſſue, & iſſue eſt trove pur le demandant, pur que il ad judgement de recover, & ſuiſt execution, & puis le Tenant en le Taile morust, ſon iſſue poit aũ un Briefe de Formdon envers celuy que recovera, & ſi voile plead le recoverie per laction trie envers ſon pier, que fuit Tenant en Taile, donque il poit monſtrer & pleader le Releaſe fait al ſon pier, & iſſint laction que fuit ſue, ſeint Ley.

land, &c. and notwithſtanding this he ſueth a Writ of Entrie in the *Poſt*, againſt the tenant in Taile, in manner as is aforeſaid, and the tenant in Tail plead to him, that the ſaid A. of B. did not diſſeiſe his Grandfather in ſuch manner as his Writ ſuppoſed, and upon this they are at iſſue, and the iſſue is found for the demandant, whereby he hath judgment to recover, and ſueth execution, and after the tenant in taile dieth, his iſſue may have a writ of *Formedon* againſt him that recovered, and if he will plead the recovery by the action tried againſt his father who was tenant in tail, then he may ſhew and plead the releaſe made to his father, and ſo the action which was ſued, ſaint in Law.

¶ *Si recovera envers le tenant en taile per default.* Littleton addeth (by default) because if the (c) recovery paſſeth upon an iſſue tried by verdict, he ſhall never falſifie in the point tried, becauſe an attaint might have been had againſt the Jurors, and albeit all the Jurors be dead, ſo as the attaint do fail, yet the iſſue in tail ſhall not falſifie in the point tried, which untill it be lawfully avoided, pro veritate accipitur. As if the Tenant in taile be impleaded in a Formedon, and he traverſeth the gift, and it is tried againſt him, and thereupon the demandant recover. In this caſe the iſſue in tail ſhall not falſifie in the point tried, but he may falſifie the recovery by any other matter: as that the tenant in Taile might have pleaded a collateral warranty or a releaſe, as Littleton here putteth the caſe, or to confeſſe and avoid the point tried. And Littletons caſe holdeth not only a recovery by default, whereof he ſpeaketh, but alſo upon a nihil dicit, or confeſſion, or Demurrer.

(c) 12.E.4.19.13.E.4.3. 11.H.4.89.7.H.4.17. 14.H.7.10.11.28.Aſſ.32 52.34.Aſſ.7.10.H.6.5. 19.H.6.39.Brook tit. Fauxifier de Recoverie 55.22.H.6.28.34.H.6. 2.26.H.6.32.36.H.6. Fauxifier de Recoverie 27.

## *Sect.* 689.

¶ Et il ſemble que ſeint action eſt autant adire Engliſh a fained action, ceſt aſcavoir, tiel action, que coment que les parolx de le briefe ſont veyers, uncore pur certain cauſes il nad cauſe ne title p la ley de recover pur meſme laction. Et faux action eſt, lou les parolx de briefe ſont faux. Et en les deux caſes avantdits, ſi le cas ſuit tiel, que apres tiel recovery & execution

AND it ſeemeth that a faint action is as much to ſay, in Engliſh *a fained action*, that is to ſay, ſuch an action as albeit the words of the Writ be true, yet for certain cauſes he hath no cauſe nor title by the law to recover by the ſame action. And a falſe action is, where the words of the Writ be falſe. And in theſe two Caſes aforeſaid, if the caſe were ſuch that after ſuch recovery, and execution

ent fait, le tenant en taile uſt diſſeiſie celuy que recobera, & ent moruſt ſeiſie, per que la terre diſcendiſt a ſon iſſue, ceo eſt un remitter al iſſue, & iſſue eſt eins per force de le taile, & pur cel cauſe jeo aye mis les deux cales precedents, pur enformer toy, mon fits, que iſſue en taile per force dun diſcent fait a luy apres un recobery & execution fait envers ſon aunceſter poit eſtre auxy bien en ſon remitter ſicome il ſerroit per le diſcent fait a luy apres un diſcontinuance fait per ſon aunceſter de les terres tailes, per feoffement en pais, ou autrement, &c.

thereupon done the tenant in tail had diſſeiſed him that recovered, and therefore died ſeiſed, whereby the land deſcended to his iſſue, this is a remitter to the iſſue, and the iſſue is in by force of the taile; and for this cauſe I have put theſe two caſes precedent, to enform thee (my Son) that the iſſue in tail by force of a diſcent made unto him after a recovery and execution made againſt his Anceſtor, may be as well in his remitter, as he ſhould be by the diſcent made to him after a a Diſcontinuance made by his Anceſtor of the entailed lands by feoffment in the Country or otherwiſe, &c.

¶ Here Littleton explaineth what a faint action is, and what a falſe action is, which is plain and perſpicuous. And here is to be obſerved, that a Remitter may be had after a recobery upon a faint action by a diſſeiſin and a diſcent, as well by a diſcent after a diſcontinuance by a feoffment, &c.

## *Sect.* 690.

38.Aſſ.32.34.Aſſ.Pl.7. 15.E.3.Age.95.11.H.4. 89.7.H.4.17.33.E.3. Entry cong. 31.28.H 6. 13.10.H.6.6.2.E.4.20. 14.H.7.11.23.El.Dier. 276.li.1.f. 106. Shelleys caſe, Pl.Com. 55.

¶ Here it appeareth, that if a judgement be given againſt a tenant in taile upon a faint or falſe action, and Tenant in taile die before execution, no execution can be ſued againſt the iſſue in taile. But if in a common recobery judgement be had againſt Tenant in taile where he voucheth, and hath judgement to recober over in value, albeit the Tenant in taile dieth before execution; yet the recoberor ſhall execute the judgment againſt the iſſue in tail in reſpect of the intended recompence, and for that it is the common aſſurance of the Realm, and is well warranted (d) by our Books, and was not invented by Juſtice Cook, who was a grave and learned Iudge in the time of E. 4 (as ſome hold by tradition) but it may be

See hereafter Sect.709. 15.E.3.Briefe.324.42. E.3.53.44.E.3.21.48.F. 3.11.1.E.4.5.5.E.4.2.

(d) 12.E 4.20.Dier.21 El.376,lib.10.fol.37. 38. In Mary Portingtons caſe.

¶ Item, ẽ les cales avantdits, ſi le cas ſuit tiel, que apres ceo que le demãdant aboit judgement de recober envers l' tenant ẽ tail, & meſme le tenant en taile moruſt devaunt aſcun execution ewe envers luy p que les tenements diſcendõt a ſon iſſue, & celuy q̃ recobera ſuiſt un ſcire facias, hors de le judgement daber execution de le judgement envers iſſue ẽ taile, iſſue pledera le

Alſo, in the caſes aforeſaid, if the caſe were ſuch, that after that the Demandant have judgment to recover againſt the tenant in tail, and the ſame tenant in tail dieth before any execution had againſt him, whereby the tenements deſcend to his iſſue, and he who recovereth ſueth a *ſcire facias* out of the judgement to have execution of the judgement againſt the iſſue in taile, the iſſue ſhall plead them after as aforeſaid, and ſo

matter

matter come avaunt eſt dit: Et iſſint prova que l'dit recovery fuit faux, ou feint en ley, & iſſint luy barrera daver execution de le judgement.

prove that the ſaid recovery was falſe, or faind in Law, and ſo ſhall barre him to have execution of the judgement.

that it was upon former Authorities and opinions of Judges diſcovered by him, aſſented unto by the reſt of the Judges.

If a recovery be had againſt Tenant for life without conſent or covine, though it be without title, and Execution be had, and tenant for life dieth, the reverſion or remainder is diſcontinued, ſo as he in the reverſion or remainder cannot enter; but if ſuch a recovery be had by agreament and covine between the Demandant and the Tenant for life, then, as hath been ſaid, it is a forfeiture of the eſtate for life, and he in the reverſion or remainder may enter for the forfeiture. So it is if the tenant for life ſuffer a common recovery at this day, it is a forfeiture of his eſtate, for a common recovery is a common conveyance or aſſurance, whereof the Law taketh knowledg. Since Littleton wrote there were two Statutes (e) made for preſervation of Remainders and Reverſions expectant upon any manner of eſtate for life, the one in 32. H. 8. the other in 14. El. but 32. H. 8. extended not to recoveries, when Tenant for life came in as Vouchee, &c. and therefore that act is repealed by 14. Eliz and full remedy provided for preſervation of the entry of them in reverſion or remainder. But the Statute of 14. El. extendeth not to any recovery, unleſſe it be by agreement or covine. Secondly, (f) if there be tenant for life, Remainder in tail, the reverſion or remainder in fee, if tenant for life be impleaded by agreement, and he vouch Tenant in taile, and he vouch over the common Vouchee, this ſhall bar the Reverſion or Remainder in fee, although he in the Reverſion or Remainder did never aſſent to the recovery, becauſe it was not the intent of the act to extend to ſuch a recovery, in which a Tenant in tail was vouched, for he hath power by common recovery, if he were in poſſeſſion, to cut off all Reverſions or Remainders. And ſo if tenant for life had ſurrendred to him in remainder in tail, he might have barred the remainders and reverſion expectant upon his eſtate. Thirdly, where the proviſo of that act ſpeaketh of an aſſent of Record by him in Reverſion or Remainder, it is to be underſtood, that ſuch aſſent muſt appear upon the ſame Record either upon a Voucher, Aid praier, receit, or the like, for it cannot appear of Record, unleſſe it be done in courſe of Law, and not by any extrajudicial entry, or by Memorandum.

5. Aſſ. 3, 5. E. 3. entre Cong. 42. li. 1. fol. 15, 16. Sir Will. Pelhams caſe.

(e) 32. H. 8. cap. 31. 14. El. cap. 8.

(f) Lib. 3 fol. 60, 61. Lincoln Colledge caſe.

## *Sect.* 691.

ITem, ſi tenant en taile diſcontinua le taile, & morust, & ſon iſſue port ſon brieve de formedon envers le diſcontinuee, (eſteant tenant de franktenement del terre) & le diſcontinuee pleda q̄ il neſt tenant, mes ouſtermet diſclaima de le tenancy en la terre, en teſt cas le judgement ſerra q̄z le tenant alaſt ſans jour, & apres tiel

ALſo, if Tenant in taile diſcontinue the taile, and dieth, and his iſſue bringeth his writ of *formedon* againſt the diſcontinuee (being tenant of the freehold of the land) and the diſcontinuee plead that he is not tenant, but utterly diſclaimeth from the tenancy in the land; In this caſe the judgement ſhall be that the Tenant goeth without day, and after ſuch

CHere it appeareth that upon the plea of non-tenure, or of a diſclaimer of the tenant in a Formedon in the Deſcender, albeit the expreſſe judgement be that the tenant ſhall go without day; yet in judgement of law the Demandant may enter according to the title of his writ, and be ſeiſed in taile, notwithſtanding the diſcontinuance. And here Littleton ſaith the Demandant ſhall be adjudged in his Remitter, where he taketh Remitter in a large ſence; for in this caſe the demandant hath not two rights, but hath only one antient right, and is reſtored to the ſame by courſe of Law, and ſo Remitter here is taken for a recontinuance of the right.

5. E. 4. 1. 36. H. 6. 29. 6. E. 3. 8. 4. E. 4. 38.

Non-tenure. Vide Bracton. lib. 5. fol. 431, 432. & 414. Britton cap. 84.

¶ *Ou le demandant ne recovera dammages.* Here is to be obſerved that in ſuch a Præcipe where the Demandant is to recover dammages, if the Tenant plead non-tenure or diſclaime, (f) there the Demandant may aver him to be tenant of the land, as his writ ſuppoſeth for the benefit of his damages, which otherwiſe he ſhould loſe, or pray judgment and enter. (g) But where no damages are to be recovered, as in a Formedon in the Deſcender, and the like, there he cannot aver him tenant, but pray his Judgement and enter; for thereby he hath the effect of his ſuite. Et ſruſtrà fit per plura, quod fieri poteſt per pauciora.

(f) 13.H.28.36.H.6. 29.22.H.6.44.4.E.4.38. 5.E.4.1.6.E.3.8.

(g) 8.E.3.134.24.E.3.9. 11.H.4.16.& 7.H.6.17.

5.E.4.1.

¶ *Averrer.* To aver or avouch, or verifie, verificare, whereof cometh verificatio an averment, and is ſo ſaid as well in Engliſh as in French. And is twofold, viz. generall averment, which is the concluſion of every plea to the writ, or in bar of replications and other pleadings (for Courts or avowries in nature of Counts need not be averred) containing matter affirmative, ought to be averred, & hoc paratus eſt verificare, &c. Particular averments are, as when the life of Tenant for life, or tenant in taile are averred, and there, though this word (verificare) be not uſed, but the matter avouched and affirmed, it is upon the matter an averment. And an averment containeth as well the matter as the form thereof.

¶ *Que le tenant aſt laſt ſans jour.* Quod tenens eat ſine die. This is the entry of the judgement in that caſe, viz. the Tenant ſhall go without day, that is to be diſcharged of further attendance, and this is ſome-

judgement liſſue en le taile que eſt demandant poit enter en la terre, nyent contriſteant le diſcontinuance, & per tiel entry il ſerra adjudge eins en ſon Remitter. Et la cauſe eſt, pur ceo q̃ ſi aſcun home ſuiſt Præcipe quod reddat envers aſcun tenant de franktenement, en quel action l' demandant ne recovera damages, & le tenant pledaſt nontenure, ou autrement diſclaima en le tenancy, le demandant ne poit averrer cõ briefe & dirra q̃ il eſt tenant come le briefe ſuppoſe. Et pur cel cauſe l'demandant apres ceo que judgement eſt done q̃ le tenant alaſt ſans jour, poit entrer ẽ les tenements demands, le quel ſerra auxy graund advantage a luy en ley, ſicome il avoit judgement de recoverer envers le tenant, & per tiel entrie il eſt en ſon remitter per force del taile. Mes lou le demand recovera dammages envers le tenant, la le demandant poit averer, que il eſt tenant come le briefe ſupp̃, & ceo pur ladvantage

judgement the iſſue in the tail that is demandant may enter into the land, notwithſtanding the diſcontinuance, & by ſuch entry he ſhall be adjudged in his remitter. And the reaſon is, for that if any man ſue a *Præcipe quod reddat* againſt any tenant of the freehold, in which action the demandant ſhall not recover damages, & the tenant pleads non-tenure, or otherwiſe diſclaim in the tenancy, the Demandant cannot aver the writ and ſay that he is tenant as the writ ſuppoſeth. And for this cauſe the demandant after that the judgement is given that the tenant ſhall go without day, may enter into the tenements demanded, the which ſhall be as great an advantage to him in law, as if he had judgement to recover againſt the tenant, and by ſuch entry he is in his remitter by force of the entail. But where the demandant ſhall recover damages againſt the tenant, there the demandant may aver that he is tenant, as the writ ſuppoſeth, & that for the advan-

del

del demandant p̄ recouer les damages, ou auterment il ne recoueroit les damages, queux sont ou sueront a luy dones per la Ley.

tage of the demandant to recover his damages, or otherwise he shall not recover his damages, which are or were given to him by the Law.

time final for that action whereof Littleton here putteth an example, and sometime temporary, whereof Littleton also hath put an example, as when excommengement is pleaded in disability of the Plaintiff or Demandant, there the award is, that the Tenant or Defendant shall go without day, and yet when the Demandant or shewing them to the Court, he cause again. But it is to be known, that when judgment is given for the Tenant or defendant upon a Plea in bar, or to the Writ, &c. the judgment is all one, viz. Quod tenens, or defendens eat inde sine die, and shall have reference to the nature and manner of the plea, and so be taken either to go in bar, or to the Writ. So when judgment is given against the Plaintiff, either in bar of his Action, or in abatement of his Writ, &c. the judgment is all one, viz. Nihil capiat per breve; and it appeareth by the Record, whether the Plea did go in bar, or to the Writ. And the cause of the judgment is never entred in the Record in any case, for that upon consideration had of the record, it appeareth therein.

Vide Sect. 101.

Plaintiff have purchased his Letters of absolution, upon may have a resummons or re-attachment to recontinue the

3.H.4.2.11.

## *Sect.* 692.

¶ Item, si home soit disseisie, & le disseisor deby, son heire esteant eins per discent, ore lentrie de le Disseisee est tollee: si le disseisee porta son briefe dentrie sur disseisin en le Per, enders lheire, & lheire disclaime en le tenancy, &c. le Demandant poit averrer son briefe q̄z il est tenant come le briefe suppose, il voit, pur recoverer ses damages: mes uncore il voit relinquisher le averment, &c. il poit loyalment entrer en la terre per cause del disclaimer, nient obstant q̄z son entrie adevant suit tolle, & ceo fuit adjudge devant mon master Sir R. Dandy (ades Chiefe Justice de la Common Banke, & ses compagnions, &c.

ALso, if a man be disseised, and the Disseisor die his Heir being in by discent, now the entry of the Disseisee is taken away; and if the Disseisee bring his writ of entry *Sur disseisin* in the *per* against the Heir, and the Heir disclaim in the tenancy, &c. the Demandant may aver his Writ that he is Tenant as the Writ supposeth, if he will, to recover his damages; but yet if he will relinquish the averment, &c. he may lawfully enter into the Land because of the Disclaimer, notwithstanding that his Entry before was taken away; and this was adjudged before my Master Sir *R. Dandy* late chiefe Justice of the Common Place, and his Companions, &c.

¶ *Item si home soit disseisie, &c.* Albeit in this case, and in the case before, the Entry of the Demandant is his own act, and the Demandant hath no expresse judgment to recover, yet shall he be remitted, because he in judgment of the Law shall be in according to the title of his Writ, and by his entry defeat the discontinuance, and consequently is remitted to his antient estate.

36.H.6.fol.29.

¶ *Sir Robert Dandy* Knight, was a Gentleman of an antient and fair descended family, & Chief Justice of the Court of Common Pleas, a grave, reverend and learned Judge of

5.E.4.41.4.E.4.38.

of whom our Author ſpeaketh here with very great reverence, as you may perceive. And here is to be noted how neceſſary it is, after the example of our Author, to obſerve the judgments and reſolutions of the Sages of the Law.

## Sect. 693.

29.Aſſ.p.26,43.Aſſ.p.3. 11.H.7.20.3 H.6.19. 40.E.3.43.

¶ HEre appeareth a diverſity between a right of Entry, and a right of action; for if a man of full age having but a right of action, taketh an eſtate to him, he is not remitted: but where he hath a right of entry, and taketh an Eſtate, he by his entry is remitted, becauſe his entry is lawful; and if the Diſſeiſor enfeoffe the diſſeiſee and others, the diſſeiſee is remitted to the whole, for his entry is lawful: otherwiſe it is if his Entry were taken away.

¶ Item, lou lentry dun home eſt congeable, coment que il prent eſtate a luy quand il eſt de pleine age, pur terme de vie, ou en taile, ou en fee, ceo eſt un Remitter a luy, ſi tiel priſel de eſtate ne ſoit per fait indent, ou per matter de record, que concludera ou eſtoppera. Car ſi home ſoit diſſeiſie, & reprēt eſtate de le Diſſeiſor ſans fait, ou per fait polle, ceo eſt un remit al Diſſeiſee, &c.

ALſo, where the Entry of a man is congeable, although that he takes an eſtate to him when he is of full age, for term of life, or in taile, or in Fee, this is a Remitter to him, If ſuch taking of the Eſtate be not by Deed indented, or by matter of Record, which ſhall conclude or eſtop him: for if a man be diſſeiſed, and takes back an Eſtate from the Diſſeiſor without Deed, or by deed poll, this is a Remitter to the Diſſeiſee, &c.

8.R.Quar.Imp.199. 19.H.6.30.8.H.6.17. 21.H.6.2.3 H.4 8. 14.H.6.15,16.37. H.6. 18. 26.H.8.4.F.N.B.36. fol.& 35.b.

¶ *Lou l' entrie eſt congeable.* A. is diſſeiſed of a manor, whereunto an advowſon is appendant, an eſtranger uſurps to the Advowſon, if the diſſeiſee enter into that manor, the Advowſon is recontinued again, which was ſevered by the uſurpation. And ſo it is, if tenant in Tail be of a Manor whereunto an advowſon is appendant, the Tenant in tail diſcontinueth in Fee, the Diſcontinuee granteth away the Advowſon in fee, and dieth, the iſſue in tail recontinueth the Manor by recovery, he is thereby remitted to the Advowſon, and in both caſes he that right hath ſhall preſent when the Church becometh void.

22.Aſſ.p.33. en le caſe de Theobald Grinvile.

The Patron of a Benefice is outlawed, and the Church becometh void, an Eſtranger uſurpeth, and ſix months paſſe, the King doth recover in a Quare impedit, and remove the Incumbent, &c. the Advowſon is recontinued to the rightful Patron. And ſo note a diverſity between a Recontinuance and a Remitter, for a remitter cannot be properly, unleſſe there be two titles, but a recontinuance may be where there is but one.

13.H.4.5.3.H.4 17. 8.H.4.8.2.H.4.19. 35.Aſſ.8.17 Aſſ.3. 29.Aſſ.53.43.E.3.17. Parkers caſe, 44 E.3. Eſtop.21 H.6.2.per Paſton.8.H.6.7.per Cotiſmere.

¶ *Per fait indent, &c.* Here it appeareth, That if the Diſſeiſor by deed indented make a Leaſe for life, or a gift in taile, or a Feoffment in fee, whereunto Livery of Seiſin is requiſite, yet the deed indented ſhall not ſuffer the livery made according to the form and effect of the Indenture, to worke any Remitter to the diſſeiſee, but ſhall eſtop the diſſeiſee to claim his former eſtate: and if the Diſſeiſor upon the feoffment doth reſerve any rent or condition, &c. the rent or condition is good: and the reaſon wherefore a deed indented ſhall conclude the taker more then the deed poll is, for that the deed poll is only the Deed of the feoffor, Donor, and Leſſor, but the deed indented is the deed of both parties; and therefore as well the taker as the giver is concluded.

¶ *Ou per Record.* As by fine, Deed indented, and enrolled, and the like.

Sect.

## *Sect.* 694.

¶ Item, ſi home leſſa terre pur terme de vie a un auſ, le quel aliena a un auter en fee, & lalienee fait eſtate a le Leſſor, ceo eſt un Remitter al Leſſor, pur ceo que ſon Entrie fuit congeable, &c.

ALſo, if a man let land for term of life to another, who alieneth to another in fee, and the Alienee make an Eſtate to the Leſſor, this is a Remitter to the Leſſor, becauſe his entry was congeable, &c.

This is evident enough upon that which hath been ſaid.

## *Sect.* 695.

¶ Item, ſi hom̃ ſoit diſſeiſe & le Diſſeiſor leſſa la terre al diſſeiſee p fait pol, ou ſans fait, pur terme des ans, per q̃ le diſſeiſee entra, ceſt entre eſt un Remitter a le diſſeiſee. Car en tiel caſe lou lentre dun home eſt congeable, & un Leaſe eſt fait a luy, coment que il claima p parol en pais, que il ad eſtate per force de tiel leaſe, ou dit ouertment que il ne claima riens en la terre ſi non p force de tiel Leaſe, uncore ceo eſt un remitter a luy, car tiel diſclaimer en le pays neſt riens a purpoſe. Mes ſi declaimer en court de Record que il nad eſtate forſque per force de tiel Leaſe, & nemy auterment, donqz il eſt conclude, &c.

ALſo, if a man be diſſeiſed, and the Diſſeiſor let the Land to the Diſſeiſee by deed poll, or without deed, for term of years, by which the Diſſeiſee entreth, this entry is a remitter to the diſſeiſee. For in ſuch caſe where the entry of a man is congeable, and a Leaſe is made to him, albeit that he claimeth by words in *Pais*, that he hath eſtate by force of ſuch Leaſe, or ſaith openly, That he claimeth nothing in the land but by force of ſuch leaſe, yet this is a Remitter to him, for that ſuch diſclaimer in *Pais* is nothing to the purpoſe. But if he diſclaim in court of Record, that he hath no eſtate but by force of ſuch Leaſe, and not otherwiſe, then is he concluded, &c.

¶ Here appeareth a diverſity between a Claim in Pais of an Eſtate, and a Claim of record; for a Claim in Pais ſhall not hinder a remitter. Otherwiſe it is of a Claim of record, becauſe that doth work a Concluſion.

## *Sect.* 696.

¶ Item, ſi deux Joyntenants leſſe de certeine tenements en Fee, lun

ALſo, if two Joyntenants ſeiſed of certain Tenements in Fee, the one being of

¶ Here note a Diverſitie worthy the obſervation, that where Joyntenants & Coparceners have one and the ſame remedy, if the one enter, the

the other ſhall enter alſo: but where remedies be ſeveral, there it is otherwiſe. As if two Joyntenants or coparceners joyn in a real action, where their entry is not lawful, and the one is ſummoned and severed, and the other purſueth and recovereth the moity, the other Joyntenant or Coparcener ſhall enter and take the profits with her, becauſe their remedy was one and the ſame. But where two Coparceners be, and they are diſſeiſed, and a diſcent is caſt, and they have iſſue and die, if the iſſue of the one recover her moity, the other ſhall not enter with her, becauſe their remedies were ſeveral; and yet when both have recovered, they are Coparceners again. So here in this caſe that Littleton putteth, the two joyntenants have not equal remedy, for the infant hath a right of entry, and the other a right of action; and therefore the infant being remitted to a moity, the other ſhall not enter and take the profits with her.

10.H.6.10.19 H.6.45. 31.H.6.tit.Ent.cong.54

If A. and B. Joyntenants in fee, be diſſeiſed by the father of A who dieth ſeiſed, his ſon and heir entreth, he is remitted to the whole, and his companion ſhall take advantage thereof. Otherwiſe here in the caſe of Littleton, for that the advantage is given to the Infant, more in reſpect of his perſon than of his right, whereof his companion ſhall take no advantage. But if the Grand-father had diſſeiſed the Joyntenants, and the Land had diſcended to the Father, and from him to A. and then A. had died, the entry of the other ſhould be taken away by the firſt diſcent; and therefore he would not enter with the heir of A.

Vid.35.Aſſ.Pl.Ultim.

But here in the caſe of Littleton, if after the diſcent the other Joyntenant had died, and the Infant ſurvived, ſome ſay that he ſhould have entred into the whole, becauſe he is now in judgment of law, ſolely in by the firſt feoffment, and he claimeth not under the diſcent.

eſteant de pleine age, lauter deins age ſont diſſeiſies, &c. & le diſſeiſor moruſt ſeiſie, & ſon iſſue entra lun de les Joyntenants eſteant adonque deins age, & apres que il vient al pleine age, iheire le diſſeiſor leſſa les Tenements a meſmes les Joyntenants pur terme de lour deux vies, ceo eſt un remitter (quant al moitie) a celuy que fuit deins age, pur ceo que il eſt ſeiſie de ceſt moitie que affiert a luy en Fee, pur ceo que ſon entre fuit congeable. Mes lauter Joyntenant nad en lauter moity forſque eſtate pur term de ſa vie, per force de le leaſe pur ceo que ſ entre fuit tolle, &c.

full age, the other within age, be diſſeiſed, &c. and the Diſſeiſor die ſeiſed, and his Iſſue enter, the one of the Joyntenants being then within age, and after that he cometh to full age, the heir of the Diſſeiſor letteth the Tenements to the ſame Joyntenants for term of their two lives, this is a remitter (as to the moity) to him that was within age, becauſe he is ſeiſed of the moity which belongeth to him in fee, for that his entry was congeable. But the other Joyntenant hath in the other moity but an eſtate for term of his life by force of the leaſe, becauſe his entry was taken away, &c.

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## Cap. 13. Of Warranty: *Sect.*697.

Vide Sect.288 331.

"IL *eſt communement dit*, here by the opinion of Littleton, Communis opinio is of authority, and ſtands with the rule of law. A Communi obſervantia non eſt rece-

"IL eſt cõmunement dit, Que trois Garranties y ſont, ſ, Garrantie lineal, Gar-

IT is commonly ſaid that there be three warranties, *ſcil.* Warranty Lineall, Warranty Co-

rantie

rantie collateral, & garrantie q̄ cōmence p̄ disseisiū. Et est a cas voir, q̄ devant lestatute de Glouc̄, touts garranties q̄ux discendont eux queux sont heires a eux q̄ le soyēt les garranties, fueront barrez a mesmes les heires a demander aleuns terres ou tenemēts encounter les garranties, forepris le garrāties q̄ commencerēt p̄ disseisiū, car tiel garrantie ne fuit unq̄ barre al heire, pur ceo q̄ le garrantie commence per tort, s. per disseisiū.

lateral, and warrantie that commence by disseisin. And it is to be understood, that before the Statute of Glouc' all warranties which descended to them which are heirs to those who made the warranties, were barres to the same heirs to demand any Lands or Tenements against the Warranties, except the warranties which commence by disseisin. For such warranty was no bar to the heir, for that the Warranty commenced by wrong, *viz.* by disseisin.

dendum: and again, Minime mutanda sunt quæ certam habuerunt interpretationem.

Here our Author beginneth this Chapter with an exact division of warranties. A warranty is a Covenant reall annexed to Lands or tenements, whereby a man and his heirs are bound to Warrant the same, and either upon voucher, or by judgement in a Writ of Warrantia cartæ to yield other lands and tenements (which in old Books is called in Excambio) to the value of those that shall be evicted by a former title, or else may be used by way of Rebutter. Bract.l.2.f.37.l.5.f.380 381.&c. Glanvil. lib. 3. c.1,2,3,li.7.cap. 105. f.249,250.&c. & fol.88. 106.b.196.197.Fleta.li. 5.cap.15.Lib.6.6.c.23. Mirr.cap.2,Sect.17.

¶ *Rebouter* is a French word, and is in Latine repellere, to repell or bar, that is, in the understanding of the Common Law, the action of the heire by the warranty of his Ancestor; and this is called to Rebut or Repell. (c) Britton saith, Garrantee en un 38.E.3.21.45.E.3. (c) Britton.fol.197.b.

sence signifie a defender lon Tenant en sa seisin; & en auter sence signifie que si il ne defende que le garrant luy soit tenue a eschange, & de faire on gree a la vaillaunce. (d) Bracton saith, Warrantizare nihil aliud est, quam defendere & acquietare tenentem qui warrantum vocavit in seisina sua, (e) Fleta saith, Warrantizare nihil aliud est quam possidentem vocantem defendere & acquietare in sua seisina vel possessione erga petentem, &c. & teneus de re Warranti excambium habebit ad valentiam. (d) Bract.lib.5.fol.380. (e) Fleta lib.5.cap. 15.

It is to be observed that there be two kind of Warranties, that is to say, Warrantia expressa & tacita, vulgarly said warranty, in deed, because they be expressed; and warranties in law, because the law doth tacitely imply them. And this division of Warranties that Littleton here speaketh of, he intendeth of warranties in deed. And of warranties in Law more shall be said hereafter in this Chapter. As for promises or contracts annexed to Chattels real or personal, they are not intended by our Author in his said division, but only Warranties concerning Freeholds and Inheritances. Lib.4.f 81.Nokes case. Vide Sect.733.

*Devant le statute de Glouc.* This statute was made at a Parliament holden at Gloucester in the fifth year of the reign of King E. 1. and therefore it is called the statute of Gloucester. Gloc.cap.3. Vide Sect.724,725, & 727.&c.

¶ *Sont barres a mesmes les heires a demander aleuns terres, &c.* For the Statute, as hath been said, being made in 6. E. 1. (was before the Statute of Donis conditionalibus which was enacted 13. Edward 1.) when all states of inheritance were fee simple. But after the statute of 13. Edward 1. the heir in tail is not barred by the warranty of his Ancestor unlesse there be assets, as shall be said hereafter more largely in this Chapter. Bract.lib.4.fol.332.b. Fleta,lib.5.c.54. 7.E.3.Gar.47.

By the Statute of Gloucester four things are enacted.

First, that if a tenant by the courtesie alien with warranty and dieth, that this shall be no bar to the heir in a Writ of Mordancester without assets in fee simple. And if Lands or tenements descend to the heir from the father, he shall be barred having regard to the value thereof.

Secondly,

Secondly, that if the heir, for want of assets at that time descended, doth recover the lands of his mother by force of this Act, and afterwards assets descend to the heir from the father, then the Tenant shall recover against the heir the inheritance of the mother by a writ of Judgment, which shall issue out of the Record, to resummon him that ought to warrant, as it hath been done in other Cases, where the heir being vouched cometh into the Court, and pleadeth that he hath nothing by discent.

Thirdly, that the issue of the sonne shall recover by a writ of Cosinage, Aiel and Bisaiel.

And lastly, that the heir of the wife after the death of the Father and Mother shall be barred of his action to demand the Heritage of the Mother by a writ of Entry, which his Father alened in the time of his Mother, whereof no fine was levied in the Kings Court.

Concerning the first, there be two points in law to be observed.

(e) 11.E.2.tit.Gar.83. 4.E.3.Gar.63.18.E.3. 51.Pl.Com.110.7.E.3. 53.Temps.E.1.Gar.87.

First, albeit the statute in this article name a writ of Mordancester, and after writes of Cosinage, Aiel and Bisaiell (e) yet a writ of Right, a Formedon, a writ of Entry Ad Communem Legem, and all other like actions are within the purview of this Statute, for those actions are put but for examples.

27.E.3.89.14.E.4.Gar.5 Dyer.4.Mar.148.2.

Secondly, where it is said in the said act, (the Tenant by the courtesie alien) yet this release with warranty to a disseisor, &c. is within the purview of the Statute, for that it is in equal mischief; and if that evasion might take place, the Statute should have been made in vaine.

22.Ass.9.& 37.Temps, E.Gar.86.

If tenant by the courtesie be of a seigniory, and the Tenancy escheat unto him, and after he alieneth with warranty, this shall not bind the issue, unlesse assets descend, for it is in equal mischief. But notwithstanding this statute, if feme tenant in dower had alened in fee with warranty, and died, the warranty had bound the heir until the Statute (o) of 11.H.7. since our Author wrote. By which Statute the heir may enter notwithstanding such Warranty.

(o) 11.H.7.cap.20.

18.E 3.9.

But note, there is a diversity between a warranty on the part of the mother, and an estoppell. For an estoppel of the part of the Mother shall not bind the heir, when he claimeth from the father. As if lands be given to the Husband and Wife, and to the heirs of the Husband, the husband make a gift in tail, and dieth, the wife recovereth in a Cui in vita against the Donee, supposing that she had fee simple, and make a feoffment and dieth, the Donee dieth without issue, the issue of the husband and wife bring a Formedon in the Reverter against the feoffee, and notwithstanding that he was heir to the estoppel, and the Mother was estopped; yet for that he claimed the Land as heir to his Father, he was not Estopped. Note that warranties are favoured in Law, being part of a mans assurance, but Estoppels are odious.

21.R.2.Judgment.263.

If a feme heir of a disseisor infeoffeth me with warranty, and marrieth with the Disseisee, if after the disseisee bring a Præcipe against me, I shall rebut him, in respect of the Warranty of his wife, and yet he demandeth the Land in another right. And so if the husband and wife demand the right of the wife, a warranty of the collateral ancestor of the husband shall bar.

If a woman had been tenant for life, the remainder or reversion to her next heir, and the woman hath alened in fee and died, this warranty had barred her heir in Remainder or Reversion, but this is partly holpen by the said act of 11.H.7. viz. where the woman hath any estate for life of the inheritance or purchase of her husband, or given to her by any of the ancestors of the husband, or by any other person seised to the use of her husband or of any of his ancestors, there her alienation, Release or Confirmation with warranty shall not bind the heir.

11.H.7.cap.20. Vide Sect 595. See this Statute of 11.H.7.c2. 20.well expounded. Li. 1.f. 176.in Sir Anthon. Mildmays case,3.& 4. Ph.& M.Dier.146. Lib.3.f.59,60,61,62. Lincoln Coll.case.Pl. Com.fol.56.20.El. Dier.362.Doct.& Stud. 55.8.El.Dier.248.19.E. Dier.354.21.El.Ibi.362 lib.3.f.50,51,Sir George Browns case,Lib.5 f.79. Fitzh.case. 27.H.8.23.

To the authorities quoted in the margent, which may serve as Commentaries upon the said Statute, I will only adde two cases, the one was: (f) A man seised of Lands in fee levied a fine to the use of himself for life, and after to the use of his wife, and of the heirs males of her body by him begotten for her joynture, and had issue male, and after he and his wife levied a fine, and suffered a common recovery, the husband and wife died, and the issue male entred by force of the said statute of 11.H.7. And it was holden by the Justices of Assise (the case coming down to be tried by Nisi prius) that the entry of the issue male was lawfull; and yet this case is out of the Letter of the statute, for she neither levied the fine, &c. being sole, or with any other after-taken husband, but is by her self with her husband, that made the joynture. Sed qui hæret in litteræ hæret in cortice; and this case being in the same mischief is therefore within the remedy of the statute by the intendment of the makers of the same, to avoid the disherison of heirs, who were provided for by the said Joynture, and especially by the husband himself that made the joynture, which (as it was said) is a stronger case then the example set down in the statute. The other was, (g) A man is seised of Lands

(f) Mich.13.Jac.inter Harley & West.in ejectione firmæ in comm. Banco Lincoln.

(g) Pasch.17.El.in.

Lands in the right of his wife, and they two levy a fine, and the conuſee grant and rendereth the land to the husband and wife in ſpecial tail, the remainder to the right heirs of the wife, they have iſſue, the husband dieth, the wife taketh another husband, and they two levy a fine in fee, and the iſſue entreth, this is directly within the Letter of the Statute; and yet it is out of the meaning, becauſe the eſtate of the land moved from the wife, ſo as it was the purchaſe of the husband in Letter, and not in meaning. But where the woman is tenant for life, by the gift or conveyance of any other, her alienation with warranty ſhall bind the heir at this day. So if a man be Tenant for life, (otherwiſe then as Tenant by the courteſie) and alien in fee with warranty, and dieth, this ſhall at this day bind the heir, that hath the Reverſion or Remainder by the Common Law not holpen by any Statute. But all this is to be underſtood, unleſſe the heir that hath the Reverſion or Remainder doth avoid the eſtates ſo alienes in the life of the Anceſtor, for then the eſtate being avoided, the Warranty being annexed unto the eſtate, is avoided alſo, whereof more ſhall be ſaid in this Chapter in his proper place. And therefore it is neceſſary for the heir in ſuch caſes to make an entry as ſoon as he hath notice or probable ſuſpition of ſuch an alienation. Com. Banco Lattons caſe, which I my ſelf heard and obſerved. Sect. 715.

As to the ſecond clauſe of the Statute of Gloucester. There are two points of Law to be obſerved.

Firſt, That by the expreſſe purview of the Statute, if aſſets do after deſcend from the Father, then the Tenant ſhall have recovery or reſtitution of the Lands of the Mother. But in a Formedon, if at the time of the Warranty pleaded, no aſſets be deſcended whereby the Demandant recovereth, if after aſſets deſcend, there the Tenant ſhall have a Scire facias for the aſſets, and not for the Land intailed. And the reaſon hereof is, that if in this caſe the Tenant ſhould be reſtored to the Land intailed, then if the Iſſue in Tail aliened the aſſets, his iſſue ſhould recover in a Formedon; and therefore the Sages of the Law, to prevent future occaſions of ſuits, reſolved the ſaid diverſity in the caſes abovelaid, upon conſideration and conſtruction of the Statute of *Gloucester*, and the Statute of de donis Conditionalibus. Pl. Com. Fulmerſtones caſe, 110. a. Li. 8. Fol. 53. Syms caſe.

Secondly, It is to be obſerved, that after aſſets deſcended, the recovery ſhall be by Writ of judgement, which ſhall iſſue out of the roll of the Juſtices, &c. And here two things are to be declared and explained. Firſt, by what writ, &c. and that is clear, viz. by Scire facias. But the ſecond is more difficult, and that is upon what manner of judgement the Scire facias is to be grounded; for explanation whereof it is to be underſtood, that if the Tenant will have benefit of the Statute, he muſt plead the Warranty, and acknowledge the title of the Demandant, and pray that the advantage of the Statute may be laied unto him. And then if after aſſets deſcend, the Tenant upon this Record ſhall have a Scire facias. And if aſſets deſcend but for part, he ſhall have a Scire facias for ſo much. But if the Tenant plead the warranty, and plead further that aſſets deſcended, &c. and the Demandant taketh iſſue that aſſets deſcended not, &c. which iſſue is found for the Demandant, whereupon he recovereth, the Tenant, albeit aſſets do after deſcend, ſhall never have a Scire facias upon the ſaid Judgment, for that by his falſe plea he hath loſt the benefit of the ſaid Statute. Lib. 8. fol. 53, 54. *Syms* caſe, Ibi. 134. Mary Shipleys caſe.

Touching the third, ſufficient hath been ſpoken before. For the laſt, it is to be obſerved, That if the Husband be ſeiſed of lands in the right of his wife, and maketh a feoffment in fee with warranty, the wife dieth, and the Husband dieth, this Warranty ſhall not bind the heir of the wife without aſſets, albeit the husband be not Tenant by the courteſie. But of this you ſhall read more hereafter. 8. E. 2, tit. Gar, 81; 8. E. 3. 51.

In the mean time know this, that the learning of Warranties is one of the moſt curious and cunning Learnings of the Law, and of great uſe and conſequence. Vid. Sect. 725.

¶ *A demander aſcuns terres ou tenements.* A Warranty may not only be annext to Freeholds, or Inheritances corporal, which paſſe by livery, as Houſes and Lands: but alſo to Freeholds or inheritances incorporal, which lie in grant, as advowſons, and to Rents, Commons, Eſtovers, and the like, which Iſſue out of lands or Tenements. And not only to Inheritances in eſſe, but alſo to Rents, Commons, Eſtovers, &c. newly created. As a man (ſome ſay) may grant a rent, &c. out of Land for life, or tail, or in fee with Warranty: for although there can be no title precedent to the Rent, yet there may be a title precedent to the Land, out of which it iſſueth before the grant of the Rent, which Rent may be avoided by the recovery of the Land, in which caſe the Grantee may help himſelf by a Warrantia Chartæ upon the eſpecial matter. And ſo a warranty in law may extend to a Rent, &c. newly created; and therefore if a rent newly created be granted in Exchange for an acre of Land, this Exchange is good, and every Exchange imployeth a Warranty in law. And ſo a rent newly created may be granted for oweltie of partition. 2. H. 4. 13. 30. H. 8. Dier. 4. Temps, E. 1. admeaſurement 16. 32. E. 1. Voucher 291. 30. E. 1. Exchange 16. 9. E. 4. 15, E. 9. 29. Aſſ. 13.

Vide Sect.741.
45.E.3.Vouch 72.9.E 3
78.18.E.3.55.30.E.3.30
21.H.7.9.3.H.7.4.7.H.4
17.10.E.4.9.b.21.E.4.
26.14.H.8.6.30.H.8.
Dier.42.

A man ſeiſed of a rent ſeck iſſuing out of the Manor of Dale, taketh a wife, the husband releaſeth to the Ter-tenant, and warranteth Tenementa prædicta, and dieth, the wife dyingeth a writ of dower of the Rent, the Ter-tenant ſhall vouch, for that albeit the releaſe entured by way of extinguiſhment, yet the warranty extended to it, and by warranting of the Land all Rents, &c. iſſuing out of the Land, that are ſuſpended or diſcharged at the time of Warranty created, are warranted alſo.

## Sect. 698.

*Garrantie que commence per diſſeiſin, &c.* It is called a warranty that commenceth by diſſeiſin, becauſe regularly the conveyance whereunto the warranty is annexed doth worke a diſſeiſin.

7.E.3.41.43.E.17.
50.E.3.12. Vid.Sect.611

In this Section Littleton putteth five examples of a Warranty commencing by Diſſeiſin, viz. of a feoffment made with warranty by Tenant for yeers, by Tenant at will, by Tenant by Elegit, by Tenant by Statute merchant, and by Tenant by ſtatute Stapie: all theſe and the other examples that Littleton putteth of this kind of warranties in the ſucceeding Sections, have four qualities.

Lib.5.fol.79.b. Fitzherberts caſe.

First, that the diſſeiſin is done immediately to the heir that is to be bound; and yet if the father be Tenant for life, the remainder to the ſon in fee, the father by Covine and conſent maketh a Leaſe for yeers, to the end that the leſſee ſhall make a feoffment in fee to whom the father ſhal releaſe with warranty, and all is executed accordingly, the father dieth, this Warranty ſhall not bind, albeit the Diſſeiſin was not done immediately to the ſon; for the feoffment of the Leſſee is a diſſeiſin to the father, who is particeps criminis. So it is if one brother make a gift in tail to another, and the uncle diſſeiſe the Donee, and enfeoffeth another with warranty, the uncle dieth, and the warranty deſcendeth upon the Donor, and then the Donee dyeth without

31.E.3.tit.Garrantie.

Garranty q̄ cõmence per diſſeiſiñ eſt en tiel forñ, ſicome lou il eſt pier & fits, & le fits purchaſe terre, &c. & leſſa meſme la terre a ſon pier pur terme dans, & pier per ſon fait ent enfeoffa un auter en fee, & oblige luy & ſes heires a garranty, & le pier deby, per q̄ le garranty diſcendiſt al fits, ceo garranty ne barrera my le fits, car nient obſtant cel garrantie le fits poit bien enter la terre, ou aver un aſſiſe envers lalienee ſil voit, pur ceo q̄ l'garrantie commẽce per diſſeiſiñ, car quant le pier q̄ navoit eſtate forſque pur terme des ans, fiſt un feoffment en fee, ceo fuit un diſſeiſiñ al fits del franktenement q̄ adonq̄ fuit en le fits. En meſme le maner eſt, ſi le fits leſſa a le pier la terre a tener a volũt, & puis le pier fuit un feoffment oue

WArrantie that commence by diſſeiſin is in this manner, as where there is father and ſon, and the ſon purchaſeth land, &c. and letteth the ſame land to his father for terme of yeers, and the father by his deed thereof enfeoffeth another in fee, and bind him and his heirs to Warranty, and the father dies, whereby the Warranty deſcendeth to the ſon, this warrantie ſhall not bar the ſon; for notwithſtanding this warranty the ſon may well enter into the Land, or have an Aſſiſe againſt the Alienee if he will, becauſe the Warranty commenced by diſſeiſin; for when the father which had but an eſtate for term of years made a feoffment in fee, this was a diſſeiſin to the ſon of the freehold which then was in the ſonne. In the ſame manner it is if the ſon letteth to the fa-

garrantie,

garrantie, &c. Et ſi come eſt dit de pier, iſſint poit eſtre dit de cheſcun auter aunceſter, &c. En meſme l'maner eſt ſi tenant per Elegit, tenant per Statute Merchant, ou tenant per Statute de le Staple fait feoffment en fee odeſque garrantie, ceo ne barrera my lheire que doit averla terre, pur ceo or tiels garranties commencerent per diſſeiſin.

ther the Land to hold at will and after the father make a feoffement with Warrantie, *&c.* And as it is ſaid of the father, ſo it may be ſaid of every other anceſter, *&c.* In the ſame manner is it, if tenant by *Elegit*, tenant by ſtatute Merchant, or Tenant by ſtatute ſtaple make a feoffement in fee with warranty, this ſhall not barre the heire which ought to have the Land, becauſe ſuch warranties commence by diſſeiſin.

iſſue, albeit the diſſeiſin was done to the Done, and not to the Donor; yet the warrantie ſhall not bind him. The father, the ſon, and a third perſon are Joyntenants in fee, the father maketh a feoffment in fee of the whole with warrantie, and dieth, the ſonne dieth, the third perſon ſhall not onely avoid the feoffment for his own part, but alſo for the part of the ſonne, and he ſhall take advantage that the warranty commenced by Diſſeiſin, though the Diſſeiſin was done to another.

The ſecond qualitie appearing in Littletons examples is, that the warranty and Diſſeiſin are ſimul & ſemel, both at one and the ſame time. (y) And yet if a man commit a diſſeiſin of intent to make the feoffement in fee with warrantie, albeit he make the feoffement

(y) 19 H.8.12. lib.5. fol.79.b. Fitz. caſe.

many years after the diſſeiſin, notwithſtanding becauſe the warranty was done to that intent and purpoſe, the Law ſhall adjudge upon the whole matter, and by the intent couple the Diſſeiſin and warranty together.

The third quality is, that the warranty commenceth by diſſeiſin by all theſe examples (if it ſhould bind) it ſhould bind as a Collateral warranty, and therefore commencing by Diſſeiſin ſhall not bind at all.

¶ *Ne barrera my le heir* &c. For by the authority of our Author himſelfe, a Leſſee for years may make a feoffment and by his feoffment a fee ſimple ſhall paſſe, ſo as albeit as to the Leſſor it worketh by diſſeiſin, yet between the parties the warrantie annexed of ſuch eſtate ſtandeth good: upon which the feoffee may vouch the feoffor or his heirs, as by force of a lineal warranty. And therefore if a leſſee for years or Tenant by Elegit, &c. or a diſſeiſor incontinent make a feoffment in fee with warrantie, if the feoffee be impleaded, he ſhall vouch the feoffor, and after him his heire alſo, becauſe this is a Covenant real, which bindes him and his heires to recompence in value, if they have aſſets by diſcent to recompence, for there is a feoffment de facto, and a feoffment de jure: (*) And a feoffment de facto made by them that have ſuch intereſt or poſſeſſion, as is aforeſaid, is good between the parties, and againſt all men but only againſt him that hath a right. And therefore if the Lord be Gardein of the Land, or if the tenant maketh a leaſe to the Lord for years, or if the Lord be Tenant by Statute Merchant or Staple, or by Elegit of the tenancie, and make a feoffment in fee, he hereby doth extinguiſh his ſeigniorie, although having regard to the Leſſor it is a Diſſeiſin.

The fourth qualitie is a diſſeiſin, but that is put for an example, and the rather for that it is moſt uſual and frequent, but a warranty that commenceth by abatement or intruſion (that is, when the abatement or intruſion is made of intent to make a feoffment in fee with warranty) ſhall not bind the right heir, no more then a warranty that commenceth by diſſeiſin, becauſe all do commence by wrong. And ſo it is if the tenant dieth without heir, and an Intruſor or the Lord enter before the entrie of the Lord, and make a feoffment in fee with warrantie and dieth, this warranty ſhall not bind the Lord, becauſe it commenceth by wrong, being in nature of an abatement. Et ſic de ſimil bus.

vide Sect. 611. 699. Bract. fol. 216, 423, 224. Fleta lib. 4. cap. 17. 192. Britton, cap. diſſeiſin. 50. E. 3. 12. b. H. 7. 5. 7. E. 3. 11, 14. E. 3. Feoffments en faits 67. 18. E. 3. Iſſue 36. 4. E. 2. Briefe 790. 19. E. 2. Aſſ. 400. 43. E. 3. 7. 17. E. 3. 41. 43. E. 3. Diſſ. 5, 3. E. 4. 17. 12. E. 4. 12. 10. E. 4. 18. F. N. B. 201. l. 3. fol. 78. in Fermors caſe.

(*) Temps E. 1. Coun. terplea de Voucher 126. 50. E. 3. ibid. 124. Vide W. 1. cap. 48. in the ſecond part of the inſtitutes.

## *Sect.*699.

¶ ITem ſi Gardein en Chivalrie, ou Gardein en Socage

ALſo if Gardein in Chivalrie, or Gardeine in Socage make

fait un Feoffment en fee, ou en fee taile, ou pur term de vie ou eſque garrantie, &c. tiels garranties ne ſont pas barres a les heires, as ſur les terres ſerront diſcendus, pur ceo que ils commence per diſſeiſin.

a feoffment in fee, or in fee taile, or for life, with warranty, *&c.* ſuch warranties are not bars to the heires to whom the Lands ſhall be diſcended, becauſe they commence by Diſſeiſin.

16.E 3 Gar.20.8 Aſſ.2. 43.E.3.and the Books aboveſaid. Vide *Sect.*698.

HEre Littleton addeth the caſe of Gardeine in Chivalrie, and Gardeine in Socage, and gardeine, becauſe Nurture is alſo in the ſame caſe.

## *Sect.* 700.

13.Aſſ.8.13.E. Gar.24. 25.37.22.H.6.51.8.H. 7.6.

¶ *AVer & tener a eux joyntment*, &c. This is to be intended of a joynt purchaſe in fee, for if the purchaſe were to the father and the ſon, & the heirs of the ſonne, and the Father maketh a Feoffment in fee with warranty, if the ſonne entreth in the life of the Father, and the feoffee re-enter, the father dieth, the ſon ſhall have an aſſiſe of the whole, and ſo is the Book of 22. H. 6. to be underſtood. But if the ſonne had not entred in the life of the father, then for the fathers moity it had been a bar to the ſon, for that therein he had an eſtate for life; and therefore the warranty as to that moity, had been collateral to the ſon, and by Diſſeiſin for the ſonnes moity, and ſo a warranty defeated in part, and ſtand good in part. And this appeareth by the example that Littleton hath put. But if the purchaſe had been to the father and ſonne, and to the Heires of the Father, then the Entrie of the ſonne in the life of the Father, as to avoidance of the warranty, had not availed him, becauſe his Father lawfully conveyed away his moitie.

¶ ITem, ſi le pier & le fits purchaſe certaine terres ou Tenements, a aver & tener a eux joyntmẽt, &c. et puis le pier alien lentier a un auter, et oblige luy & ſes heires a garrantie, &c. & puis le pier devie, cel garrãtie ne barrera my le fits de le moitie que a luy affiert de les dits terres ou tenements, pur ceo qz quaunt a cel moitie que affiert a le fits, le garrãtie comente per Diſſeiſin.

ALſo, if Father and Son purchaſe certaine Lands or Tenements to have and to hold to them jointly, *&c.* and after the father alien the whole to another, & bind him & his Heires to Warrantie, *&c.* and after the father dieth, this Warrantie ſhall not barre the ſon of the moitie that belongs to him of the ſaid Lands or Tenements, becauſe as to that moity which belongs to the ſon, the warranty commences by diſſeiſin, &c.

Temps E.1. Vouch.207. 39.E.3.26. John Londons caſe, 14.H.6.

If a man of full age and an Infant make a feoffement in Fee with warranty, this warrantie is not void in part, and good in part, but it is good for the whole againſt the man of full age, and void againſt the Infant: for albeit the feoffment of an infant paſſing by livery of ſeiſin be voidable, yet this warranty which taketh effect only by deed, is meerly void.

*Sect.*

## *Sect.* 701.

¶ ITem, ſi A. de B. ſoit ſeiſie dun meale, e F. de G. que nul droit ad dentrer en meſme le meale, claimaunt meſme le meale, a tener a luy e a ſes heirs, entra en meſme le meale, mes le dit A. de B. adonque eſt continualment demurrant en meſme le meale: En ceſt cas le poſſeſſion de frank-tenement ſerra tout temps adjudge en A. de B. e nemy en F. de G. pur ceo que en tiel caſe lou deux ſont en un meale, ou autres Tenements, e lun claima per lun Title, e lauter per lauter Title, la ley adjudgera celuy en poſſeſſion que ad droit daver le poſſeſſion de meſmes les Tenements. Mes ſi en le caſe avant dit, le dit G. de G. fait un Feoffment a certain Barretors e Extortioners en le pais, purmaintenance de eux aver, de meſme le meale per un fait de Feoffement ove garrantie, per force de quel le dit A. de B.

ALſo, if A. of B. be ſeiſed of a Meſe, and F. of G. that no right hath to enter into the ſame Meſe, claiming the ſaid Meſe to hold to him and to his Heirs, entreth into the ſaid Meſe, but the ſame A. of B. is then continually abiding in the ſame Meſe: In this Caſe the poſſeſſion of the Free-hold ſhall be alwaies adjudged in A. of B. and not in F. of G. becauſe in ſuch Caſe where two be in one Houſe or other Tenements, and the one claimeth by one Title, and the other by another Title, the Law ſhall adjudge him in poſſeſſion that hath right to have the poſſeſſion of the ſame tenements. But if in the caſe aforeſaid the ſaid F. of G. make a feoffement to certain Barretors & Extortioners in the Country, to have maintenance from them of the ſaid houſe, by a deed of feoffment with Warranty, by force whereof the ſaid

¶ *Ou deux ſont en un meſe, &c. & lun claima per lun title, & lauter per lauter title, &c.* For the rule is, Duo non poſſunt in ſolido unam rem poſſidere. 17.H.6.fol.28.b. per Newton.

Theſe words of our Author be ſignificant and materiall: (h) for if a man hath iſſue two daughters, Baſtard eigne and Mulier puiſne, and die ſeiſed, and they both enter generally, the ſole poſſeſſion ſhall not be adjudged only in the Mulier, becauſe they both claim by one & the ſame title, and not one by one title, and the other by another title, as our Author here ſaith. (h) 17. E. 3. 59. 11. Aſſ. p. 23.

(i) If the tenant in an aſſiſe or an houſe deſire the plaintiffe to dine with him in the houſe, which the plaintiffe doth accordingly, & ſo they be both in the houſe, and in truth one pretendeth one title, and the other another title, yet the law in this caſe ſhall not adjudge the poſſeſſion in him that right hath, becauſe our Author here ſaith, he claimed not his right; and it ſhould be to his prejudice if the law ſhould adjudge him poſſeſſion, and a treſpaſſer he cannot be, becauſe he was invited by the Tenant in aſſiſe. (i) Pl. Com. 91. the Parſon of Honey Lanes. caſe.

¶ *Barretors.* A barretor is a common Mover, and Exciter, or Maintainer of ſuits, quarrels, or parts, either in courts, or elſewhere in the country. In Courts, as in Courts of Record, or not of Record, as in the County, Hundred, or other inferiour Courts. In the country in three manners: firſt, in the diſturbance of the peace. Secondly, in taking or keeping of poſſeſſions of lands in controverſie, not only by force, but alſo by ſubtil-

See the Inditement of commonBarretor. W. 1. cap. 18. & 32. 40. E. 3. 33. Lib. 8 fol. 36. b. Caſe de Barretrie.

tie and a deceit, and moſt commonly in ſuppreſſion of truth and right. Thirdly, by falſe inventions, and ſowing of calumniations, rumors, and reports, whereby diſcord and diſquiet may grow between neighbours.

33.E.1.Stat.de Conſpiracie Lib.8.ubi ſupra.

¶ *Barretor* is derived of this word (Barret) which ſignifieth not only a wrangling ſuit, but alſo ſuch brawls and quarrels in the Country, as are aforeſaid.

Pl.Com.fol 64. Lib.10. fol.101,102. Beſtiages caſe.

¶ *Extortioner.* Extortion in its proper ſence is a great unlawfull exaction by wreſting, or unlawful taking by any officer, by colour of his office, any money or valuable thing of or from any man, either that is not due, or more then is due, or before it be due. Quod non eſt debitum, vel quod eſt ultra debitum, vel ante tempus quod eſt debitum.

(l)W.1.c.26.&c. W.1. c.10.42.E.3.5.27. Aſſ. 14.Pl.Com.68.

For this it is to be known, that it is provided by the (l) Statute of W.1. That no Sheriff nor any other Miniſter of the King, ſhall take any reward for doing of his Office, but only that which the King alloweth him, upon pain that he ſhall render double to the Party, and be puniſhed at the Kings pleaſure. And this was the ancient common Law, and was puniſhable by fine and impriſonment, but the ſtatute added the aforeſaid penalty. But ſome latter Statutes having permitted them to take in ſome caſes, by colour thereof, the Kings Officers and Miniſters, as Sheriffs, Coroners, Eſcheators, Feodaries, Gaolers,

23 H 6.c.10,33.H.6.22 21.H.7.17. Stanf.49. 3.E.3.Cor.372.

and the like, do offend in moſt caſes; and ſeeing this Act yet ſtandeth in force, they cannot take any thing, but where, and ſo far as latter Statutes have allowed unto them. But yet ſuch reaſonable fees as have been allowed by the Courts of Juſtice of ancient time to inferiour Miniſters and Attendants of Courts for their labour and attendance, if it be asked and taken of the Subject, is no extortion.

(n)Hil.13.Jac.Reg.

And all this was reſolved (n) by the whole Court of Kings Bench, between Shurley Plaintiff, and Packer Deputie of one of the Sheriffs of London, in an action upon the caſe in the Kings bench.

See the Statute of 21.H.8.cap.5. ſetting down the Fees of Ordinaries, Regiſters, and other Officers, in certain Caſes, and many other Statutes, as for example, the ſtatute of 9. H.7.8. againſt taking of ſhewage (that is taking of any thing for ſhewing of Wares and Merchandizes that be truly cuſtomed to the King before) and the like.

Pl.Com.in Dine & Manninghams caſe. Mir. cap.5.Sect.1.

Of this terme it is ſaid, That it is no other then Robbery: and another ſaith, That it is more obvious then Robbery, for Robbery is apparent, and hath the face of a crime, but Extortion puts on the viſore of vertue, for expedition of Juſtice, and the like; and it is ever accompanied with that grievous ſin of Perjury.

7.E.4.21.

But largely, extortion is taken for any oppreſſion by extort power, or by colour or pretence of right, and ſo Littleton taketh it in this place. Extortio is derived from the Verb Extorqueo, and it is called Grimen expilationis, or concuſſionis: And here Barretors and Extortioners are put but for examples; for if the feoffment be made to any other perſon or perſons, the Law is all one.

¶ *Pur maintenance de eux aver.* Maintenance, Manutenentia is derived of the Verb Manutenere, and ſignifieth in Latin, taking in hand, bearing up or upholding of quarrels and ſides to the diſturbance or hindrance of Common right, Culpa eſt rei ſe immiſcere ad ſe non pertinenti, and it is twofold, One in the Country and another in the Court. For quarrels and ſides in the Court, (k) the Statutes have inflicted grievous puniſhments. But this kind of maintenance of quarrels and ſides in the country, is puniſhable only at the ſuit of the King, (r) as it hath been reſolved. And this maintenance is called Manutenentia, or Manutentio ruralis, for example, as to take poſſeſſions, or to keep poſſeſſions, whereof Littleton here ſpeaketh, or the like.

(k)1.E.3.cap.14.20.E. 3 cap.4.5. (r)Mich.7.Ia.in the Starre-Chamber.

33.E.1.St.2.in fine.Regiſt.183.6.E.3.33.22.H. 6.7.9.H.7.22.

The other is called Curialis, becauſe it is done pendente placito, in the Courts of Juſtice, and this was an Office at the common law, and is threefold.

Firſt, To maintain, to have part of the Land, or any thing out of the Land, or part of the Debt, or other thing in plea or ſuit, and this is called Cambiparcia, Champertie.

The ſecond is, when one maintaineth the one ſide, without having any part of the thing in

Plea

A. of B. dare not abide in the houſe, but goeth out of the ſame, this warranty commenceth by diſſeiſin, becauſe ſuch Feoffement was the cauſe that the ſaid A. of B. relinquiſhed the poſſeſſion of the ſame houſe.

ne oſast pas demurren en l' Meaſe, mes alas hors d' l' meaſe, ceſt Garrantie commence per Diſſeiſin, pur ceo or tiel Feoffement fuit la caſe or le dit A. de B. relinquiſt le poſſeſſion de meſme le Meaſe.

Plea or ſuit, and this maintenance is twofold, general maintenance, and ſpecial maintenance, whereof you ſhall read at large in our Books, which were too long here to be inſerted. 32.Aſſ.5.19.E.4.3.2. 2.H.6.12.34.H.6.2. 11.H.6.23.8.H.3.8.

The third is, when (u) one laboureth the Jury, if it be but to appear, or if he inſtruct them, or put them in fear, or the like, he is a maintainer, and he is in law called an Embracer, & an action of maintenance lieth againſt him; and if he take money, a decies tantum may be brought againſt him. And whether the Jury paſſe for his ſide or no, or whether the Jury give any verdict at all, yet ſhall he be puniſhed as a maintainer or Embracer, either at the ſuit of the King or party. 10.E.4.13.W.1.cap.15. 28.W.2.c.49. Artic.ſuper Cart.cap.11.F.N.B. 171.172.Mirror cap.1. Sect.5. (u) 13.H.4.16.b.F.N.B. 171.11.H.6.10.37.H.6.31.

Here in this caſe that Littleton putteth, the feoffment is void by the Statute (a) of 1.R.2. for thereby it is enacted, that feoffments made for Maintenance ſhall be holden for none, and of no value, ſo as Littleton putteth his caſe at the common Law, for he feemeth to allow the feoffment. Where he ſaith, tiel feoffment fuit le cauſe, &c. but ſome have ſaid that the feoffment is not void between the feoffor and Feoffee, but to him that right hath. (a) 1.R.2.cap.8. Vide 27.H.2.fol.23.

Now ſince Littleton wrote, there is a notable Statute (b) made in ſuppreſſion of the cauſes of unlawful maintenance (which is the moſt dangerous enemy that Juſtice hath) the effect of which Statute is. (b) 32.H.8.cap.9.

Firſt, that no perſon ſhall bargain, buy or ſell, or obtain any pretenced Rights or titles.

Secondly, Or take promiſe, grant, or covenant to have any right, or title of any perſon in or to any Lands, Tenements, or hereditaments; but if ſuch perſon which ſo ſhall bargain, &c. their anceſtors, or they by whom he or they claim the ſame have been in poſſeſſion of the ſame, or of the reverſion or remainder thereof, or taken the rents or profits thereof by the ſpace of one whole year, &c. upon pain to forfeit the whole value of the Lands, &c. and the buyer or taker, knowing the ſame, to forfeit alſo the value.

Thirdly, Provided that it ſhall be lawful for any perſon being in lawful poſſeſſion, by taking of the yearly farm-rents or profits, to obtain, and get the pretenced Right or Title, &c. of any lands, whereof he or they ſhall be in lawful poſſeſſion.

For the better underſtanding of which Statute, you muſt obſerve, that title or right may be pretenced two manner of waies:

Firſt, When it is meerly in pretence or ſuppoſition, and nothing in verity.

Secondly, When it is a good right or title in verity, and made pretenced by the act of the parte, and both theſe are within the ſaid Statute; for example, If A. be lawful owner of Land, and is in poſſeſſion, B. that hath no right thereunto granteth to, or contracteth for the land with another, the Grantee & the Grantor, (albeit the grant be meerly void) are within the danger of the Statute. For B. hath no right at all, but onely in pretence. If A. be diſſeiſed in this caſe, A. hath a good lawful right, yet if A. being out of poſſeſſion granteth to, or contracteth for the land with another, he hath now made good his right of entry, pretenced within the Statute, and both the grantor and grantee within the danger thereof A fortiori, of a right action, Quod nota. Pl.Com.fo.30.&c. Partridges caſe.

It is further to be known, that a right or title may be conſidered three manner of waies.

Firſt, As it is naked and without poſſeſſion. Secondly, When the abſolute right cometh by releaſe, or otherwiſe to a wrongful poſſeſſion, and no third perſon hath either Jus proprietatis, or Jus poſſeſſionis. The third, when he hath a good right and wrongful poſſeſſion. As to the firſt, ſomewhat hath been ſaid, and more ſhall be ſaid hereafter. As to the ſecond, taking the former example, if A. be diſſeiſed, and the diſſeiſee releaſe unto him, he may preſently ſell, grant, or contract for the Land, and need not tarry a year; for it is a rule upon this Statute, that whoſoever hath the abſolute ownerſhip of any land, Tenements, or Hereditaments (as in this caſe the Diſſeiſor hath) there ſuch owner may at his pleaſure bargaine, grant, or contract for the land, for no perſon can thereby be prejudiced or grieved. And ſo if a man morgage his Land, and after repeem the ſame, or if a man recover Land upon a former title, or be remitted to an ancient right, he may at any time bargain, grant, or contract for the Land, for the reaſon aforeſaid. As to the third, if in the caſe aforeſaid the Diſſeiſee dieth ſeiſed, and A. the Diſſeiſee entreth, and diſſeiſe the heir of the diſſeiſor, albeit he hath an ancient right, yet ſeeing the poſſeſſion is unlawful if he bargain or contract for the land before he hath been in poſſeſſion by the ſpace of a year, he is within the danger of the Statute, becauſe the heir of the diſſeiſor hath right to the poſſeſſion, and he is thereby grieved, & ſic de ſimilibus; and albeit he that hath a pretenced right (and none in verity) getteth the poſſeſſion wrongfully, yet the Statute extendeth unto him, as well as where he is out of poſſeſſion. Pl.Com.Patridges caſe, ubi ſup 6.E.6. Brook tit. Maintenance 38.

Note, the words of the Statute be (any pretenced right) therefore a leaſe for years is within the Statute, for the Statute ſaith not (the right) but any right) and the Offendour ſhall forfeit the whole value of the land. And where the Statute ſpeaketh of rights in the plural number, yet any one right is within the ſtatute. (a) But yet if a man make a leaſe for years to another, to the intent to trie the title in an ejectione firmæ that is out of the ſtatute becauſe 23.Eliz.Dier.374. Com.Partridges caſe. fol.87. (a) Mich.30.& 31.Eliz. 281.inter Finch. & Cockham in Com. Eſſex.

because it is in a kind of course of law; but if it be made to a great man, or any other, to save or countenance the cause, that is within this statute.

(b) Lib.4.fol.26. Copihold cases. 6.E.6.tit. maintenance Brook 38.

Also the statute speaks of any right or title to any lands, &c.) (b) A customary right, or a pretence thereof to lands, holden by Copy, is within this statute.

The said proviso (which is rather added for explanation, than of any necessitie) extendeth only to a pretended right or title and to a good & clear right; and therefore without question, any that hath a just & lawful estate, may obtain any pretenced right by release or otherwise, for that cannot be to the prejudice of any; nay, as hath been said, a Disseisor that hath a wrongful estate may obtain a release of the Disseisee, and that is not within the body of the act, and consequently standeth not in need of any proviso to protect him.

(c) 34.H.8. Dier 52.

And therefore (c) if there be tenant for life, the remainder in fee by lawful and just title, he in the remainder may obtain and get the pretenced right or title of any stranger, not only for that the particular Estate, and the remainder are all one, but for that it is a mean to extinguish the seeds of troubles, and suits, and cannot be to the prejudice of any, as hath been said. And where the statute saith, (being in lawful possession, by taking the yearly rent, &c.) those words are but explanatory, and put for example: for howsoever he be lawfully seised in Possession, Reversion or remainder, it sufficeth though he never took profit. But the matter observable upon this proviso, which is worthy of observation, is, that if a disseisor make a lease for life, lives, or years, the remainder for life, in taile or in fee, he in remainder cannot take a promise or Covenant, that when the disseisee hath entred upon the land, or recovered the same, that then he should convey the land to any of them in remainder, thereby to avoid the particular estate, or the interest or estate of any other; for the words of the proviso be, (buy, obtain, get or have by any reasonable way or mean) and that is not by promise or covenant to convey the land after entry or recovery, for that is neither lawful being against the expresse purview of the body of the act, and not reasonable, because it is to the prejudice of a third person. But the reasonable way or mean intended by the statute, is by release or Confirmation, or such conveyance as amount to as much; and this agreeth with the letter of the law, viz. the pretended Right or title of any other person, and Rights and Titles are by release or Confirmation, as by reasonable wayes and means lawfully transferred and extinct; and the words of promise or covenant, &c. which are prohibited by the body of the act, are omitted in the proviso.

¶ *Relinquist le possession*, &c. This must be understood, that before livery of seisin upon the feoffement, A. de B. departed out of the house, for otherwise the livery and seisin should be void, because A. de B. was in possession. And Littleton here saith, Per un fait de feoffment; so as albeit the deed were made before the departure, it is not material, but the departure must be before the livery of seisin, for that doth work the disseisin. And yet that which Littleton saith is true, that the feoffment was the cause that he relinquished his possession, for otherwise he would not have done it.

But admit that A. de B. had departed for any other cause, yet if F. de G. enter and enfeoffe certain Barretors, or Extortioners, or any other with warranty, this is a warranty that commenceth by disseisin, for that the feoffment worketh a disseisin.

## *Sect.* 702.

See before in the chapter of Releases.

¶ This doth explaine that which hath been said before. And albeit Littleton useth the words (and incontinently thereof make a feoffment) and that in this case of Littleton the disseisin and feoffement were made (quasi uno tempore) yet if the disseisin were made to the intent to make a feoffment with warrantie, albeit the Feoffment be long after, this, (as hath been said) is a warrantie

46.E.3.6.

¶ Item si home que nul droit ad denter en auters Tenements, entra en mesmes les tenements, & incontinent en fait un feoffement as auters per son fait ou Garrantie, & deliver a eux seisin, cel Garrantie commence per disseisin

ALso if a man which hath no right to enter into other tenements enter into the same Tenements and incontinently make a Feoffement thereof to others by his deed with warranty & deliver to them seisin, this warraty comenceth

sin

ſin, pur ceo que le diſſeiſin et le feoffement fueront faits quaſi uno tempore. Et oꝛ ceo eſt ley, poies veier en un plee M. 11. Ed. 3. en un briefe de Formedon en le reverter.

by diſſeiſin, becauſe the diſſeiſin and feoffement were made as it were at one time. And that this is law, you may ſee in a plea. M. 11. E. 3. in a Writ of *Formedon* in the reverter.

that commenceth by diſſeiſin.

¶ *Mich.* 11. *E.* 3. This is miſtaken, and ſhould be (d) 31. E. 3. and ſo is the originall, which caſe you ſhall ſee in Maſter Fitzherberts abridgement; for there is no book at large of that year. Hereby you may perceive that learned men look not only to the caſes reported, but unto Records, as you may ſee Littleton did; for Fitzherbert put this caſe in print long after, as elſewhere hath been ſhewed.

(d) 31. E. 3. tit. Garr. 28.

## Sect. 703.

¶ Garranty lineal eſt, lou home ſeiſie de terres en fee, fait feoffement per ſon fait a un auter, & oblige luy & ſes heires a garranty, & ad iſſue & mozuſt, et le garrantie diſcendiſt a ſon iſſue, ceo eſt lineal garranty. Et la cauſe pur ceo q̄ eſt dit lineal garrantie, neſt pur ceo que le garranty diſcendiſt de le pier a ſon heire, mes la cauſe eſt pur ceo oꝛ ū nul tiel fait obe garranty fuiſſoit fait per le pier, donque le droit de les tenemẽts diſcenderoit al heire, et lheire cõbeyeroit le diſcent de ſon pier, &c.

WArranty lineal is, where a man ſeiſed of lands in fee, maketh a feoffment by his deed to another, and binds himſelf and his heirs to warranty, and hath iſſue and die, and the warranty deſcend to his iſſue, this is a lineal warranty. And the cauſe why this is called lineal warranty, is, not becauſe the warranty deſcendeth from the father to his heir; but the cauſe is, for that if no ſuch deed with warranty had been made by the father, then the right of the tenements ſhould deſcend to the heire, and the heire ſhould convey the diſcent from his father, *&c*

¶ *Garranty lineal*, &c. A Warrantie lineal is a Covenant real annexed to the Land by him which either was owner, oꝛ might have inherited the land, and from whom his heire lineal oꝛ collateral might by poſſibility have claimed the Land as heire from him that made the warranty, whereof Littleton himſelf putteth divers caſes, which ſhall be explained in their proper places. And in this caſe put in this Section Littleton (once for all) ſheweth, that the reaſon of the example here put, is, becauſe if no ſuch alienation with warrantie (for ſo is Littleton to be intended) had been made, the very lands had deſcended to the heire; ſo as the caſe being put of lands in fee ſimple, the alienation without the Warrantie had barred the heire. And note, that it is called a lineal warranty, not becauſe it muſt deſcend upon the lineal heire; for be the heir lineal oꝛ collateral, if by poſſibility he might claime the land from him that made the Warrantie, it is lineal having regard to the warranty; and

35. E. 3. Garr. 73.

title of the land. And alſo it is called lineal, in reſpect that the warrantie made by him that had no right, oꝛ poſſibility of right to the land, is called collateral, in regard that it is collateral to the title of the land. And it is alſo to be obſerved, that in all the caſes that Littleton hath put, oꝛ ſhall put, the lineal, oꝛ collateral warrantie doth bind the heire, and therefore the ſucceſſoꝛ claiming in another right ſhall not be bound by the warranty of any natural Anceſtour. For which cauſe (c) in a Juris utrum brought by a Parſon of a Church, the collateral warranty of his Anceſtoꝛ is no barre, for that he demandeth the land in the right of his Church in his politike capacity, and the warrantie deſcendeth on him in his natural capacity. (d) But ſome have holden that if a Parſon bring an aſſiſe, that a collateral warranty of the Anceſtour ſhall binde him, and their reaſon is for that the aſſiſe

(c) 27. H. 6. Garr. 48.

(d) 34. E. 3. Garr. 71.

Aſſiſe is brought of his poſſeſſion and ſeiſin, he ſhall recover the meane profits to his own uſe; But ſeeing he is ſeiſed of the freehold, whereof the aſſiſe is brought in jure Eccleſiæ which is another right then the warrantie, it ſeemeth that it ſhould not be any barre in the aſſiſe. The like law is of a Biſhop, Archdeacon, Deane, Maſter of an Hoſpital, and the like of their ſole poſſeſſions, and of the Prebend, Vicar, and the like.

(*)45.Aſſ.6.6.E.3.56. Pl.Com.234.& 553,554

¶ *Et oblige luy & ſes heires.** King H. 3. gave a Mannor to Edmund Earl of Cornwal, and to the heirs of his body, ſaving the poſſibility of reverter, and died; The Earle before the Statute of W. 2 cap.1. De donis conditionalibus by deed gave the ſaid Mannor to another in Fee, with warrantie in exchange for another mannor, and after the ſaid ſtatute, in the 28. year of E.1. dieth without iſſue, leaving aſſets in fee ſimple. Which warrantie and aſſets deſcended upon King E.1. as Coſin germane, and heire of the ſaid Earl, viz. ſon and heir of King Henry the third, brother of Richard Earle of Cornwal, Father of the ſaid Earle Edmund. And it was adjudged, that the King as heir to the ſaid Earl Edmund, was by the ſaid warrantie & aſſets barred of the poſſibilitie of the reverter, which he had expectant upon the ſaid gift, albeit the warranty and aſſets deſcended upon the natural body of King E.1. as heir to a ſubject, and King E.1. claimed the ſaid Mannor, as in his reverter in jure Coronæ in the capacity of his body politick, in which right he was ſeiſed before the gift. In this caſe, how by the death of the ſaid Earl Edmund without iſſue, the Kings title by reverter, & the warrantie and aſſets came together, and that the warrantie was collateral, yet the King ſhall not be barred without aſſets, as a ſubject ſhall be; and many other things are to be obſerved in this caſe, which the learned Reader will obſerve.

Vide 27.H.6.Garr.48. 39.E.3.Garr.71.

Vide *Sect.*711,712.

## *Sect.* 704.

CAr ſi ſoit pier et fits, et le fits purchaſe terres en fée, et le pier de ceo diſſeiſift ſon fits, et aliena a un auter en fée per ſon fait: et per meſme le fait oblige luy et ſes heires a garrãter meſmes les tenements, &c. & le pier morust, ore eſt le fits barre daver les dits tenements, car il ne poit per aſcun ſuit, ne per auter mean de la ley, aver meſmes les terres per cauſe del dit garrantie, et ceo eſt un collateral garranty, et uncore le garranty diſcendiſt linealment de le pier a le fits.

FOr if there be father and ſonne, and the ſon purchaſe lands in fee, and the father of this diſſeiſeth his ſon, and alieneth to another in fee by his deed, and by the ſame deed binde him and his heirs to warrant the ſame Tenements, &c. and the father dieth; now is the ſon barred to have the ſaid Tenements; for he cannot by any ſuit, nor by other mean of Law, have the ſame lands by cauſe of the ſaid warrantie. And this is a collateral warrantie, and yet the Warranty deſcendeth lineally from the father to the ſon.

## *Sect.* 705.

MEs, pur ceo que ſi nul tiel fait oue garr̃ un eſtre fait, le fits en nul maner puiſſoit conveyer le title que il ad a les tenements de ſon pier a luy, entant que ſon pier navoit aſcun

BUT, becauſe if no ſuch Deed with Warranty had been made, the Sonne in no manner could convey the Title which he hath to the Tenements from his father unto him, inaſmuch as his fa-

eſtate

eſtate en droit en les tenements, pur ceo tiel Garrantie eſt appel collateral Garrantie, entant que celuy que fiſt le Garrantie eſt collateral a le title de les tenements, & ceo eſt tant adire que celuy a que le Garrantie diſcendiſt, ne puiſſoit a luy conveyer le title que il ad en les Tenements per my celuy que fiſt le Garrantie, en cas que nul tiel Garrantie fuit fait.

ther had no eſtate in right in the Lands, wherefore ſuch Warrantie is called Collateral warranty, inaſmuch, as he that maketh the warranty is collateral to the title of the tenements, and this is aſmuch to ſay, as he to whom the warranty deſcendeth, could not convey to him the title which he hath in the Tenements by him that made the warranty, in caſe that no ſuch warrantie were made.

¶ HEre Littleton putteth an example, proving that it is not called Lineal, becauſe it deſcendeth lineally from the Father to the ſon; for in this caſe the Warranty deſcendeth lineally, and yet is a collateral warranty. In this example you muſt intend that the diſſeiſin was not of intent to alien with warranty to bar the ſon, but here the diſſeiſin being done to the Son, without any ſuch intent, the alienation afterwards with warranty doth barre the Son, becauſe that albeit the Warranty doth lineally deſcend, yet ſeeing the title is collateral, that is, that the ſon claimeth not the Land as heire to his Father, therefore in reſpect of the title it is a collateral warranty. And thus doth Littleton agree (e) with the Authority of our Books. So as the diverſities do ſtand thus. Firſt, where the diſſeiſin and feoffment are uno tempore, and where at ſeveral times. Secondly, where the diſſeiſin is with intent to alien with Warranty, and where the Diſſeiſin is made without ſuch intent, and the alienation with warranty afterwards made.

5.E.3.14.46.B.3.6. 16.H.8.12.8.R.2.Gar. 100. Vide Sect.716.

(e)46.E.3.6.5.F.3.14. 19.H.2.22.

## *Sect.* 706.

¶ ITem, ſi ſoit aiel, pier, & fits, & le aiel ſoit diſſeiſie, en que poſſeſſion le pier releas per ſon fait ode garrantie, &c. & mozuſt, & puis laiel mozuſt, ore le fits eſt barre daver les tenements per le garrantie del pier. Et ceo eſt appel lineal Garrantie, pur ceo oz ſi nul tiel Garrantie fuit, le fits ne puiſſoit conveyer le droit de les Tenements a luy, ne monſtre coment il eſt heire al Aiel ſoz-

ALſo, if there be Grandfather, Father, and Son, and the Grandfather is diſſeiſed, in whoſe poſſeſſion the father releaſeth by his deed with warranty, *&c.* and dieth, & after the Grandfather dieth, now the ſon is barred to have the Tenements by the warranty of the father. And this is called a lineal Warranty, becauſe if no ſuch warranty were, the Son could not convey the right of the tenements to him, nor

¶ HEre Littleton putteth an example where the ſon muſt claim the land as heire to his Grandfather, and yet becauſe he cannot make himſelfe heire to his Grandfather, but by his father, it is lineal. 1.H.4.33.35.E.3.Gar. 73.

And it is to be obſerved, that the Warrantie in this caſe deſcended upon the ſon, before the diſcent of the right, which happened by the death of the Grandfather in whom the right was, Vide Littleton cap. de Releaſes, and after in this Chapter, Sect. 707, & 741.

¶ *Pier releaſe per ſon fait ove Garrantie.*

(f) It is to be known, that upon every conveyance of Lands, Tenements, or Hereditaments, as upon Fine, Feoffments, Gifts, &c. Releaſes and Confirmations made

(f)14.E.3 Voucher 108 16.E.3.ibid.67. 18.E.3.ibid.6.10.E.3. 52,21,E.3.37.11.H.4. 22.44.E.3, Cont. de Vouch.22,12.H.7.1, Vide Sect. 733.838.745.

made to the Tenant of the Land, a Warranty may be made, albeit he that makes the Releaſe or confirmation, hath no right to the land, &c. but

que per meane del Pier.

ſhew how he is Heire to the Grandfather but by means of the father.

ſome do hold, That by releaſe or Confirmation, where there is no eſtate created, or tranſmutation of poſſeſſion, a Warranty cannot be made to the Aſſignee.

## Sect. 707.

¶ Item, ſi home ad iſſue deux fits & eſt diſſeiſie, & leigne fits releſſa al diſſeiſor per ſon fait ove Garranty, &c. & morust ſans iſſue, & apres ceo le Pier morust, ceo eſt un lineal Garrantie al puiſne fits, pur ceo que coment que leigne fits morust en la vie le Pier, uncore pur ceo que per poſſibilitie, il puiſſoit eſtre que il puiſſoit conveier a luy le title del terre per ſon eigne frere, ſi nul tiel Garrantie fuiſſoit. Car il puiſſoit eſtre que apres la mort le pier, leigne frere entroit en les Tenements & morust ſans iſſue, & donque le puiſne fits conveyera a luy le title per leigne fits. Mes en tiel cas, ſi le puiſne fits releſſa ove Garrantie a le Diſſeiſor, & morust ſans iſſue ceo eſt un Collateral Garrantie al eigne fits, pur ceo que de tiel terre que fuit al Pier, leigne per nul poſſibilitie poit conveyer a luy le title per meane de le puiſne fits.

ALſo, if a man hath iſſue two ſonnes, and is diſſeiſed, and the eldeſt ſon releaſe to the Diſſeiſor by his deed with warranty, &c. and dies without iſſue, and afterwards the father dieth, this is a lineal warranty to the younger ſon, becauſe albeit the eldeſt ſon died in the life of the father, yet by poſſibility it might have been, that he might convey to him the title of the Land by his elder brother, if no ſuch warranty had been. For it might be, that after the death of the father the elder brother entred into the tenements and died without iſſue, & then the younger ſon ſhall convey to him the title by the elder ſon. But in this caſe, if the younger ſon releaſeth with Warr' to the diſſeiſor, & dieth without iſſue, this is a collateral warr' to the elder ſon, becauſe that of ſuch land as was the fathers, the elder by no poſſibility can convey to him the title by means of the younger ſon.

35.E.Gar.73.11.H.4.33 ¶ HEre Littleton putteth an example, where the Heire that is to be barred by the Warranty, is not to make his Diſcent by him that made the warrantie, as in the caſe before; and yet becauſe by poſſibility he might have claimed by the eldeſt Sonne, if he had ſurvived the father, and died without iſſue, and ſo the younger brother might by poſſibility have been heire to him, the warranty is lineal.

And here it is to be noted, that the warranty of the eldeſt ſon deſcended before the right deſcended, whereof more ſhall be ſaid hereafter, Sect.741. and the opinion of Littleton in this Caſe is holden for Law, againſt the opinion in 35.E.3.Garr.73.

9.E.3.16.38.E.3.21.46. E.3.26.8.R.2.Gar.101. ¶ *Mes en tiel caſe le puiſne fits releaſe ove Garrantie*, &c. This warranty in this caſe is collateral to the eldeſt ſon, and to the iſſues of his body: but if the eldeſt Son dieth without Iſſue of his body, then the warranty is lineal to the iſſues of the body of the youngeſt: and ſo the warranty that was collateral to ſome perſons may become lineal to others.

Sect.

## Sect. 708.

¶ ITem, ſi Tenant en le taile ad iſſue trois fits, & diſcontinue le taile en fee, & le mulnes fits releſſa per ſon fait al Diſcontinuee, & oblige luy & ſes heires a garrantie, &c. & puis le tenant en le Taile mozuſt, & le mulnes fits mozuſt ſans iſſue, oze leigne fits eſt barre daver aſcun recoverie per brieſe de Formedon, pur ceo que le Garrantie del mulnes frere eſt collateral a luy, entant que il ne poit per nul manner conveyer a luy per force del taile aſcun diſcent per le mulnes, & pur ceo eſt un collateral garrantie. Mes en ceſt Caſ ſi leigne fits debie ſans iſſue, oze le puiſn frere poit bien aver un brieſe de formedon en le diſcender, & recovera meſme le terre, pur ceo qz le Garrantie del mulnes eſt lineal al fits puiſne pur ceo qz il puiſſoit eſtre que per poſſibilitie le mulnes puiſſoit eſtre ſeiſie per force del tail apres la mozt ſon eigne Frere, &

ALſo, if Tenant in tail hath iſſue three ſonnes, and diſcontinue the taile in fee, & the middle ſon releaſe by his deed to the diſcontinuee, and bind him and his heirs to warranty, &c. and after the tenant in tail dieth, and the middle ſon dieth without iſſue, now the eldeſt ſon is barred to have any recovery by writ of *Formedon*, becauſe the warranty of the middle brother is collateral to him, in aſmuch as he can by no means convey to him by force of the taile any Diſcent by the middle, and therefore this is a collateral warranty. But in this caſe if the eldeſt ſonne die without iſſue, now the youngeſt brother may well have a writ of *formedon* in the diſcender & ſhall recover the ſame land, becauſe the warranty of the middle is lineal to the youngeſt ſon, for that it might be that by poſſibility the middle might be ſeiſed by force of the taile after the death of his eldeſt

¶ HEreby it alſo appeareth, That a warranty that is collateral in reſpect of ſome perſons, may afterwards become lineal in reſpect of others. Whereupon it followeth. * That a collateral warrantie doth not give a right but bindeth only a right ſo long as the ſame continueth: but if the collateral warrantie be determined, removed, or defeated, the right is revived. (f) And yet in an Aſſiſe the Plaintiff hath made his title by a Collateral Warranty.

8 R.2. Gar.101.

* 43.Aſſ.44.21.H.8.tit. Taile Br.7.H.5.6.tit. Aſſ.350.34.E.3. Droit. 29.19.H.6 59.21.H.7. 30.5.H.7 29.3 H.7. 9.b.

(f) 16. Aſſ.p.16.27. Aſſ. 74.29 Aſſ.50.43. Aſſ.8. 14.H.13.19.H.6.60.

¶ *Barre*, is a word common as well to the Engliſh as to the French, of which cometh the Nown, a Barre Barra. It ſignifieth legally a deſtruction for ever, or taking away for a time of the action of him that right hath And Barra is an Italian word, and ſignifieth Barre, as we uſe it, as is called a Plea in Barre, when ſuch a Barre is pleaded. Here Littleton putteth an example of a barre of an eſtate taile by a collateral warranty. It is to be obſerved, That in ſome Caſes an Eſtate taile may be barred by ſome Act of Parliament made ſince Littleton wrote, and in ſome caſes an Eſtate tail cannot be barred, which might when Littleton wrote have been barred. For example, If Tenant in Taile levie a fine with Proclamations according to the ſtatute, this is a barre to the Eſtate taile, but not to him in reverſion or remainder, if he maketh his claim or purſue his action within five years after the ſtate tail ſpent.

4 H.7.cap.24.& 32.H. 8.c.36.

(b) If a gift be made to the eldeſt ſonne, and to the heirs of his body, the remainder to the father, and to the heirs of his body; the father dieth, the eldeſt ſonne levieth a fine with proclamations, and dieth with-

(b) Daliſon 2.El. & 7. El. vide lib.3.fol 84. le caſe de Fines.

without iſſue, this ſhall bar the ſecond Donee; for the remainder deſcendeth to the eldeſt.

dongz le puiſne frere puiſſoit conveyer ſon title de Diſcent per le mulnes.

brother, and the the youngeſt brother might convey his title of diſcent by the middle brother.

If tenant in tail be diſſeiſed, or have right of action, and the Tenant of the Land levie a Fine with Proclamations, and five years paſſe, the right of the eſtate taile is barred.

(b) If tenant in taile in poſſeſſion, or that hath a right of Entry be attainted of high treaſon, the eſtate taile is barred, and the land is forfeited to the King, and none of theſe were bars when Littleton wrote. A lineal warrantie and aſſets was a barre to the eſtate taile when Littleton wrote, whereof more ſhall be ſaid hereafter.

(b) 26.H.8.8 cap.13. 33.H.8.cap.20.5. E.6. cap.11. Stanf.H.Coron. 18.

(c) A common recoverie with a voucher over, and judgment to recover in value, was a bar of the eſtate taile when Littleton wrote. (d) And of common recoveries there be two ſorts, viz. one with a ſingle voucher and another with a double voucher, and that is more common and more ſafe: there may be more vouchers over.

(c) E.4.14 Taitarums caſe. (d) Vide devant. Sect. 690. Vide lib.3.fol.5. Coupplediks caſe & fol.94.97.106. Lib.1.fol.62. Capels caſe. lib.2.fol.16.52.74. 77. Lib.6.fol.41. 32. lib. 12. fol.37. Mary Portingtons caſe.

(e) If the King had made a gift in tail, and the Donee had ſuffered a common recovery, this ſhould have barred the eſtate tail in Littletons time, but not the reverſion or remainder in the King. And ſo if ſuch a Donee had levied a fine with Proclamations after the ſtatute of 4.H.7. this had barred the eſtate tail although the reverſion was in the King (f) But ſince Littleton wrote, a Common recoverie had againſt tenant in tail of the Kings gift, or ſuch a fine levied by him, the reverſion continuing in the Crown, is no bar to the eſtate tail by the Statute of 34. *H.* 8. And where the words of the Statute be (whereof the reverſion or remainder at the time of ſuch recoverie had, ſhall be in the King) theſe ten things are to be obſerved upon the conſtruction of that act.

(e) 38.H.8.tale Br 41 Pl.com.fol.555. 29.H.8.Dier 12. (f) 34.H.8.cap.20.

Firſt, that the eſtate taile muſt be created by a King, and not by any ſubject, albeit the King be his heir to the reverſion, for the Preamble ſpeaks of gifts made to Subjects, and none can have Subjects but the King; and alſo in the Preamble is ſaid (for ſervice done to the Kings of the Realm) and the body of the act referreth to the Preamble (g) And therefore if the Duke of Lancaſter had made a gift in tail, and the reverſion deſcended to the King, yet was not the eſtate taile reſtrained by that Statute, and ſo of the like.

(g) Trin.23.Eliz. inter Dively & Aſhton reſolved in the Court of Wards. Lib.2.fol.15.& 16. in Wiſemans caſe. Lib.8 fol.77,78. the Lord Stafford caſe.

Secondly, If the King grant over the reverſion, then a recovery ſuffered will barre the eſtate taile, becauſe the King had no reverſion at the time of the recovery.

Thirdly, If the King make a gift in taile, the remainder in taile, or grant the reverſion in tail, keeping the reverſion in the Crown, a recovery againſt tenant in tail in poſſeſſion ſhall neither bar the eſtate tail in poſſeſſion by the expreſſe purview of the ſtatute, nor by conſequence the ſtate in remainder or reverſion, for that the reverſion or remainder cannot be barred, but where the eſtate tail in poſſeſſion is barred.

Lib.1.fol.15,16. Wiſemans caſe. Lib.2.fol.22. Chomleyes caſe.

Fourthly, If a Subject make a gift in tail, the Remainder to the King in fee, albeit the words of Statute be (whereof the reverſion or remainder of the ſame, &c.) yet ſeeing the eſtate in tail was not created by a King, as hath been ſaid, the eſtate taile may be barred by a common recoverie.

Fiftly, If Prince Henry Sonne of Henry, the ſeventh, had made a gift in taile, the Remainder to Henry the ſeventh in fee, which remainder by the death of Henry the Seventh had deſcended to Henry the Eighth, ſo as he had the remainder by diſcent, yet might tenant in tail, for the cauſe aforeſaid, bar the eſtate tail by a common recovery.

Lib.2.fol.16. Wiſemans caſe.

Sixthly, the word (Remainder) in the Statute is no vain word, for the Words of the Preamble be, (The King hath given or granted, or otherwiſe provided to his ſervants and Subjects. (The word (Reverſion) in the body of the act hath reference to theſe words (given or granted) and (Remainder) hath reference to theſe words (otherwiſe provided.) As if the King in conſideration of Money, or aſſurance of land, or for other conſideration by way of proviſion, procure a ſubject by Indented and inrolled, to make a gift in taile to one of his ſervants and ſubjects for recompence of ſervice, or other conſideration, the remainder to the King in fee, and all this appear of Record, this is a good proviſion within the Statute, and the Tenant in tail cannot by a common recovery barre the eſtate taile. So it is if the remainder be limited to the King in tail: but if the remainder be limited to the King for years or for life, that is no ſuch remainder, as it is intended by the Statute, becauſe it is of no Remainder of continuance, as it ought to be, as it appeareth by the preamble, and it ought to have ſome affinitie with a reverſion, wherewith it is joyned.

Seventhly, where a common recovery cannot bar the ſtate taile by force of the ſaid Statute, there a fine levied in fee, in tail, for lives or years, with Proclamations according to the Statutes, ſhall not bar the ſtate taile, or the iſſue in taile, where the Reverſion or Remainder

mainder is in the King as is aforesaid, by reason of these words in the said Act, (the said recovery, or any other thing or things hereafter to be had, done, or suffered by or against any such Tenant in tail to the contrary notwithstanding) which words include a fine levied by such a Donee, and restraineth the same.

So resolved Pasch. 31. E. Rot. 1645. in Morlius case in Communi Banco.

Eighthly, But where a common recovery shall bar the estate taile, notwithstanding that Statute, there a fine with proclamations shall bar the same also.

Ninthly, where the said latter words of the Statute be (had, done, or suffered by or against any such Tenant in tail) the sense and construction is, where tenant in tail is partie or privie to the act, be it by doing or suffering that which should work the bar, and not by meer permission, he being a stranger to the Act.

So holden Trin 39. Eliz. Rot. 1914. inter Stratford & Dover in Communi Banco.

If tenant in taile of the gift of the King, the reversion to the King expectant, is disseised, and the disseisor levie a fine, and five years passe, this shall bar the estate tail: and so if a collateral Ancestour of the Donee release with warranty, and the Donee sucker the Warranty to discend without any entry made in the life of the Ancestour, this shall bind the tenant in taile, because he is not party or privie to any act, either done or suffered by or against him.

Tenthly, albeit the preamble of the statute extend only to gifts in tail made by the Kings of England before the Act (viz. hath given & granted, &c) and the body of the act referreth to the preamble (viz. that no such feined recovery hereafter to be had against such tenant in tail) so as this word (such) may seem to couple the body and the preamble together; yet in this case (such) shall be taken for such in equal mischiefe, or in like case, and by divers parts of the Act it appeareth, that the makers of the act intended to extend it to future gifts, and so is the Law taken at this day without question.

A recovery in a Writ of Right against tenant in taile without a voucher, is no bar of any gift in tail.

33. E. 3. judgement 252. 3. H. 6. 55. 10. H. 6. 5. 14. E. 4. 5. b. 15. E. 4. 8. F. N. B. 134. b. Pl. Com. 237. 28. E. 3. 95. F. N. B. 28. I.

If tenant in tail, the remainder over in fee cesse, and the Lord recover in a Cessavit, this shall not bar the estate taile, for the issue shall recover in a Formedon: neither were either of these bars when Littleton wrote. But let us now hear Littleton.

## Sect. 709.

¶ Item, si tenant ẽ taile discontinua l' tail & ad issue & deby, & l' uncle del issue relessa al discontinuee ove Garrantie, &c. et mozust sans issue. ceo est collateral Garranty al issue en tail pur ceo que le Garranty discendist sur lissue, le quel ne poit soy conveyer a le tail per meane de son uncle.

ALso if Tenant in taile discontinue the taile and hath issue and dieth, and the uncle of the issue release to the Discontinuee with warrantie, &c. and dieth without issue, this is collateral Warranty to the issue in taile, because the Warranty descendeth upon the issue that cannot convey himself to the entaile by means of his Uncle.

¶ The reason wherefore the Warranty of the Uncle having no right to the Land entailed shall barre the issue in taile, is, for that the Law presumeth that the Uncle would not unnaturally disherit his lawful heire, being of his own blood, of that right which the Uncle never had, but came to to the heire by another meane, unlesse he would leave him greater advancement. Nemo præsumitur aliam posteritatem suæ præcluisse. And in this case the Law will admit no proof against that which the Law presumeth. And so it is of all other collateral warranties; for no man is presumed to do any thing against nature.

Pl. Com. fol. 307. a in Sharingtons case.

(k) And the like holdeth in some other Cases, as if a rent

(k) 11. H. 4. 55, 10. Eliz. Dier 271.

be behind for twenty years, and the Lord make an Acquittance for the last that is due, all the rest is presumed to be paid, and the law will admit no proof against this presumption.

(l) So if a man be within the four Seas, and his Wife hath a child, the law presumeth that it is the child of the husband, and against this presumption the law will admit no proof.

(l) 7. H. 4. 9.

(m) If a man that is innocent be accused of felony, and for fear flieth for the same, albeit

(m) 3. E. 3. Coron. Stanf.

beit he judicially acquitteth himſelf of the Felonie, yet if it be found that he fled for the Felonie, he ſhall notwithſtanding his innocency forfeit all his goods and Chattels. Debts and duties; for as to the forfeiture of them the Law will admit no proof againſt the preſumption in Law grounded upon his flight: and ſo in many other caſes. But yet the general rule is, Quod ſtabitur præſumptioni, donec probetur in contrarium. But as you ſee, it hath many exceptions.

Bracton lib. 1, cap. 9.

(n) It hath been attempted in Parliament, that a ſtatute might be made, that no man ſhould be barred by a warranty collateral but where aſſets deſcend from the ſame Anceſtor: but it never took effect, for that it ſhould weaken common aſſurances.

(n) Rot. Parliament. 50. E. 3. num. 77.

## *Sect.* 710.

¶ *AND iſſue deux files.* If huſband and wife, Tenants in ſpecial tail, have iſſue a daughter, and the wife die, the husband by a ſecond wife hath iſſue another daughter, and diſcontinueth in fee and dieth, a collateral anceſtor of the daughters releaſeth to the diſcontinuee with warranty and dieth, the warranty deſcendeth upon both daughters, yet the iſſue in tayl ſhall be barred of the whole; for in judgement of Law the entire Warranty deſcendeth upon both of them.

5. E. 2. Gar. 78. lib. 8. fol. 41. Syms caſe.

¶ *Et leigne enter en lentiertie, & ent fait un feoffement* &c. Here it is to be underſtood, that when one Coparcener doth generally enter into the whole, this doth not deveſt the eſtate which deſcended by the Law to the other, unleſſe ſhe that doth enter claimeth the whole, and taketh the profits of the whole, for that ſhall deveſt the freehold in law of the other Parcener.

See before in the Chapter of Diſcent. Sect. 398.

Otherwiſe it is after the parceners be actually ſeiſed, the taking of the whole profits or any claime made by the one cannot put the other out of poſſeſſion without an

¶ ITem, ſi le tenant en taile ad iſſue deux files & mourust, & leigne entra en le entiérty & ent fait un feoffemẽt en fee ove garrantie, &c. & puis leigne file mourust ſans iſſue, en teſt cas le puiſne file eſt barre quant al un moitie, & quant al auter moitie, el neſt pas barre. Car quant a la moitie que affiert a le puiſne file el eſt barre, pur ceo que quant a cel part el ne poit conveyir le diſcent per my le maine de ſon eigne ſoer, et pur ceo quant a cel moitie, ceo eſt un collateral Garrantie. Mes quant al auter moity que affiert a ſon eigne ſoer, le Garrantie neſt pas barre a le puiſne ſoer, pur ceo qr el poit conveyer ſon diſcent, quant a cel moitie que affiert a ſon eigne ſoer per meſme le eigne ſoer, iſſint quant a ceſt moitie que affiert al eigne ſoer, le Garran-

ALſo, if the tenant in taile hath iſſue two daughters and dieth, and the elder entreth into the whole, and thereof maketh a feoffement in fee with warrantie, *&c.* and after the elder daughter dieth without iſſue: In this caſe the younger daughter is barred as to the one moitie, and as to the other moitie ſhe is not barred. For as to the moity which belongeth to the younger daughter, ſhe is barred, becauſe as to this part ſhe cannot convey the diſcent by means of her eldeſt ſiſter, and therefore as to this moitie, this is a collateral Warrantie. But as to the other moitie, which belongeth to her elder ſiſter, the warrantie is no bar to the younger ſiſter, becauſe ſhe may convey her diſcent as to that moity which belongeth to her elder ſiſter by the ſame elder ſiſter, ſo as to this moity which be-

tie

tie eſt lineal al puiſne ſoer.

longeth to the elder ſiſter, the warranty is lineal to the younger ſiſter.

## Sect. 711.

ET nota q̄ quant a celuy que demanda fee ſimple per aſcū de ſes auncetters, il ſerra barre per Garrantie lineal que diſcēdit ſur luy, ſi non que ſoit reſtraine per aſcun eſtatute.

AND note, that as to him that demandeth fee ſimple by any of his Anceſtors, he ſhall be barred by Warrantie lineal which deſcendeth upon him, unleſſe he be reſtrained by ſome Statute.

## Sect. 712.

MEs il q̄demande fee taile per briefe de Formedon en diſcender, ne ſerra my barre p̄ lineal Garrantie, ſi nō q̄ il ad Aſſets p̄ diſcent en fee ſimple p̄ meſme launcetter q̄ fit le Garranty. Mes collateral Garrantie eſt barre a celuy q̄ demanda fee, & auxy a celuy que demanda fee taile ſans aſcun auter diſcent de fee ſimple, ſinon en caſes queux ſont reſtraines per les eſtatutes, & auters caſes pur certaine cauſes, come ſerra dit en appes.

BUt he that demandeth Fee Tayle by Writ of *Formedon* in *diſcender*, ſhall not be barred by lineal warrantie, unleſſe he hath Aſſets by diſcent in fee ſimple by the ſame Anceſtour that made the Warrantie. But collateral Warrantie is a barre to him that demandeth fee, and alſo to him that demandeth fee Taile without any other diſcent of fee ſimple, except in caſes which are reſtrained by the Statutes, and in other caſes for certain cauſes, as ſhall be ſaid hereafter.

actual putting out or diſſeiſin. And in this caſe of Littleton, when one Coparcener entreth into the whole, and maketh a feoffment of the whole, this deveſteth the freehold in law out of the other Coparcener. Now ſeeing the entrie, in this caſe of Littleton, deveſted not the eſtate of the other Parcener, if no further proceeding had been, then it is to be demanded, that ſeeing the feoffement doth worke the wrong, & be the wrong either a diſſeiſin, or in nature of an abatement, how can the warranty annexed to that feoffment that wrought the wrong be collateral or bind the youngeſt ſiſter for her part: To this it is anſwer'd, that when the one ſiſter entreth into the whole, the poſſeſſion being void, & maketh a feoffement in fee, this act ſubſequent doth ſo explain the entry precedent into the whole, that now by conſtruction of Law ſhe was only ſeiſed of the whole, and this feoffement can be no diſſeiſin, becauſe the other ſiſter was never ſeiſed, nor any abatement, becauſe they both made but one heire to the Anceſtour, and one freehold and inheritance deſcended to them. Thus in judgment of law the warranty doth not commence by diſſeiſin or by abatement, and without queſtion her entry was no intruſion. Pl. Com. 543.

(Tenant in taile hath iſſue two daughters, & diſcontinueth in fee, the youngeſt diſſeiſeth the

diſcontinuee to the uſe of her ſelfe and her ſiſter, the diſcontinuee outſeth her, againſt whom ſhe recovereth in an Aſſife, the eldeſt agreeth to the Diſſeiſin, as ſhe may, againſt her ſiſter, and becomes joyntenant with her. And thus is the Book in the 21. Aſſiſe (n) to be intended, the caſe being no other in effect, but A. diſſeiſeth one to the uſe of himſelf and B.B. agreeth, by this he is joyntenant with A. (n) 21. Aſſ. p. 19.

¶ *Et nota que quant a celuy que demanda fee simple, &c.* In these two Sections there are expressed four legal conclusions:

3.E.3.22.4.E.3.28.50. 6.E.3.56.7. E.3.54.57. 9.E.3.16.10.E.3.14. 15.E.3.Gar.27.20.E.3. ibid.29.25.E.3.30.20. E.3.83.41.E.4.Garr.16. Mich.38.E.3. Coram Rege Abbot de Colchesters case 45. Ass.6. Pl.Com.554. 19.E.1.10. Vide Sect.703.747.

First, that a lineal warrantie doth binde the right of Fee-simple.

Secondly, That a lineal warranty doth not bind the right of an estate taile, for that it is restrained by the statute of Donis conditionalibus.

Thirdly, that a lineal Warrantie and Assets is a barre of the right in taile, and is not restrained, as hath been said, by the said Act.

Fourthly, That a Collateral Warranty made by a Collateral Ancestor of the Donee, doth bind the right of an estate taile, albeit there be no assets; and the reason thereof is upon the statute of Donis conditionalibus, for that it is not made by the Tenant in taile, &c. as the lineal Warranty is.

To this may be added, that the warranty of the Donee in taile, which is collateral to the Donor, or to him in remainder, being heire to him, doth bind them without any assets. For though the alienation of the Donee after issue doth not bar the Donor, which was the mischief provided for by the Act, yet the warranty being collateral doth bar both of them; for the Act restraineth not that Warrantie, but it remaineth at the Common law. as Littleton after saith: and in like manner the warranty of the Donee doth bar him in the remainder.

Fleta li.2,c.65. Britton 185.4.E.3. Gar.63.16. E.3.Ass.4.43.E.9.7.H. 63.11.H.4.20.

¶ *Assets* (id est) quod tantundem valet, sufficient by discent.

Now assets requisite to make a lineal Warranty a barre must have fiue qualities. First, it must be assets (that is) of equal value, or more, at the time of the Discent. Secondly, it must be of discent, and not by purchase or gift. Thirdly, as Littleton here saith, it must be Assets in fee simple, and not in taile, or for another mans life. Fourthly, it must discend to him as heir to the same Ancestor that made the Warranty, as Littleton here saith. Fiftly, it must be of lands or tenements, or rents, or services valuable, or other profits issuing out of Lands, or tenements, and not personal inheritances, as Annuities, and the like. Sixthly, it must be in state or interest, and not in use or right of actions, or rights of entry; for they are no assets until they be brought into possession. (a) But if a rent in fee simple issuing out of the land of the heir discend unto him, whereby it is extinct, yet this is assets; and to this purpose hath in judgment of Law a continuance.

24.E.3.47.

(a)31.E.3.Ass.5.13.E.3. Recovery in value 17. Lib.3.fol.31.Butler and Bakers case.

(b) A Seigniorie in fee almoigne is no assets, because it is not valuable, and therefore not to be extended, and so it seemeth of a Seigniorie of Homage and fealty. But an advowson is assets, whereof (c) Fleta saith; Item de Ecclesiis quæ ad donationem domini pertinent quot sunt & quæ, & ubi, & quantum valeat quælibet Ecclesia per annum secundùm veram ipsius æstimationem, & pro marca solidus extendatur, ut si Ecclesia centum marcas valeat per annum, ad centum solidos extendatur advocatio per annum. And herewith agreeth Britton, and others have reckoned a shilling in the pound; and Britton addeth further, Mes si la advowson puist estre vendue, adonques sur le reasonable price solonque le value en un an a cel extent; wherein it is to be observed, that antiquity did ever reckon by marks.

(d)14.E.3.Mesne.7. Registrum 293.

(c)Fleta lib.2.cap.65. Britton fo.185.Extent. manerii 5.H.7.37.32. H.6.21,33.E.3.Gar.102

## Sect. 713.

¶ ITem, si terre soit done a un home & a les heires de son corps engendrez, le quel prent feme, & ont issue fits enter eux, & le baron discontinua le taile en fee, & deby, & puis la feme relessa al discontinuee en fee ove garrantie, &c. & mourust, & le garrantie discendit a le fits, ceo est un collateral garrantie.

ALso if land be given to a man and to the heires of his body begotten, who taketh wife, & have issue a son between them, and the husband discontinues the taile in fee and dieth, and after the wife releaseth to the discontinuee in fee with warrantie, *&c.* and dieth, and the warrantie descends to the son, this is a collateral Warrantie.

¶ This case standeth upon the same reason that divers other formerly put by our Author do, viz. that because the heire claimeth only from the father Per formam doni, and nothing from the wife, that therefore the warrantie of the wife is collateral, and the warrantie made by any Ancestor male or female of the wife bindeth; and here the warranty descended after the discent of the right.

Sect.

## Sect. 714.

MEs ſi Tenements ſoyent dones a le baron & a ſa feme, & a les heires de lour deux corps engendres, queux ont iſſue fits, & le baron diſcontinua le taile & mozust, & puis la Feme releſſa ove Garrantie & mozust, ceſt Garrantie neſt forſque un lineal Garrantie a le fits: Car le fits ne ſerra barre en ceo cas de ſuer ſon bꝛe de Formedon, ſinon que il ad aſſets per diſcent en Fee ſimple per la mere, pur ceo que lour iſſue en Bꝛieſe de Formedon covient conveyer a luy le dꝛoit come heire a ſon pere & a la mere de lour deux corps engendres, per forme del done, & iſſint en tiel caſe, le Garrantie de le Pere, & l' Garrantie de la mere ſont forſque lineal Garr̃ al heire, &c.

BUt if lands be given to the huſband & wife, and to the heirs of their two bodies begotten, who have iſſue a ſon, and the husband diſcontinue the taile and dieth, and after the wife releaſe with warranty and dieth, this warranty is but a lineal warranty to the ſon: For the ſon ſhall not be barred in this caſe to ſue his writ of *Formedon*, unleſſe that he hath Aſſets by diſcent in fee ſimple by his mother, becauſe their iſſue in the writ of *Formedon* ought to convey to him the right as heire to his father and mother of their two bodies begotten, *Per formam doni*; and ſo in this caſe the warrantie of the father and the warrantie of the mother are but lineal warrantie to the heirs, *&c.*

35. E. 3. tit. Gar. 73.

CHere is a point worthy of obſervation, that albeit in this caſe the iſſue in taile muſt claime as heire of both their bodies, yet the warrantie of either of them is lineal to the iſſue, and yet the iſſue cannot claime as heire to either of them alone, but of both.

If lands be given to a man and to a woman unmarried, and the heirs of their two bodies, and they entermarrie, and are diſſeiſed, and the husband releaſe with warrantie, the wife dieth, the husband dieth, albeit the Donees did take by moities, yet the warranty is lineal for the whole, becauſe, as our Author here ſaith, the iſſue muſt in a Formedon convey to him the right as heire to his father and his mother of their two bodies engendred, and therefore it is collateral for no part.

## Sect. 715.

ET nota que en chescun cas ou home demanda tenements en fee taile per Bꝛieſe de Formedon, ſi alcun del iſſue en le Taile que aboit poſſeſſion fait un Garrantie, &c. ſi celuy q̃ ſuiſt le Bꝛieſe de Formedon puiſſoit p alcun poſſibility per matter que puiſſoit eſtre en fait, conveyer a luy per my celuy que fit le Gar-

AND note, that in every caſe where a man demandeth lands in fee taile by writ of *Formedon*, if any of the iſſue in taile that hath poſſeſſion, or that hath not poſſeſſion, make a warranty, &c. if he which ſueth the writ of *Formedon* might by any poſſibilitie by matter which might be in fait convey to him, by him that made the warrantie *Per formam doni*, this is

rantie per forme del done, ceo eſt unlineal Garr, & nemy collateral.

neal Warrantie and not collateral.

35.E.3.Garr.73. ¶ Of this ſufficient hath been ſaid before, Sed nunquam nimis dicitur quod nunquam ſatis dicitur, for it is a point of great uſe and conſequence.

## Sect. 716.

¶ ITem, ſi home ad iſſue trois fits, & il dona Terre al eigne fits, a aver & tener a luy & a les heires de ſon corps engendres, & pur default de tiel Iſſue, le remainder al mulnes fits, a luy, & a les heires de ſon corps engendres, & pur default d tiel iſſue del mulnes, le remainder al puiſne fits & les heires de ſon corps engendres, en ceſt cas ſi leigne diſcontinua le Taile en fee, & oblige luy & ſes heires a Garrantie, & morust ſans iſſue, ceo eſt un collateral Garrantie al mulnes fits, & ſerra barre a demaunder meſme la Terre per force del remainder, pur ceo que le remainder eſt ſon title, & ſon eigne frere eſt collateral a cel title, que commence per force del remainder. En meſme le maner eſt, ſi le mulnes fits avoit meſme la Terre per force del remainder pur ceo que ſon eigne frere ne fiſt aſcun diſcontinuance, mes morust ſans iſſue de ſon corps, & puis le mulnes fait un diſcontinuance ove Garrantie, &c. et morust ſãs iſſue, ceo eſt un collateral Garrantie a le puiſne fits. Eſt auxy en ceſt caſe ſi aſcun de les dits fits ſoit diſeiſie, et l' pere que fiſt le done, &c. releſſa a le diſſeiſor tout ſon droit ove Garrantie, ceo eſt un collateral Garrantie a celuy fits ſur que le Garrantie diſcendiſt, Cauſa qua ſupra.

ALſo, if a man hath Iſſue three ſons and giveth land to the eldeſt ſon, to have and to hold to him and to the Heires of his body begotten, and for default of ſuch iſſue, the remainder to the middle ſonne, to him and to the heires of his body begotten, and for default of ſuch iſſue of the middle ſonne the remainder to the youngeſt ſon and to the heires of his body begotten; in this caſe, if the eldeſt diſcontinue the taile in fee, & bind him and his heires to warranty, & dieth without iſſue, this is a collateral warranty to the middle ſon, and ſhall be a bar to demand the ſame land by force of the rem. for the remainder is his title, and his elder brother is collateral to this title which commenceth by force of the remainder. In the ſame manner it is, if the middle ſon hath the ſame land by force of the Remainder, becauſe his eldeſt brother made no diſcontinuance, but died without iſſue of his body, & after the middle make a diſcontinuance with warranty, &c. & dieth without iſſue, this is a collateral warranty to the youngeſt ſon. And alſo in this caſe, if any of the ſaid ſons be diſſeiſed, & the father that made the gift, &c. releaſeth to the diſſeiſor all his right with warranty, this is a collateral warranty to that Son upon whom the warrantie deſcendeth, *Cauſa qua ſupra.*

Sect.

## *Sect.* 717.

¶ ET ſic Note, Que lou home que eſt collateral a le Title, & ceo releaſe ove Garrantie, &c. ceo eſt un Collateral Garrantie.

AND ſo Note, That where a Man that is collateral to the Title, and releaſeth this with Warrantie, &c. this is a collateral Warrantie.

¶ HERE it appeareth, that it is not adjudged in law a Collateral Warrantie, in reſpect of the blood, for the Warrantie may be Collateral, albeit the blood be lineal, and the warrantie may be lineal, albeit the blood be collateral, as hath been ſaid. But it is in law deemed a Collateral warrantie, in reſpect that he that maketh the Warrantie is collateral to the title of him upon whom the Warrantie doth fall, as by the example which Littleton here putteth, and by that which hath been formerly ſaid, is manifeſt. 8.R.2.Gar.101. V.Sect. 704.

## *Sect,* 718.

¶ ITem, Pier dona Terre a ſon eigne fits, a aver & tenā a luy, & a les hits Males de ſon corps engendres, le Remainder a le ſecond fits, &c. ſi leigne fits alienalt en fee ovesqz Garrantie, &c. & ad iſſue female, & murſt ſans iſſue male, ceo neſt pas collateral garrantie al ſecond fits, car il ne ſerra barre de ſ̄ action de formedon en le remainder, pur ceo que le garrantie diſcendit al file del eigne fits, et nemy al ſecond fits. Car chel cum Garrantie que diſcendiſt, diſcendiſt a celuy que eſt heire a luy que fit le Garrantie per le Common ley.

ALSO, if a father giveth land to his eldeſt ſon, to have and to hold to him and to the heirs males of his body begotten, the remainder to the ſecond ſonne, *&c.* if the eldeſt ſonne alieneth in fee with warranty, *&c.* & hath iſſue female, and dieth without iſſue male, this is no collateral warranty to the ſecond ſon, for he ſhall not be barred of his action of *Formedon* in the remainder, becauſe the warrantie deſcended to the daughter of the elder ſon, and not to the ſecond ſonne: for every Warrantie which deſcends, deſcendeth to him that is heire to him who made the warrantie by the Common law.

¶ HERE is rehearſed a Maxime of the Common law, that every Warrantie doth deſcend upon him that is heir to him that made the warranty, by the common law, as by this example it appeareth. Vid. Sect. 3.603.733, 736,737.

¶ *A celuy que eſt heire a luy que fiſt le garrantie per le Common ley,* &c. Hereupon many things worthy to be known are to be underſtood.

(a) Firſt, that if a man infeoffeth another of an acre of ground with warrantie, and hath iſſue two ſons, and dieth ſeiſed of another acre of land, of the nature of Burrough English, the feoffee is impleaded, albeit the warrantie deſcendeth only upon the eldeſt ſonne, yet may he vouch them both: the one as heir to the warrantie, and the other as heire to the land: for if he ſhould vouch the eldeſt ſonne only, then ſhould he not have the fruit of his warrantie, viz. a recovery in value, the youngeſt ſon only he cannot vouch, becauſe he is not heire at the common law, upon whom the warrantie deſcendeth. (a)40.E.3.14.

(b) So if tenant in Gavelkind, the eldeſt may be vouched as heire to the warranty (b)22.E.4.10.4.E.3. 55.27.H.6.1,2.11.E.3. Det, 7.

ranty, and the other ſons in reſpect of the inheritance deſcended unto them. (e) And in like ſort, the Heir at the Common Law, and the heir of the part of the mother ſhall be vouched. But the Heir at the Common law may be vouched alone in both theſe caſes, at the election of the tenant, & ſic de ſimilibus (d) In the ſame manner, if a man dieth ſeiſed of certain lands in fee, having iſſue a ſonne and a daughter by one venter, and a ſonne by another, the eldeſt ſonne entreth and dieth, the land deſcends to the ſiſter: In this caſe the warrantie deſcendeth on the ſonne, and he may be vouched as heir, and the Siſter as heir of the Land: In which and the other caſe of Burrough English, the ſon and heir by the Common law having nothing by diſcent, the whole loſſe of the recovery in value lieth upon the heirs of the land, albeit they be no heirs to the warrantie. Then put the caſe that there is a warrantie Paramount, who ſhall deraigne that warranty? and to whom ſhall the recompence in value goe? Some have ſaid that as they are vouched together, ſo ſhall they avouch over, and that the recompence in value ſhall enure according to the loſſe, and that the effect muſt purſue the cauſe, as a recovery in value by a warrantie of the part of the mother ſhall goe to the heire of the part of the mother, &c.

e) 49. Aſſ. 4. 38. E. 3. 22.

(d) 32. E. 3. Vouch. 94. 35. H. 6. 33.

Pl. Com. 515.

Some others hold, That it is againſt the Maxime of law, that they that are no heires to the warranty ſhould joyn in voucher, or to take benefit of the warrantie which deſcended not to them, but that the heir at the Common law, to whom the warranty deſcended, ſhall deraigne the warrantie; and recover in value, and that this doth ſtand with the rule of the Common law.

Others hold the contrary; and that this ſhould be both againſt the rule of law, and againſt reaſon alſo; for by the rule of law (e) the Vouchee ſhall never ſue to have execution in value, until execution be ſued againſt him. But in this caſe execution can never be ſued againſt the heire at the Common law, therefore he cannot ſue to have execution over in value. Secondly, It ſhould be againſt reaſon, that the heir at the common law ſhould have totum lucrum, and the ſpecial heires, totum damnum. I find in our Books, (f) that this reaſon is yielded, that the ſpecial heir ſhould not be vouched only: For (ſay they) if the ſpecial heires ſhould be vouched only, then could not they deraign the warrantie over, which ſhould be miſchievous, that they ſhould loſe the benefit of the warranty, if they ſhould be vouched only. But if the heir at the Common law were vouched with them, (as by the law he ought) all might be ſaved; and therefore ſtudy well this point, how it may be done.

(e) 17. E. 2. tit. Recover in value 33. 1. E. 3. 12. 33. E. 3. Judgm. 222. 14. E. 3. ibid. 160. 10. E. 3. 52. 18. E. 3. 51. lib. 1. f. 96. Shelleyes caſe.

(f) 32. E. 3. Vouch. 94. per Green.

(g) Vid. Pl. Com. fo. 514.

(g) If tenant in generall Taile be, and a common recovery is had againſt him and his wife, where his wife hath nothing, and they vouch, and have judgment to recover in value. Tenant in tail dieth, and the wife ſurviveth: for that the iſſue in taile had the whole loſſe, the recompence ſhall enure wholly to him; and the wife, albeit ſhe was partie to the judgment, ſhall have nothing in the recompence, for that ſhe loſeth nothing.

(h) 17. E. 3. 59. E. 3. Vouch. 129. 32. E. 3. Vouch. 24. 5. H. 7. 2.

(h) If the Baſtard eigne and take the profits, he ſhall be vouched only, and not the Baſtard and the Mulier, becauſe the Baſtard is in appearance heir, and ſhall not diſable himſelfe.

(i) 11. H. 7. 12. 11. E. 3. tit. Det. 7. Di. 5. El. 238.

(i) If a man be ſeiſed of lands in Gavelkind, and hath iſſue three ſons, and by Obligation bindeth himſelf and his heirs and dieth, an action of debt ſhall be maintainable againſt all the three ſons, for the heire is not chargeable, unleſſe he hath lands by diſcent.

(k) 11. H. 7. 12.

(k) So if a man be ſeiſed of Land on the part of his mother, and bind himſelfe and his heirs by obligation, and dieth, an action of debt ſhall lie againſt the heir on the part of the Mother, without naming of the heir at the Common Law. And ſo note a diverſity between a perſonal lien of a Bond, and a real lien of a Warrantie.

## Sect. 719.

HEre it appeareth, That (l) whenſoever the anceſtor taketh any eſtate of freehold, a limitation after in the ſame conveyance to any of his heirs, are words of limitation, and not of purchaſe, albeit in words it be limited by way of remainder: and therefore here the remainder to the heirs females reſteth in the Tenant in Tail himſelfe.

(l) 24. E. 3. 36. 27. E. 3. age. 108. 38. E. 3. 26. 40. E. 3. 5. 37. H. 8. Br. Noſme. 1. & 40. & tit. Done & Rem. 61.

NOta, ſi fre ſoit done a un home, & a les heires males de ſon corps engendres, & pur default de tiel Iſſue, le Reſn ent a les heires females de ſon corps engendres, & puis le

NOte, if Land be given to a man and to the heirs males of his body begotten, and for default of ſuch Iſſue the Remainder thereof to his Heires females of his body begotten, and after the

donee

donee en le taile fait feoffment en fee oblesque Garrantie accordant, & ad issue fits & file & mourt, cel Garrantie nest forsque lineal Garrantie a le fits a demaunder per briefe de Formedon en le discender, & auxy il nest forsque lineal a le file, a demander mesme la terre per briefe de Formedon en le remainder, sinon frere devia sans issue male, pur ceo que el claime come heire female de le corps son pere engendres. Mes en cest cas, si son frere en sa vie relealast al discontinuee, &c. ove garrantie, &c. & puis mourt sauns issue, ceo est un collateral garrantie a le file, pur ceo que el ne poit conveyer a luy le droit que el ad per force de le remainder per aucun meane de discent per son frere, pur ceo que le frere est collateral a le title a sa soer, & pur ceo son Garrantie est collateral, &c.

donee in taile maketh a Feoffment in Fee, with warrantie accordingly and hath issue a son and a daughter and dieth, this warrantie is but a lineal warrantie to the sonne to demand by a writ of *Formedon* in the discender; and also it is but lineal to the daughter to demand the same land by Writ of *Formedon*, in the remainder, unlesse the brother dieth without issue male, because she claimeth as heire female of the body of her Father ingendred. But in this case, if her brother in his life release to the discontinuee, *&c.* with Warrantie, *&c.* and after dieth without issue, this is a collateral warranty to the daughter, because she cannot convey to her the right which she hath by force of the remainder by any meanes of discent by her Brother, for that the brother is collateral to the title of his sister, and therefore his warranty is collateral, *&c.*

known, that for Learning sake, and to find out the reason of the Law, these limitations to the heires males of the bodie, and after to the heires females of the body, may be put; but it is dangerous to use them in conveyances, for great inconveniences may arise thereupon; for if such a Tenant in taile hath issue divers sons, and they have issue divers daughters, and likewise if tenant in tail hath issue divers daughters, and each of them hath issue sonnes, none of the daughters of the sons, nor the sons of the daughters shall ever inherit to either of the said estates taile: and so it is of the Issues of the issues, for that (as hath been said) the issues inheritable must make their claim either only by Males, or only by females, so as the females of the males, or males of the females are wholly excluded to the inheritable to either of the said Estates taile: but where the first limitation is to the heires males, let the limitation be, for default of such issue to the heires of the body of the Donee, and then all the Issues, be they Females of Males, or Males of Females, are inheritable.

1.H.6.4.11.H.6.13.14. 28.H.6.Devise 18.Stratham.Devise. Pl. Com. 414.20. H.6.43. Vid. Litt.c.taile.Sect.24.37. H.8.Br.done & rem. 61. & tit.no'm: 1.& 40.

If a man give Lands to a man, to have and to hold, to him and the heires Males of his body, and to him and to the heires females of his body, the estate to the heires females is in remainder, and the daughters shall not inherit any part, so long as there is issue Male, for the estate to the heires males is first limited, and shall be first serued, and it is as much to say, and after to the heires females, and Males in construction of Law are to be preferred.

Sect.

## *Sect.* 720.

¶ ITem, jeo ay oye dire que en temps le Roy Richard le ſecond, il y fuyt un Juſtice del Common Banke, demurrant en Kent, appel Richel, que avoit iſſue divers fits, & ſon entent fuit, que ſon eigne fits averoit certaine terres & tenements a luy, & a les heires de ſon corps engendres, & pur default diſſue, le remainder a le ſecond fits, &c. & iſſint a l' tierce fits, &c. & pur ceo q̄ il voile que nul de ſes fits alieneroit, ou ferroit garrantie pur barrer ou leder les auters q̄ux ſerront en le remainder, &c. il fit faire tiel Indentur, a tiel effect, ceſt aſcavoir, que les terres & tenements ſueront dones a ſon eig̃ fits aliena en fee, ou en fee taile, &c. ou ſ̃ altun de ſes fits alienast, &c. que adonqz lour eſtate ceſſera, & ſerroit void, & que adonqz meſme les terres & tenements immediat remaindront a le ſecond fits, & a les heires d̃ ſon corps engendres, & ſic ultra, l' remainder as auters de ſes fits, & livery de ſeiſin fuit fait accordant.

ALſo, I have heard ſay, that in the time of King *Richard* the ſecond, there was a Juſtice of the Common place, dwelling in *Kent*, called *Richel*, who had iſſue divers ſons, and his intent was that his eldeſt ſon ſhould have certaine lands and tenements to him and to the heirs of his body begotten, and for default of his iſſue, the remainder to the ſecond ſonne, *&c.* and ſo to the third ſon, *&c.* and becauſe he would that none of his ſonnes ſhould alien or make warranty to bar or hurt the others that ſhould be in the remainder, *&c.* he cauſeth an indenture to be made to this effect, *viz.* That the lands and tenements were given to his eldeſt ſon upon ſuch condition, that if the eldeſt ſon alien in fee or in fee taile, *&c.* or if any of his ſons alien, *&c.* that then their eſtate ſhould ceaſe and be void, and that then the ſame lands and tenements immediately ſhould remaine to the ſecond ſon, and to the heirs of his body begotten, *& ſic ultra*, the remainder to his other ſons, & livery of ſeiſin was made accordingly.

21 H.6 f.33.l.6. f. 42.b. Sir Anthony Mildmaies caſe.

¶ *Jeo ay oye dire* &c. Thoſe things that one hath by credible heare-ſay, by the example of our authors, are worthy of obſervation. This invention deviſed by Juſtice Richel in the reigne of King Richard the ſecond, who was an Iriſh-man born, and the like by Thirning chiefe Juſtice, in the reigne of Henry the fourth, were both full of imperfections; for Nihil ſimul inventum eſt & perfectum, and Sæpe viatorem nova, non vetus, orbita fallit. And therefore new inventions in Aſſurances are dangerous. And hereby it may appear, that it is not ſafe for any man (be he never ſo learned) to be of counſel with himſelf in his own caſe, but to take advice of other great and learned men.

Non proſunt Dominis quæ proſunt omnibus, artes.

And the reaſon hereof is, In ſuo quiſque negotio hebetior eſt, quàm in alieno.

(m) 2.H.4.fol. 11. in Action ſur le caſe.

(m) And the ſame Judge in his own name, &c. brought an Action upon his caſe againſt others, and obtained a verdict, ſo as the right of the cauſe was tried on his ſide; yet for that upon his own ſhewing in his Count the action did not lie, Ex aſſenſu omnium Juſticiariorum præter quærentem Richel, judgement was given againſt him; but let us now leave this Judge for example to others, and let us return to our Author.

*Sect.*

## Sect. 721.

¶ MEs il semble per treason, que touts tiels remainders en la forme avantdit sont voides & de nul value, & ceo pur trois causes. Un cause est; pur ceo que chescun remainder q̃ commence p un fait, il covient que le remainder soit en luy a que l' remainder est taile per force de melme le fait, avant liverie de seisin est fait a luy que avera le franktenement, car en tiel case le nelsance & le estre de le remainder est per le livery de seisin a celuy q̃ avera l' franktenement, & tiel remainder ne suit al second fits, al temps de livery de seisin en l'cas avandit, &c.

BVt it seemeth by reason, that all such remainders in the forme aforesaid are void and of no value, and that for three causes. One cause is, for that every remainder which beginneth by a Deed, it behooveth that the rem. be in him to whom the remainder is entailed by force of the same Deed, before the livery of seisin is made to him which shall have the freehold, for in such case the growing and the being of the remainder is by the livery of seisin to him that shall have the freehold, and such remainder was not to the second sonne at the time of the livery of seisin in the case aforesaid, *&c.*

¶ HEre our Author is of opinion, that these Remainders in the form aforesaid, are void and of no value, for three causes.

¶ *Un cause est*, &c. Here he setteth down a rule concerning remainders, viz. Every remainder which commenceth by a deed ought to vest in him to whom it is limited, when livery of seisin is made to him that hath the particular estate.

First, Littleton saith, by Deed, (n) because if Lands be granted and rendred by Fine for life, the remainder in tail, the remainder in fee, none of these remainders are in them in the remainder, until the particular estate be executed. (n) 7.R.2. Scire fac.

Secondly, that the remainder be in him, &c. at the time of the livery. This is regularly true; but yet it hath divers exceptions. First, unlesse the person that is to take the remainder be not in rerum natura, (o) as if a lease for life be made, the remainder to the right heires of I.S. I.S. being then alive, it sufficeth that the inheritance passeth presently out of the Lessor, but cannot vest in the heir of I S. for that living his father he is not in rerum natura, for non est hæres viventis; so as the remainder is (o) 32.H.6. tit. Feoffm. & faits 99. 27.E.3.87. 11.R.2. Detinue, 46. 2.H.7.13. 12.H.7.27. 12.E.4.2. 21.H.7.11. 7.H.4.23. 11.H.4.74. 18.H.8.3. 27.H.8.42. 38.E.3.26. 30. Ass. 47. 6.R.2. qu. Jur. dam. 20.

(p) And so it is if a man make a lease for life to A.B. and C. and if B. survive C. then the remainder to B. and his heirs. Here is another exception out of the said rule, for albeit the person be certain, yet inasmuch as it depends upon the dying of B. before C. the remainder cannot vest in C. presently. And the reason of both these cases in effect is, because the remainder is to commence upon limitation of time, viz. upon the possibility of the death of one man before another, which is a common possibility.

A man letteth lands for life upon condition to have fee, and warranteth the land in forma prædicta, afterward the lessee performeth the condition, whereby the lessee hath fee, the warranty shall extend & increase according to the state. And so it is in that case, if the lessor had died before the performance of the condition, the warranty shall rise and increase according to the estate, & yet the lessor himself was never bound to the warranty, but it hath relation from the first livery. And by this it appeareth that a warranty being a covenant real executory may extend to an estate in futuro, having an estate whereupon it may work in the beginning. But if a man grant a Seigniory for years, upon Condition to have fee with a (p) Pl. Com. in Colthirst's case, fol. 25, 26.

warranty

Warranty in forma prædicta, and after the condition is perfoꝛmed, this ſhall not extend to the fee, becauſe the firſt eſtate was but foꝛ years, which was not capable of a warranty. And ſo it is, if a man make a leaſe foꝛ years, the remainder in fee, and warrant the land in forma prædicta, he in the remainder cannot take benefit of the warranty, becauſe he is not party to the Deed, and immediately he cannot take, if he were party to the deed, becauſe he is named after the Habendum, and the eſtate foꝛ years is not capable of a warranty. And ſo it is if Land be given to A. and B. ſo long as they joyntly together live, the remainder to the right heires of him that dieth firſt, and warrant the land in forma prædicta. A. dieth, his heir ſhall have the warranty, and yet the remainder veſted not during the life of A. foꝛ the death of A. muſt pꝛecede the remainder, and yet ſhall the heire of A. have the Land by diſcent.

## *Sect.* 722.

¶ *Sile primer fits alienaſt*, &c. By the alienation of the Donee two things are wꝛought.

Firſt, the franktenement and fee is in the alienee.

Secondly, the Reverſion is deveſted out of the Donoꝛ (q) And theꝛefoꝛe by the alienation that transferreth the free-hold & fee ſimple to the alienee there can no rem. be raiſed & veſted in the ſecond ſon. (r) As if a man make a leaſe foꝛ life upon Condition, that if the leſſoꝛ grant oveꝛ the reverſion, that then the leſſee ſhall have fee, if the leſſoꝛ grant the reverſion by fine, the leſſee ſhall not have fee; foꝛ when the Fine transferreth the fee to the Conuſee, it would be abſurd and repugnant to reaſon, that the ſame fine ſhould woꝛk an eſtate in the Leſſee; foꝛ one alienation cannot veſt an eſtate of one and the ſame land to two ſeveral perſons at one time.

(q) 21.H.7.11.27. H.8. 24.

(r) 6.R.2. quid clam. 20.

Argumentum ex abſurdo.

In a mans own grant, which is ever taken moſt foꝛcibly againſt himſelf, the reaſon of Littleton doth hold; foꝛ it hath been reſolved by the Juſtices (ſ) that if a man ſeiſed of an advowſon in fee by his deed granteth the next preſentation to A. and before the Church becometh void, by another deed grant the next preſentation of the ſame Church to *B.* the ſecond grant is void; foꝛ A. hath the ſame granted to him before, and the Grantee ſhall not have the ſecond avoidance by conſtruction to have the next avoidance, which the grantoꝛ might lawfully grant; foꝛ the grant of the next avoidance doth not import the ſecond preſentation. (t) But if a man ſeiſed of an advow-

(ſ) 20.H.Præſentments al Egliſe. Br. 52. 33. H. 8. ibid. 55. 29. H. 8. Dy. 35. 11. El. 282. 283.

(t) 15.H.7.9.19.E.3. quar. Imp. 154.

¶ Le ſecond cauſe eſt, ſi le primer fits alienaſt les tenements en fee, adonqꝫ eſt le franktenement, & le fee ſimple en lalienée, & en nul auter, & ſi le donour avoit aſcun reverſiõ, per tiel alienation le reverſion eſt diſcontinue, donques coment per aſcun reaſon poit ceo eſtre, que tiel rem̃ commeneera ſon eſt & ſon neſſance immediate apres tiel alienation fait a un eſtrange, que ad p meſme lalienation franktenement, & fee ſimple, &c. Et auxy ſi tiel remainder ſerroit bone, adonques purroit il enter ſur lalienee, lou il navoit aſcun mãer ñ droit avant lalienation, que ſerra inconvenient.

THe ſecond cauſe is, if the firſt ſon alien the Tenements in fee, then is the freehold and the fee ſimple in the Alienee, and in none other, and if the Donor had any Reverſion, by ſuch alienation, the Reverſion is diſcontinued, then how by any reaſon may it be, that ſuch remainder ſhall commence his being and his growing immediately after ſuch alienation made to a ſtranger, that hath by the ſame alienation a freehold and fee ſimple, *&c.* And alſo if ſuch remainder ſhould be good, then might he enter upon the Alienee, where he had no manner of right before the alienation, which ſhould be inconvenient.

ſon in fee take wife, now by act in Law is the wife intitled to the third preſentation, if the husband die before: the husband grant the third preſentation to another, the husband die, the heir ſhall preſent twice, the wife ſhall have the third preſentation, and the Grantee the fourth; for in this caſe it ſhall be taken the third preſentation, which he might lawfully grant; and ſo note a diverſity between a title by act in law, and by act of the party; for the act in Law will work no prejudice to the Grantee.

¶ *Auxi ſi tiel remainder ſerroit bone, &c.* The force of this argument is, that ſeeing the eſtate of the alienee (albeit the words of the condition be, that the eſtate ſhould ceaſe and be void) being an eſtate of inheritance in lands or tenements cannot ceaſe or be void before the eſtate be defeated by entry, then if this remainder ſhould be good, then muſt it give an entry upon the alienee to him that had no right before, which ſhould be againſt the expreſſe rule of the Law, viz. that an entry cannot be given to a ſtranger to avoid a voidable act, as before hath been ſaid in the chapter of conditions.

¶ *Le quel ſeroit enconvenient.* Here note three things. Firſt, that whatſoever is againſt the rule of Law is inconvenient. Secondly, that an argument Ab inconvenienti is ſtrong to prove it is againſt law, as often hath been obſerved. (Thirdly, that new inventions (though of a learned Judge in his own profeſſion) are full of inconvenience. Periculoſum eſt res novas & inuſitatas inducere. Vide Sect. 87. &c.

Eventus varios res nova ſemper habet.

## *Sect.* 723.

¶ A tierce cauſe eſt, quand la condition eſt tiel, que ſi leigne fits alienast, &c. que ſon eſtate ceſſera ou ſerroit void, &c. donqes apres tiel alienation, &c. poit le donor enter per force de tiel condition, com il ſemble, & iſſint le Donor ou ſes heires en tiel caſe doyent pluis toſt aver la fre que le ſecond fits, que navoit alcun droit devant tiel alienation & iſſint il ſemble que tiels remainders en le cas avantdit ſont voides.

THe third cauſe is, when the condition is ſuch, that if the elder ſon alien, *&c.* that his eſtate ſhall ceaſe or be void, *&c.* then after ſuch alienation, *&c.* may the Donor enter by force of ſuch condition, as it ſeemeth, and ſo the donor or his heirs in ſuch caſe ought ſooner to have the land then the ſecond ſon, that had not any right before ſuch alienation; and ſo it ſeemeth that ſuch remainders in the caſe aforeſaid are void.

¶ HEre it is to be obſerved, that part of the condition that prohibiteth the alienation made by tenant in tail is good in Law, with ſuch diſtinction as hath been before ſaid in the Chapter of Conditions; and the conſequent of the Condition, viz. that the lands ſhould remain to another, &c. is void in Law; and by the opinion of Littleton the Donor may reenter for the Condition broken; for utile per inutile non vitiatur. Which being in caſe of a Condition for the defeating of an eſtate, is worthy of obſervation.

And it is to be noted, that after the death of the Donor, the Condition deſcendeth to the eldeſt ſonne, and conſequently his alienation doth extinguiſh the ſame for ever, wherein the weakneſſe of this invention appeareth; and therefore Littleton here ſaith, that it ſeemeth that the Donor may re-enter, and ſpeaketh nothing of his heire. A man hath iſſue two ſons, and maketh a Gift in Taile to the Eldeſt, the Remainder in fee to the puiſne, upon condition that the eldeſt ſhall not make any Diſcontinuance with warranty to bar him in the Remainder, and if he doth, that then the puiſne ſon and his heirs ſhall re-enter, the Eldeſt makes a Feoffment in Fee with Warranty, the father dieth, the eldeſt ſon dieth without iſſue, the puiſne may entre; but if the Diſcontinuance had been after the death of the father, the puiſne could not have entred. In this caſe four points are to be obſerved. Firſt, as Littleton here ſaith, the Entry for the breach of the Condition is given to the father, and not to the puiſne ſon. Secondly, that by the death

41.E.3.fol. Vide Sect.146.

of the Father the condition deſcends to the elder Son, and is but ſuſpended, and is revived by the death of the eldeſt Son without iſſue, and deſcendeth to the youngeſt Son. Thirdly, that the Feoffment made in the life of the Father cannot give away a condition that is collateral, as it may do a right. Fourthly, that a warranty cannot bind a title of Entry for a condition broken, (as hath been ſaid) but if the diſcontinuance had been made after the death of the Father, it had extinguiſh'd the condition: Which caſe is put to open the reaſon of our Authors opinion.

In the laſt three Sections our Author hath taught as an excellent point of Learning. That when any innovation or new invention ſtarts up, to try it with the Rules of the common law, (as our Author here hath done) for theſe be true Touchſtones to ſever the pure gold from the droſſe and ſophiſticatious of novelties and new inventions. And by this example you may perceive, That the rule of the old common law being ſoundly, (as our Author hath done) applied to ſuch novelties, it doth utterly cruſh them and bring them to nothing; and commonly a new invention doth offend againſt many rules and reaſons (as here appeareth) of the common Law, and the antient Judges and Sages of the Law have ever (as it appeareth * in our Books) ſuppreſſed innovation and novelties in the beginning, as ſoon as they have offered to creep up, leſt the quiet of the Common law might be diſturbed: and ſo have (a) acts of Parliament done the like, whereof by the authorities quoted in the margent, you may in ſtead of many others, upon this occaſion, take a title taſte. But our excellent Author in all his three Books hath ſaid nothing, but Ex veterum ſapientium ore, & more.

* 31.E.3. Gager deliverance 5.22. Aſſ.12. 38.E.3.1.2.H.4. 18.&c. (a) 1.E.3.cap.15. Stat.3. 18.E.3.cap.1.& 6. 4.H.4.c.2.11.H.6.c.23. 12.E.4.cap.8.&c.

## *Sect.* 724, 725.

¶ Item, a le Common Ley devant leſtatute de Gloucester, ſi tenant p le Curteſie uſt alien en fee ovelque Garrantie, apres ſon deceaſe ceo fuit un bar al Heire, ſicome apiert p les parols de meſme leſtatut: mes il eſt remedy p meſme leſtatute que le Garrantie de le Tenant p le Curteſie nelz fit my bar al hẽe, ſinon que il y ad aſſets per diſcent per le tenant per le curteſie, car devant le dit eſtatute, ceo fuit un Collateral Garrantie al hẽe, pur ceo qz il ne puiſſoit conveyer alcun title de Diſcent a les tenements per le tenant p le curteſie, mes tantſolement per ſa mere, ou auters de ſes anceſtors, & ceo eſt le cauſe pur que il fuit Collateral Garrantie.

ALſo, at the Common Law before the Statute of *Glouceſter*, if tenant by the Courteſie had aliened in fee with warranty, after his deceaſe this was a barre to the Heir, as it appeareth by the words of the ſame Statute: but it is remedied by the ſame Statute, That the warrantie of Tenant by the Courteſie ſhall be no barre to the Heir, unleſſe that he hath aſſets by diſcent by the Tenant by the Courteſie; for before the ſaid ſtatute this was a Collateral warrantie to the heire, for that he could not convey any title of diſcent to the tenements by the tenant by the Courteſie, but only by his mother, or other of his Anceſtors, and this is the cauſe why it was a collateral warranty.

## *Sect.* 725.

¶ Mes ſi home inherit p̃ent feme, les queux ont fits enter eux, & le pier devie, & le

But if a man Inheritor taketh Wife, who have iſſue a ſon between them, and the father di-

fits

fits entra en la Terre, & endowa la mere, & puis la mere alien ceo que el ad en la Dower, a un auter en fee oue Garrantie accordant, & puis morust, & le Garrantie descendist a le fits, ore le fits serra barre a demaunder mesme la terre p̄ cause de la dit Garrantie, pur ceo que tiel collateral Garrantie de Tenant en Dower nest pas remedie per aſcun Eſtatute. Mesme la Ley est, lou Tenaunt a terme de vie fait un Alienation ouesq; Garrantie, &c. & morust, & le Garrantie discendist a celuy que avoit le reversion ou le remainder, ils serront barres per tiel Garrantie.

eth, and the ſon entreth into the land, and endow his mother, & after the mother alienateth that which ſhe hath in dower to another in fee with warranty accordant, and after dieth, and the warranty deſcendeth to the ſon, now the ſon ſhall be barred to demand the ſame land by cauſe of the ſaid Warranty, becauſe that ſuch Collateral warranty of Tenant in Dower is not remedied by any Statute. The ſame Law is it, where tenant for life maketh an alienation with warranty, *&c.* and dieth, and the warranty deſcendeth to him which hath the reverſion or the rem', they ſhall be barred by ſuch warranty.

¶ Of this and the ſubſequent Section ſufficient hath been ſaid before in this Chapter, Sect. 697.

( *Nest pas remedie per aſcun Statute.* But by a Statute made ſince, this caſe is remedied, as you ſee before, Sect. 697.

## *Sect.* 726.

¶ ITem, en le dit Caſe, ſi illint fuit que quand le Tenant en dower alienast, &c. ſon heire fuit deins age, & aury al temps que garrantie diſcendist ſur luy, il fuit deins age, en ceſt cas l'heir poit apres enter ſur lalienee, nient contreſteant le garrātie diſcēdist, &c. p̄ c̄ q̄ nul lacheſſe ſerra adjudg' en l'heire deins age qz il nentra pas ſur lalienee en la vie le tenāt e dower. Mē

ALſo, in the Caſe aforeſaid, if it were ſo that when the Tenant in Dower alienedd, *&c.* his heir was within age, and alſo at the time that the warranty deſcended upon him he was within age; In this Caſe the Heire may after enter upon the alienee, notwithſtanding the warranty deſcended, *&c.* becauſe no Lacheſſe ſhal be adjudged in the heir within age, that he did not enter upon the alienee in the life

¶ HEre note this diverſity, if the Heire bee within age at the time of the Diſcent of the warranty, may enter and avoid the eſtate either within age, or at any time after his full age: And Littleton ſaith well, That the Infant in this caſe may enter upon the Alienee, for if he bring his action againſt him, he ſhall be barred by this warranty, ſo long as the eſtate whereunto the warranty is annexed continue, and be not defeated by entry of the heir: but if he be within age at the time of the alienation with warranty, and become of full age before the diſcent of the warranty, the warranty ſhall bar him for ever. Our Author putteth his caſes where the Entry of the infant is lawfull; (a) for where the entry of the Infant is not lawfull

18.E.4.13.35.H.6.63. 23.Aſſ.28.32.E.3.Gar. 30.

35.H.6.63.

(a) 3.H.7.9.H.6.63. Br. tit. War. 54.33 H.8. tit. War. Br. 84 Lib. 1. fol 67 a. in Archers caſe & 140. Shudleys caſe.

full when the warranty descendeth, the warranty doth binde the Infant, as well as a man of full age: and the reason thereof is, because the estate whereunto the warranty was annexed, continueth and cannot be avoided but by action, in which action the warranty is a bar: and for the same reason likewise it is of a Feme Covert, if her entry be not lawfull, a Warranty descending on her during the Coverture, doth bind her. (w) And albeit the husband be within age at the discent of the warranty; yet if the entry of the wife be taken away, the warranty shall binde the wife.

(w) 18.E.3.3.

(q) And herein a diversity is to be observed between matters of record done or suffered by an Enfant, and matters in fait, for matters in Fait he shall avoid either within age, or at full age, as hath been said: but matters of Record, as Statutes Merchants and of the Staple, Recognizances knowledged by him, or a fine levied by him, recovery against him by default in real action (saving in dower) must be avoided by him, viz. Statutes, &c. by Audita querela, and the fine and recovery by writ of Error during his minority, and the like. And the reason thereof is, because they are judicial acts, and taken by a Court or a judge, therefore the nonage of the party, to avoid the same, shall be tried by inspection of Judges, and not by the country. And for that his nonage must be tried by inspection, this cannot be done after his full age: and so is the Law clearly holden at this day, though there be some difference in our Books. But if the age be inspected by the Judges, and recorded that he is within age, albeit he come of full age before the reversal, yet may it be reversed after his full age: * And so was it resolved by the whole Court of Kings Bench, in the case of Kekewich.

(q) 20 E.3. Audit. quær. 27.F.N.B.104.k. 6.E.3.39.17.E 2.76. 17. All.53.17.21.E.2.4. 13.E.3. Aud. Quær. 26. 18.E.3.Infant.61. 16.H.7.5.15 E.4.5. 8.H.6.30.1.H.7.15.

6.H.8.Saver de default Br.50.3.H.6.10. 1.Mar.Dy.104.

* Pasch. 13.Ja R. in the Kings Bench.

If lands had been given to the husband and wife, and their heirs, and the husband had made a feoffment to another, to whom a Collateral Ancestor of the wife had released and died, and the husband died, (and this had been before the statute of 32. H. 8. this Warranty had so bound her warrable right, as she could not waive her estate, and claime Dower. Otherwise it is of an estate determined: for if a disseisor make a lease to the husband and wife during the life of the husband, and the husband dieth, she may disagree to this estate determined, to save her self from damages. And so note a diversity between an estate determined, and an estate bound by warranty.

¶ *Nul laches serra adjudge en le Heire deins age.* Laches, or Lasches is an old French word for slackness, or negligence, or not doing. And the Rule (that no negligence shall be judged in an Infant) is true, where he is thereby to be barred of this entry in respect of a former right, as by a discent, or of his former right, (as Littleton doth here put an example) by a Warranty where his entry is congeable. But otherwise it is of Conditions, charges and penalties going out of, or depending upon the original Conveyance; for the Laches or negligence shal be adjudged in those cases as well in the infant as in any other. (y) Vide Pl.Com.Stowels Case per totum. And see further there, where an infant being tenant for life or years, shall be punished for doing or suffering of Waste, and where he claimeth by purchase, a Cessavit shall lie against him, if he pay not his rent by two years. And some have said, If he have the tenancy by discent, and he himself cease, a Cessavit doth lie, and he shall not have his age, because it is of his own Cesser, 31.H. 3. Age 54. But other books (as some conceive them) be against that: Vide 9. Ed. 3. 50. 28. E. 3. 99. 14. E. 3. Age 88. 2. E.2. Age 132.

(y) Pl.Com.Stowels case, 355. &c.

and

and others, which Books do not prove that the Cessavit doth not lye in that case, but the contrary, that he shall have his age, to the end he may at his full age certainly know what to plead, or what arrerages to tender; for the Land was originally charged with the Seignior y and Services.

## *Sect.* 727.

¶ MEs ore per lestatute fait 11. H. 7. cap. 10. il est ordeine, si alcun feme discontinue, alien, release, ou confirme oue Garrantie alcun terr̃ ou Tenements que el tient en dower pur term̃ de vie, ou en taile del done la primer baron, ou de les Ancestors, ou dl don̄ dalcun auter lie alouste le primer baron, ou de les Ancestors, que touts tiels Garranties, &c. serront voides, e q̄ bn̄ lirroit a cestuy q̄ avoit ceux terres ou tenements apres la mort de meism̃ la feme denter.

BUt now by the Statute made 11. *H.*7. *cap.* 10. it is ordained, if any woman discontinue, alien, release or confirm with Warranty any Lands or tenements which she holdeth in Dower for term of life, or in taile of the gift of her first husband, or of his Ancestors, or of the gift of any other seised to the use of the first husband, or of his Ancestors, that all such warranties, *&c.* shall be void, and that it shall be lawfull for him which hath these Lands or Tenements after the death of the same woman to enter.

¶ This is an addition to Littleton, and therefore to be passed over. And hereof sufficient hath been said before, Sect. 697.

## *Sect.* 728.

¶ ITem, il est parle en le sn̄ de le dit estatut de Glouc. q̄ parle del alienation ouesque garrantie fait per le Tenant per l' curtesie en cest form. Enlement, en meisme le manner ne soit heire la feme aps la mort le pere e le mere barre daction, sil demanda lheritage ou l' marriage, la mere per briefe Dentre, que son per aliena en temps sa mer, dont nul fine est leby en la Court le

ALso, it is spoken in the end of the said statute of *Glouc.* which speaketh of the alienation with warranty made by the tenant by the courtesie in this form. Also, in the same manner, the heire of the woman after the death of the father and mother shall not be barred of action, if he demandeth the heritage or the marriage of his Mother by writ of Entry, that his father alened in his mothers time,

¶ *Dont nul fine est levy en le Court le Roy, &c.* Here are three things worthy of observation concerning the construction of Statutes. First, that (a) it is the most natural and genuine exposition of a statute to construe one part of the Statute by another part of the same Statute, for that best expresseth the meaning of the makers. As here the question upon the general words of the statute is, whether a fine levied only by a husband seised in the right of his wife with Warranty shall bar the heir without assets. And it is well expounded by the former part of the act, whereby it is enacted, that alienation made by tenant by the courtesie with warranty shall not bar the heir, unlesse assets descend

(a) Pl. Com. f. 75. 7. E. 3. 89.

Vide Brack. l. 4. f. 321. Fleta l. 5. cap. 34.

cend. And therefore it ſhould be inconvenient to intend the Statute (ſuch manner, as that he that hath nothing but in the right of his wife ſhould by his fine levied with warranty barre the heir without Aſſets. And this expoſition is ex viſceribus actus.

Roy: & iſſint p force de meſme leſtatut, ſi le baron d'ſeiſin alie na leheritage, ou mariage la ſeiſin en fee oue Garrantie, &c. p ſon fait en pays, ceo eſt clerk Ley, que teſt Garrantie ſi barrera my lheire, ſinō que il ad Aſſets per diſcent.

whereof no fine is levied in the Kings Court. And ſo by force of the ſame ſtatute, if the huſband of the wife alien the heritage or mariage of his wife in fee with warranty, &c. by his deed in the Country, it is clear Law, that this warranty ſhall not bar the heir, unleſs he hath Aſſets by diſcent.

Secondly, the words of an act of Parliament muſt be taken in a lawfull and rightfull ſenſe, as here the words being (where no fine is levied in the Kings Court) are to be underſtood, whereof no fine is lawfully or rightfully levied in the Kings Court. And therefore (b) a fine levied by the huſband alone, is not within the meaning of the Statute, for that fine ſhould work a wrong to the wife; but a fine levied by the husband and wife is intended by the Statute, for that fine is lawfull and worketh no wrong. (c) So the Statute of W. 2. c. 5. ſaith (Ita quod Epiſcopus Eccleſiam conferat (is conſtrued, Ita quòd Epiſcopus Eccleſiam legitimè conferat, and the like in a number of other caſes in our Books. And generally the rule is, Quod non præſtat impedimentum quod de jure non ſortitur effectum.

(b) Pl. Com. 246 b. Seignior Barkleys caſe, li. 9. fol. 26. in caſe del Abbot de Strata mercella.
(c) 11. H. 4. 80. 9. E. 4 12. 21. H. 6. 28. 4. E. 4. 31. 12. H. 4. Formedon 15.

Thirdly, that conſtruction muſt be made of a ſtatute in ſuppreſſion of the miſchief, and in advancement of the remedy, as by this caſe it appeareth. For a fine levied by the husband only, is within the letter of the Law; but the miſchief was, the heir was barred of the Inheritance of his mother, by the warranty of his father without aſſets, and this act intended to apply a remedy, viz. that it ſhould not bar unleſſe there were aſſets; and therefore the miſchief is to be ſuppreſſed, and the remedy advanced. Et qui hæret in litera, hæret in cortice, as often before hath been ſaid.

## Sect. 729, 730, & 731.

'MEs l'doubt eſt, ſi l'baron alienast lheritage ſa feme, p fine leby en la Court l'Roy oueſq; Garrantie, &c. ſi ceo barrera lheire ſans aſcun diſcent en value. Et quant a ceo, jeo voille icy dire certaine reaſons que jeo ay oye dit en ceſt matter. Jeo ay oye mon Maſter S. Richard Newton, iades chiefe Juſtice de Common Banke, dire un ſoits en meſme le Banke, que tiel garrantie que le Baron fait per fine levie en le Court le Roy barrera lheire, coment que il ad riens per diſcent, pur ceo que leſtatut dit (dont nul fine eſt leby en l'Court l'Roy) q̄ iſſent per ſon

BUt the doubt is, if the husband alien the heritage of his Wife by fine levied in the Kings Court with warranty, &c. if this ſhall barre the heir without any diſcent in value. And as to this I will here tell certain reaſons, which I have heard ſaid in this matter. I have heard my Maſter Sir *Richard Newton*, late Chiefe Juſtice of the Common Pleas, once ſay in the ſame Court, that ſuch Warranty as the husband maketh by fine levied in the Kings Court, ſhall bar the heir, albeit he hath nothing by diſcent, becauſe the Statute ſaith (whereof no fine is levied in the Kings Court) and ſo by his opinion

opinion cel garrantie per fine demurt uncore un collaterall Garrantie, come il fuit a le common ley, nient remedy per le dit eſtatute, pur ceo que le dit eſtatute except alienations per fine oue Garrantie.

opinion this Warranty by fine remaineth, yet a collateral Warranty as it was at the Common Law not remedied by the ſaid Statute, becauſe the ſaid ſtatute excepteth alienations by fine with Warranty.

*Sect.* 730.

ET alcuns auters ont dit, & uncore dient le contrarie, & ceo eſt lour proofe, que come per meſme le Chapiter de dit eſtatute il eſt ordeine, que le Garrantie le tenant per le curteſie ne ſerra my barre al heire, ſinon que il ad aſſets per diſcent, &c. coment que le tenant per le curteſie levie un fine de meſmes les tenements ouelque Garrantie, &c. auri forment come il poit faire uncore cel garranty ne barra my heir, ſinon que il ad aſſets per diſcent, &c. & jeo croy que ceo eſt ley, & pur ceo ils dient, que ſerroit inconvenient dentender le ſtatute en tiel forme, q̃ un home que nad riens forſque en droit ſa feme purroit per fine levie per luy de meſmes les Tenements queux il ad forſque en droit ſa feme oue Garrantie, &c. barre heire de meſmes les tenements ſans aſcun diſcent de fee ſimple, &c. lou le tenant per le curteſie ceo ne poit faire.

AND ſome others have ſaid, and yet do ſay the contrary, and this is their proof, that as by the ſame Chapter of the ſaid Statute it is ordained, that the Warrantie of the tenant by the courteſie ſhall be no bar to the heir, unleſs that he hath Aſſets by diſcent, &c. although that the tenant by the courteſie levie a fine of the ſame tenements with warranty, &c. as ſtrongly as he can, yet this Warranty ſhall not barre the heir unleſs that he hath by aſſets by diſcent, &c. And I believe that this is Law; and therefore they ſay, that it ſhould be inconvenient to intend the ſtatute in ſuch manner, as a man that hath nothing but in right of his wife might by fine levied by him of the ſame Tenements which he hath but in right of his Wife with warranty, &c. bar the heire of the ſame tenements without any diſcent of fee ſimple, &c. where the tenant by the courteſie cannot do this.

*Sect.* 731.

MES ils ont dit que le ſtatute ſerra entend ſolonge tel forme, s. lou le Satute dit, dont nul fine eſt levie en court le Roy, ceo eſt adire, dont nul loial

BUT they have ſaid that the ſtatute ſhall be intended after this manner, s. where the Statute ſaith, whereof no fine is levied in the Kings Court, that is to ſay,

fine

fine eſt droiturelment leby en la Court le Roy, ceo eſt adire, dont nul tiel fin eſt droiturelmēt leby en la court le Roy: Et ceo eſt dont nul fine de le baron & ſa feme ſoit lebie en le court le Roy, car al temps de le feſans del dit eſtatute, chelcun eſtate de terres ou tenements que alcun home ou feme avoit, que diſcenderoit a ſon heire, fuit fée ſimple ſans condition, ou ſur certaine conditions en fait, ou en ley. Et pur ceo que adonques tiel fine poit droiturelment eſtre lebie per le baron & ſa feme, & les heires le baron garranteront, &c. tiel garrantie barrera lheire, & iſſint ils diont que eſt lentendement de leſtatute, car ſi le baron & ſa feme fieront un feoffement en fée per fait en pais, ſon heire apres le deceaſe le baron & ſa feme avera briefe Dentre ſur Cui in vita, &c. nient obſtant le garrantie de le baron, donque ſi nul tiel exception fuit fait en leſtatute de le fine lebie, &c. donque lheire averoit le briefe dentre, &c. nient obſtant le fine lebie per l' baron & ſa feme, pur ceo que les paroix de leſtatute devant lexception de fine lebie, &c. ſont generals, &c. eſt aſcaboir que lheire la feme apres le moxt le pere & la mere ne ſoit barr daction, ſil demand leheritage, ou le mariage ſa mere per briefe Dentre, que ſon pere aliena en temps ſa mere, & iſſint coment que le baron & la feme alienent per fine uncore ceo eſt voier, que le baron aliena en temps la mere, & iſſint il ſerroit en caſe de leſtatute, ſinon que tielx paroix fueront, s. dont nul fine eſt lebie

whereof no lawful fine is rightfully levied in the Kings court: And that is, whereof no fine of the husband and his wife is levied in the Kings Court; for at the time of the making of the ſaid ſtatute, every eſtate of Lands or Tenements that any man or woman had which ſhould deſcend to his heir, was fee ſimple without condition, or upon certain conditions in deed or in law. And becauſe that then ſuch fine might rightfully be levied by the husband and his wife, and the heirs of the husband ſhould warrant, *&c.* ſuch warranty ſhall bar the heir, and ſo they ſay that this is the meaning of the ſtatute; for if the husband and his wife ſhould make a feoffment in fee by Deed in the Country, his heir after the deceaſe of the husband and wife ſhall have a Writ of entry *Sur cui in vita, &c.* notwithſtanding the warranty of the husband, then if no ſuch exception were made in the Statute of the fine levied, *&c.* then the heir ſhould have the writ of entry, *&c.* notwithſtanding the fine levied by the husband and his wife, becauſe the words of the ſtatute before the exception of the fine levied; *&c.* are general, *viz.* that the heir of the wife after the death of the Father and Mother is not barred of action, if he demand the heritage, or the marriage of his mother by Writ of entry, that his father aliened in the time of his mother; and ſo albeit the husband and wife aliened by fine, yet this is true, that the husband aliened in the time of the mother, and ſo it ſhould be in that caſe of the ſtatute, unleſs that ſuch

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en la Court le Roy, & iſſint ils diont que ceo eſt a entender, dont nul fine per le baron & ſa feme eſt levie en la Court le Roy, le quel eſt loialment levie en tiel caſe; car ſi les Juſtices ont conuſans, que home que nad reins forſque en droit ſa feme voile levier un fine en ſon noſme ſolement, ils ne voylont, ne unque devoyent prender tiel fine deſtre levie per le baron ſolement ſans ſa feſm, &c. Ideo quære de ceſt matter, &c.

words were, *viz.* whereof no fine is levied in the Kings Court, and ſo they ſay that this is to be underſtood, whereof no fine by the huſband and his wife is levied in the Kings court, the which is lawfully levied in ſuch caſe; for if the Juſtices have knowledge, that a man that hath nothing but in the right of his wife will levy a fine in his name only, they will not, neither ought they to take ſuch fine to be levied by the husband alone without his wife, *&c. Ideo Quære* of this matter, *&c.*

¶ *Jeo ay oye mon maſter Sir* R. Newton, *&c.* who was a Gentleman of an antient family, in Latine de nova villa, in French de neufe ville, and a reverend learned Judge, and worthily advanced to be chief Juſtice of the Court of Common Pleas, whom our Author remembers with great reverence, as by his words you may perceive, calling him his Maſter, and citeth his opinion delivered once in the Court of Common pleas, which our Author heard and obſerved (whoſe example therein it is neceſſary for our ſtudent to follow) but the latter opinion (as hath been before obſerved) being Littletons own, is againſt the opinion of the Lord Newton (d) and the Law is holden clearly with our Author at this day: and our Author (as in all other caſes) hath good authority in law to warrant his opinion, Nullius hominis authoritas tantum apud nos valere debet, ut meliora non ſequeremur ſi quis attulerit.

(d) Bract. 321. Fleta. li. 5. cap. 34. 8. E. 2. Gar. 81, 18. E. 3. 51. 7. E. 3. 84. Pl. Com. 57.

¶ *Car ſi les Juſtices ont conuſance, &c.* Hereby it appeareth (e) that the Judge, if he knoweth it, ought not to take knowledge of a fine that worketh a wrong to a third perſon.

*Sect.* 731.
(e) 33. H. 6. 52 5. E. 3. 56 2. El. Dier. 178. 1. 7. 9. 1. Mar. 89. 4. E. 3. 41. 7. El. Dier, 246.

¶ *Que ſerroit inconvenient.* Argumentum ab inconvenienti, is very forcible in Law, as often hath been obſerved.

Vide Sect. 87. &c.

Of the reſt of theſe three Sections ſufficient hath been ſaid before.

## *Sect.* 732.

¶ ITem, eſt aſcavoir, que en ceux paroly, ou lheire demande lheritage, ou le mariage ſa mere, ceſt parol (ou) eſt un diſjunctive, & eſt autant a dire, ſi le heire demande le heritage ſa mere avoit en fee ſimple per diſcent, ou per purchaſe, ou ſi lheire demand le marriage ſa mere, ceſt aſcavoir, les tenements

ALſo, it is to be underſtood that in theſe words where the heir demands the heritage, or the marriage of his mother, this word (or) is a diſjunctive, and is as much to ſay, if the heir demand the heritage of his mother, *viz.* the tenements that his mother had in fee ſimple by diſcent or by purchaſe, or if the heire demand the marriage of his mother, that is

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que fueront dones a ſa mere en frankmarriage.

to ſay, the tenements that were given to his mother in frankmarriage.

Some do expound heritage of the mother to be the lands which the mother hath by diſcent. And that conſtruction is true, but the Statute by the authority of Littleton extendeth alſo where the mother hath it by purchaſe in fee ſimple; for ſo ſaith Littleton himſelf, that this word (Inheritance) is not only intended where a man hath lands by diſcent; but where a man hath a fee ſimple by purchaſe, becauſe his heirs may inherit him. And albeit it be true, that the Statute extendeth to an eſtate in Frankmarriage acquired by purchaſe, yet doth it extend alſo to all eſtates in tail, as well by diſcent as by purchaſe: for that Frankmarriage is put but for an example.

Vide Sect. 9.

## *Sect.* 733.

EGo & hæredes mei warrantizabimus, & imperpetuum defendemus. (a) Wherein three things are to be obſerved: Firſt, that *Heredes mihi* are words of neceſſity, for otherwiſe the heirs are not bound. (a) Secondly, though in the clauſe of the warranty it be not mentioned to whom, &c. yet ſhall it be intended to the Feoffee. (b) Thirdly, That the Feoffor may by expreſſe words warrant the Land for the life of the Feoffee, or of the Feoffor, &c. but the recovery in value ſhall be in fee. (c) of this Bracton writeth in this manner, Et ego & hæredes mei warrantizabimus tali & hæredibus ſuis tantùm vel tali & hæredibus & aſſignatis, & hæredibus aſſignatorum; vel aſſignatis aſſignatorum, & eorum hæredibus, acquietabimus & defendemus eos totam terram illam cum pertinentiis, contra omnes gentes, &c. per hoc autem quod dicit (ego & hæredes mei) obligat ſe & hæredes ad warrantiam, propinquos & remotos, præſentes & futuros & ſuccedentes in infinitum. Per hoc autem quod dicit (warrantizabimus) ſuſcepit in obligationem ad defendendum ſuum tenentem in poſſeſſione rei datæ & aſſignatos ſuos & eorum hæredes & omnes alios, &c. Per hoc autem quod dicit (acquietabimus) obligat ſe & hæredes ſuos ad acquietandum ſi quis

(a) 6.E.2. Vouch. 258. 12 E.2. ib. 262. 14.H.4.5.

(b) 38.E.3.14.

(c) Bract. fol. 37. 238. & Lib. 5. 380, 381. Brit. fol. 106. b. Flet. Li. 5. cap. 15. & lib. 6. cap. 23. 35. H. 8. 8. Gar. 90. F.N.B. 134. b.

Brit. ubi ſup. Flet. ubi ſup. H. 6. 48. 6. E. 2. Gar. 11. 262.

ITem, come eſt mobe en diũs Faits, ceux paroly en Latine, Ego & hæredes mei warrantizabimus, & imperpetuum defendemus, il eſt a veier ql effect ad cel parol, Defendemus, en tiel faits, & il ſemble que il nad pas leffect de Garrantie, ne emptent en luy la cauſe de Garrantie, car ſil iſſint ſerroit, que il prent effect ou cauſe de Garrantie, dõqz il ſerroit mitte en aſcuns fines levies en la Court le Roy: Et home ne veiet ceo unque, que ceſt parol Defendemus, fuit en aſcun fine, mes tant ſolement ceſt parol Warrantizabimus, perque ſemble que ceſt parol & Verbe Warrantizo, fait la Garrantie, & eſt la cauſe de

ALſo, where it is contained in divers Deeds theſe words in Latine, *Ego & Hæredes mei warrantizabimus & imperpetuum defendemus*; it is to be ſeen what effect this word (*Defendemus*) hath in ſuch deeds; and it ſeemeth that it hath not the effect of warranty, nor comprehendeth in it the cauſe of warranty; for if it ſhould be ſo that it took the effect or cauſe of warranty, then it ſhould be put into ſome fines levied in the Kings Court: and a man never ſaw, that this word (*Defendemus*) was in any Fine, but onely this word (*Warrantizabimus*) By which it ſeemeth, that this word and Verb (*Warrantizo*) maketh the Warranty, and is the

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Garrantie, & nul auter Verbe en noſtre Ley.

cauſe of Warrantie, and no other word in our Law,

plus petierit ſervitii vel aliud ſervitium quàm in carta donationis continetur. Per hoc autem quod dicit (Defendemus) obligat ſe & hæredes ſuos ad defendendum ſi quis velit ſervitutem ponere rei datæ contra formam ſuæ donationis: (d) Hereby appeareth, That neither Defendere nor Acquietare doth create a warranty, but Warrantizare only. And as Ego & hæredes mei warrantizabimus, &c. in Latine do create a warranty; ſo I and my heirs ſhall warrant, &c. in Engliſh doth create a warranty alſo.

(d) 46.E.3.28.11.H.4. 41.6.E.2.Vouch.202. 2.E.4.15.a.

(e) If a man be bound to A. in an Obligation, to defend ſuch lands to A. whereof the Obligor had infeoffed him for twelve peers, &c. in this caſe if he be ouſted by a ſtranger without being impleaded, the obligation is forfeit: but if he be bound to warrant the land, &c. the Bond is not forfeited, unleſſe the Obligee be impleaded, and then the Obligor muſt be ready to warrant, &c.

(e) 2.E.4.15.tit.Dit.71

¶ *Donques il ſerra mit en aſcuns fines, &c.* Here Littleton draweth an Argument from the form and words of a fine, and his reaſon is this. That ſeeing that a Fine is the higheſt and ſureſt kind of aſſurance in Law, if Defendemus had the force of a warranty it would have been contained in fines: and on the other ſide ſeeing this word Warrantizo is contained in fines to create a warranty, that therefore that word doth imply a warranty, and not the other.

¶ *Et nul auter Verbe en noſtre Ley.* Here it appeareth, That no other Verb in our Law doth make a warranty, but Warrantizo only, which is only appropriated to create a warranty.

46.E.3.28. Vid. Sect.1.

But, Qui bene diſtinguit, bene docet, and here of neceſſity you muſt diſtinguiſh, * Firſt, between a warrantie annexed to a Freehold or inheritance, (whereof Littleton here ſpeaketh) and a warranty annexed to a ward, which is a Chattel real, for there, Grant, Demiſe, and the like, do make a warranty. And of warranties annexed to Freholds and Inheritances, ſome be warranties in deed, and ſome be warranties in Law. A warranty in Deed, or an expreſſe warranty, (whereof Littleton here ſpeaketh) is created only by this word Warrantizo; but warranties in Law are created by many other words, they be therefore called warranties in Law, becauſe in judgement of law they amount to a warranty without this verb Warrantizo. (f) As Dedi is a warranty in Law to the Feoffee and his heirs during the life of the feoffor, but Conceſſi in a feoffment or fine implyeth no warranty. But before the ſtatute of Quia emptores terrarum, if a man had given lands by this word Dedi, to have and to hold, to him and his heirs, of the Donor and his heirs, by certain Services, then not only the Donor but his heirs alſo had been bound to warranty. But if before that ſtatute a man had given lands by this word Dedi, to a man and his heirs for ever, to hold of the chief Lord, there the Feoffor had not been bound to warranty, but during his life, as at this day he is.

Sect.697.

* 31.E.3.Vouch.24. 12. Rich.2.tit.Cont.de Vouch.35. 29.E.3.48. 30.E.3.6.b. Symken Symons caſe.8.E.3.61. 12.E.3.Vouch.27. Temps E.1.Vouch. 302. 3.H.6.17.

(f) Dedi fiat de Bigamis c. 6.2.H.7.7.6.H.7.2.48.E 3.2.3.E.1.tit.Vouch. 290.Fitz.N.B.134.b. 6.E.2.Vouch.258.

And albeit the words of the ſtatute of Bigamis be, In cartis autem ubi continentur (Dedi & conceſſi, &c.) Yet if Dedi be contained alone, it doth import a warranty, for the ſtatute doth conclude, Ipſe tamen feoffator in vita ſua ratione proprii doni ſui tenetur warrantizare. So as Dedi is the word that impliedth warranty, and not Conceſſi. Alſo where the words of the Statute be further, ſine clauſula quæ continet Warrantiam, the meaning of the Statute is, That Dedi doth import a warranty in law, albeit there be an expreſſe warranty in the Deed.

For if a man make a feoffment by Dedi, and in the deed doth warrant the Land againſt I.S. and his heirs, yet Dedi is a general warranty during the life of the Feoffor, and ſo was the ſtatute expounded in both points, (g) Hil. 14. El. in the Court of Common Pleas, which I my ſelf heard and obſerved. (h) And if a man make a leaſe for life, reſerving a Rent, and adde an expreſſe warranty, here the expreſſe warranty doth not take away the warranty in law, for he hath election to vouch by force of either of them. And in Nokes Caſe, note a diverſity between a Warranty, that is a Covenant real, and a warranty concerning a Chattel. (i) Alſo this word Excambium doth imply a warranty.

(g) Hil.14.El.in Com. Banc. (h) Lib.4.fol.80.in Nokes caſe,8 E.3.69. 9.E.3.15.10.E.3.11. 20.E.3 Cont.de Gar.7. 31.E.3.Vouch.280. 32.E.3.ib.102,43,E.3.3 2.E.3.tit.Cui in vita 17. 3.E.3.Formedon 44.

(i) 4.E.2.Vouch.245. 22.E.3.3.14.H.6.2. 2.H.6.14.Lib.4.fol.122 in Buſtards caſe.15.E 3 Bar.255.43.E.3.3.Li.1. fol.96 Lib.5.fol.17. Spencers caſe.Lib 8.fol. 75.S.Staffords caſe.

Alſo a partition implieth a warranty in law as in the Chapter of Parceners appeareth. And Homage anceſtrel doth draw to it ſelf warranty, as hath been ſaid in the Chapter of Homage anceſtrel.

And it is to be obſerved, That the warranty wrought by this word Dedi is a ſpecial warranty, and extendeth to the heirs of the Feoffee during the life of the Donor only. But upon the exchange and homage anceſtrel the warranty extendeth reciprocally to the heirs, and againſt the heirs of both parties: and in none of the Caſes the aſſignee ſhall vouch by force

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of any of theſe Warranties; but in the caſe of the exchange and Dedi the aſſignee ſhall rebut, but not in the caſe of Homage anceſtrel.

(k) 28.Aſſ.33 14.H.4.5. 28.E.3.18.4.E.3 Avow 201.& 202.19.E.3.Avower.201,202.11.E.3. Avower.100.30.H 6.7 33.H.8.Dyer.51.10.H.7 11.b.F N.B.163 a.

(k) And ſo no man ſhall have a Writ of Contra formam collationis, but only the feoffee and his heirs which be privy to the deed, but an aſſignee may rebut by force of the deed.

(l) 6.E.2.Cont.de Vouch.105.5.E.3.67. 4.E.2.lb.102.6.E.3 11. 50.7.E.3 6.18 E.3.8.22 E.3.3.3.H.7.13.6. H.7.2.14.E.3 Gar.32. F.N.B.134.G.5.E.3. 87.20.E.3.tit. Counter plea de Gar.7.

(l) If a man make a gift in tail or a leaſe for life of Land, by Deed or without Deed, reſerving a rent, or of a rent ſervice by Deed, this is a warranty in law, and the Donee or Leſſee being impleaded ſhall vouch and recover in value. And this warranty in Law extendeth not only againſt the Donor or Leſſor, and his heirs, but alſo againſt his aſſignes of the reverſion; and ſo likewiſe the Aſſignee of Leſſee for life ſhall take the benefit of this warranty in law.

(m) 4.E.3.36.33 E.3. tit.Count de Vouch. 122,43 Aſſ.32.50.E.3.7 F.N.B.149.m.

(m) When dower is aſſigned there is a warranty in law included, that the Tenant in Dower being impleaded, ſhall vouch and recover in value a third part of the two parts whereof ſhe is dowable.

And it is to be underſtood, that a warranty in law and aſſets is in ſome caſes a good bar.

(n) 14.H.6.2.15 E.3. Bar.255.

(n) In a Formedon in the Deſcender the Tenant may plead, that the Anceſtor of the Demandant exchanged the Land with the tenant for other lands taken in exchange, which deſcendeth to the demandant, whereunto he hath entred and agreed; or if he had not entred and agreed unto the Lands taken in exchange, then the tenant may plead the warranty in law, and other aſſets deſcended.

(o) 38.H.3.22,23,24. 13.E.3.Gar.35.

(o) If tenant in tail of Lands make a gift in tail, or a Leaſe for life, rendring a rent, and dieth, and the Iſſue bringeth a Formedon in the Diſcender, the reverſion and rent ſhall not bar the Demandant, becauſe by his Formedon he is to defeat the reverſion and rent. Et non poteſt adduci exceptio ejuſdem rei, cujus petitur diſſolutio.

(p) 16.E.3 Age.45. 18.E.3.8.31.E.3 Gar.29

(p) But if other aſſets in Fee ſimple do deſcend, then this warranty in Law and aſſets is a good bar in the Formedon.

Here four things are to be obſerved: First, that no warranty in Law doth bar any Collateral title, but is in nature of a lineal warranty: wherein the equity of the Law is to be obſerved.

Secondly, that an expreſſe warranty ſhall never binde the heirs of him that maketh the warranty, unleſſe (as hath been ſaid) they be named, as for example, Littleton here ſaith (Ego & hæredes mei) but in caſe of warranties in law, in many caſes the heirs ſhall be bound to warranty, albeit they be not named.

Vid.lib.4.fol.121. Buſtards caſe.

Thirdly, that in ſome caſes warranties in Law do extend to execution in value, of ſpecial lands, and not generally of lands deſcended in Fee ſimple, as you may ſee at large in my reports.

(q) 45. E.3. 20. b.

(q) Fourthly, that warranties in Law may be in ſome caſes created without deed, as upon gifts in tail, leaſes for life, Exchanges and the like.

And ſeeing ſomewhat hath been ſaid out of Bracton and other antient Authors, concerning aſſignees, it is neceſſary to ſhew who ſhall take advantage of a warranty, as aſſignee by way of voucher, to have recompence in value.

(r) 14 E 3 Gar.33. 13 E.1.Gar.83. Lib.5.fol.17.b. in Spencers caſe, 38.E 3.21.

(r) If a man infeoff A. and B. to have and to hold to them and their heirs, with a clauſe of warranty, Prædictis A. & B. & eorum hæredibus & aſſignatis: in this caſe if A. dieth, and B. ſurvive and dieth, and the heir of B. enfeoffeth C. he ſhall vouch as aſſignee; and yet he is but the aſſignee of the heir of one of them, for in judgment of law the aſſignee of the heir is the aſſignee of the anceſtor; and ſo the aſſignee of the aſſignee ſhall vouch in infinitum, within theſe words, (His aſſignes.)

(ſ) 12.E.2.Vouch.263. 19.E.2.Gar.85.13.E.1. ib.93.Lib.5.fo.17 Spencers caſe,7.E.3.34.10.E 3.9.14.E.3.Gar.33. Bract.ubi ſup.9. E.2. Gar.de Chart.30. 36.E. 3.Gar.1.4.H.8.Dy.1. F.N.B.135.

(ſ) If a man infeoffeth A. To have and to hold to him, his heirs and Aſſignes, A. infeoffeth B. and his heirs, B. dieth, the heir of B. ſhall vouch as aſſignee to A. So as heirs of aſſignees, and aſſignees of aſſignes, and aſſignes of heirs are within this word (aſſignes) which ſeemed to be a queſtion in Bractons time. And the aſſignee ſhall not only vouch, but alſo have a Warrantia Cartæ.

If a man doth warrant Land to another without this word (heirs,) his heirs ſhall not vouch: and regularly if he warrant land to a man and his heirs, without naming aſſignes, his aſſignee ſhall not vouch.

(t) 43.E.3.23.26.E.3.68 40.E.3.14.24.E.3.3. 1.H.4.94.50.E.3.17. 5.H.3.Age.19.Pl.Com. 418.

(t) But if the Father be enfeoffed with warranty to him and his heirs, the Father infeoffeth his eldeſt ſon with warranty and dieth, the Law giveth to the Son advantage of the warranty made to his Father, becauſe by act in law the warranty between the Father and the Son is extinct.

But note, there is a diverſity between a warranty that is a Covenant real, which bindeth the party to yield Lands or Tenements in recompence, and covenant annexed to the Land, which is to yield but damages, for that a covenant is in many caſes extended further then the warranty: As for Example:

(u) 42.E.3.b.per.Finchdon.

(u) It hath been adjudged, that where two Coparceners made partition of Land, and the one made a covenant with the other, to acquite her and her heirs of a ſuite that iſſued out

out of the Land, the Covenantee alieneth, in that case the assignee shall have an action of covenant, and yet he was a stranger to the Covenant, because the acquital did run with the Land.

(x) A. seised of the Manor of D. whereof a Chappel was parcel; a Prior with the assent of his covent covenanteth by Deed indented with A. and his heirs to celebrate Divine Service in his said Chappel weekly, for the Lord of the said Manor, and his servants, &c. In this case the assignees shall have an action of Covenant, albeit they were not named; for that the remedy by Covenant doth run with the Land, to give damages to the party grieved, and was in a manner appurtenant to the Manor (y) But if the Covenant had been with a stranger to celebrate Divine service in the Chappel of A. and his heirs, there the assignee shall not have an action of Covenant, for the Covenant cannot be annexed to the Manor, because the Covenantee was not seised of the Manor. See in Spencers Case before remembred, divers other diversities, between warranties, and Covenants which yield but damages.

(x) 42.E.3.3.2.Laur.Pakenhams case.2.*H.*4.6. 6.H.4.1.& 2.Ralf Brabsons case,lib.4,fol.17. 18.Spencers case.

(y) 2.H.4.6.Hen.Homes case 6.H.4.1. Lib.5.fol. 17,18, Spencers case.

And here is to be observed, that an assignee of part of the Land shall vouch as assignee; (*) as if a man make a feoffment in fee of two acres to one, with warranty to him, his heirs and assigns, if he make a feoffment of one acre, that Feoffee shall vouch as assignee, for there is a diversity between the whole estate in part, and part of the estate in the whole, or of any part. As if a man hath a warranty to him, his heirs, and assigns, and he make a Lease for life, or a gift in tail, the Lessee or Donee shall not vouch as assignee, because he hath not the estate in fee simple, whereunto the warranty was annexed; but the Lessee for life may pray in aid, or the Lessee or Donee may vouch the Lessor or Donor, and by this means he shall take advantage of the Warranty. But if a lease for life, or gift in tail be made, the Remainder over in fee, such a Lessee or Donee shall vouch as assignee, because the whole estate is out of the Lessor, and the particular estate, and the remainder do in judgement of law to this purpose make but one estate.

* 18.E.3.51.10.E.3.58. 5.E.3.40.12.E.3. Counterplea de Vouch.41.14 *E.*3.Voucher 108.5.E.3 ibid 178.13.E.3.ibid. 19.40.E.3.22.41.*E.*3. Vouch.69.& 100.32.E.3 ibid.96. And this diversity was agreed until 14.E.1. Communi Banco, which I heard and observed.

(a) If a man infeoffe three with warranty to them and their heirs, and one of them release to the other two, they shall vouch; but if he had released to one of the other, the warranty had been extinct for that part, for he is an assignee.

(a) 40.*E.*3.14.40.Ass.5. 33.*H.*6.4.37.H.8.Alienation sans licence 31. 8.*H.*4.8.

(b) If a man doth warrant Land to two men and their heirs, and the one make a feoffment in fee, yet the other shall vouch for his moity. If a man at this day be enfeoffed with warranty to him, his heirs, and assigns, and he make a gift in tail, the remainder in fee, the Donee make a feoffment in fee, that feoffee shall not vouch as assignee, because no man shall vouch as assignee, but he that cometh in in privity of estate, but he must vouch his Feoffor, and he to vouch as assignee, but such an assignee may rebut. If the Warranty be made to a man & his heirs, without this word (assignes) yet the assignee, or any tenant of the Land may rebut. And albeit no man shall vouch or have a Warrantia cartæ, either as party, heir, or assignee, but in privity of estate; yet any that is in of another estate, be it by disseisin, abatement, intrusion, usurpation or otherwise, shall rebut by force of the Warranty, as a thing annexed to the Land, which sometime was doubted (c) in our Books. But herein is a diversity to be observed, when in the cases aforesaid, he that rebutteth claimeth under the warranty, and when he that would rebut claimeth above the warranty, for there he shall not rebut. And therefore if any Lands be given to two Brethren in fee simple, with a warranty to the eldest and his heirs, the eldest dieth without issue, the survivor, albeit he be heir to him, yet shall he neither vouch nor rebut, nor have a Warrantia cartæ, because his title to the Land is by relation above the fail of the Warranty, and he cometh not under the estate of him to whom the Warranty is made, as the Disseisor, &c. doth.

(b) 11.R.2.Detin.w.46. 7.E.3.35.46.E.3.4.

(c) 38.E.3.21.26.E.3.56 Lib.10.f 96.b Seymors case.7 *E.*3.34,35.8.E.3 10.46.E.3.4.10.E.3.42. 45.E.3.18. 10.Ass.5.35.Ass 9.22. Ass.39 88 31.Ass.13.

(d) If a man make a gift in tail at this day, and warrant the land to him, his heirs and assignes, and after the Donee make a feoffment and dieth without issue, the warranty is expired as to any voucher or Rebutter; for that the estate in tail whereunto it was knit is spent: otherwise it is, if the gift and feoffment had been made before the Statute of Donis conditionalibus; for then both the Donee and Feoffee had a fee simple, and so are our Books to be intended in this and the like cases.

(d) Lib.3.fol.62,63. Lincoln Colledge case.

(e) If A. be seised of Lands in fee, and B. releaseth unto him, or confirmeth his estate in fee with warranty to him, his heirs and assigns, all men agree this warranty to be good: but some have holden, that no warranty can be raised upon a bare release or confirmation without passing some estate or transmutation of possession. (f) But the Law, as it appeareth by Littleton himself, is to the contrary, and that both the party, and (as some do hold) his assignee shall vouch; but he that is vouched in that case must be present in Court, and ready to enter into the warranty and to answer, and the tenant must shew forth the deed of Release or confirmation with warranty, to the intent the Demandant may have an answer thereunto; and either deny the deed or avoid it; for that at the time of the confirmation made, he to whom it was made, had nothing in the land, &c. for otherwise the demandant may counterplead the Voucher by the Statute of W.1 viz. that neither Voucher nor any of his Ancestors had any

(e) 14.E.3.Gar.108. 12.*H.*7.1.

(f) 11.*H.*4 22.10.E.3. 51.21.E.3.27. Vid. Sect. 700 738.& 745.

W.1.cap.40.

ſeiſin whereof he might make a feoffment. And this is grounded upon the ſaid ſtatute of W.1. the words whereof be, Sil neit ſon garrantie en preſent, que lun voile garrenter de long gree, & maintenant en er en reſpons, Otherwiſe tenant muſt be driven to his Warrantia cartæ:

Vide 20.E.1. Statute de vocat. ad warrant.

(g) But a warranty of it ſelf cannot enlarge an eſtate; as if the Lessor by deed releaſe to his Leſſee for life, and warrane the land to the Leſſee and his heirs, yet doth not this enlarge his eſtate.

(g) 22.H.6.15. 19.H.6. 73.20.H.6.73.2.H.4.13. 41.E.3.Gar.15.43.E 3 17.43.Aſſ 42.12.Aſſ.17. 12.E.3. taile 3.22.E 4. 16.b 44.E.3.10.44. Aſſ. Baſſingborns Aſſ. l.10. fol.97. Seymors caſe.

(h) If a man make a feoffment in fee with warranty to him, his Heirs and Aſſigns, by Deed (as it muſt be) and the Feoffee enfeoffeth another by paroll, the ſecond Feoffee ſhall vouch, or have a Warrantia cartæ, (as hath been ſaid) as aſſignee, albeit he hath no Deed of the aſſignment, becauſe the deed comprehending the warrantie, doth extend to the aſſignees of the Land, and he is a ſufficient aſſignee, albeit he hath no deed.

(h) Lib3.fol.36.Lincolns Colledge Caſe.

(i) If a man enfeoffe two, their Heirs and aſſignes, and one of them make a feoffment in fee, that feoffee ſhall not vouch as aſſignee.

(i) 20.E.3.70.7.E.2. Joinder in action 1. 11.E 48.

If a man make a feoffment in fee to A. his heirs and aſſigns, A. enfeoffeth B. in fee, who re-enfeoffeth A. He or his Aſſigns ſhall never vouch, for A. cannot be his own Aſſigne. But if B. had feoffed the heir of A. he may vouch as aſſignee; for the heir of A. may be aſſignee to A, inaſmuch as he claimeth not as heir.

(k) 14.H.4.3.

(k) If a man make a feoffment by Deed of Lands to A. To have and to hold to him and his heirs, and bind him and his heirs to warrant the Land, In forma prædicta; this warranty ſhall extend to the Feoffee and his heirs, except the words had been, to him and his heirs.

If a man letteth lands for life, the Remainder in tail, the Remainder eadem forma, this is a good eſtate tail, quia idem ſemper refertur proximo præcedenti.

## Sect. 374.

ITem, ſi tenant en taile ſoit ſeiſie des terres deviſables per teſtament ſolonque le cuſtome, &c. et le tenant en taile alien meſmes les Tenements a ſon frere en fee, et ad iſſue, et devie, et puis ſon frere devila per ſon Teſtament meſmes les tenements a un auter en fee, e oblige luy et ſes heires a garrantie, &c. et mour ſans iſſue, il ſemble que ceſt garrantie ne barrera my liſſue en taile; ſi il voit ſues ſon briefe de Formedon, pur ceo que ceſt garrantie ne diſcende my al iſſue en le taile, entant que le Uncle del iſſue ne fuit my oblige a le garrantie en ſa vie; ne que il ne puiſſoit garranter les tenements en ſa vie, entant que le devile ne puiſſoit prender aſcun execution ou effect, forſque apres ſon deceaſe. Et entant que le Uncle en ſon vie ne fuit tenus de garranter, tiel garrantie ne poit diſcen-

ALſo, if tenant in taile be ſeiſed of Lands deviſable by teſtament after the cuſtome, *&c.* and the Tenant in Tail alieneth the ſame Tenements to his brother in fee, and hath iſſue and dieth, and after his brother deviſeth by his Teſtament the ſame tenements to another in fee, and bindeth him and his heirs to Warranty, *&c.* and dieth without iſſue; it ſeemeth that this warranty ſhall not bar the iſſue in the taile, if he will ſue his Writ of *Formedon*, becauſe that this Warranty ſhall not deſcend to the iſſue in Taile, in ſo much as the Uncle of the Iſſue was not bound to the ſame Warrantie in his life-time: neither could he warrant the Tenements in his life, inſomuch as the deviſe could not take an execution or effect until after his deceaſe. And inſomuch as the Uncle in his life was not

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der de luy al iſſue en le Taile, &c. car nul choſe poit diſcender del auncetter a ſon heire, ſi non que meſm̃ ceo fuit en launcetter.

held to warranty, ſuch warranty may not deſcend from him to the iſſue in taile, *&c.* for nothing can deſcend from the Anceſtor to his heire, unleſs the ſame were in the Anceſtor.

HEre our Author declareth one of the Maximes of the common Law, that the heir ſhall never be bound to any expreſs Warranty, but where the Anceſtor was bound by the ſame Warranty; for if the Anceſtor were not bound, it cannot deſcend upon the heir, which is the reaſon here yielded by Littleton. (l) If a man make a feoffment in fee, and bind his heirs to Warranty, this is void by the warrant of this Maxime, as to the Heir, becauſe the Anceſtor himſelf was not bound. Alſo, if a man bind his heirs to pay a ſum of money, this is void. And of the other ſide, if a man bind himſelf to warranty, and bind not his heirs, they be not bound, for he muſt ſay, as it appeareth before, Ego & hæredes mei warrantizabimus, &c. (m) and Fleta ſaith, Nota quod hæres non tenetur in Anglia ad debita anteceſſoris reddenda, niſi per anteceſſorem ad hoc fuerit obligatus; præterquam debita regis tantùm: A fortiori in caſe of warranty, which is in the realty.

(l) 31.E.1.Grant.8.

Bracton,li.2.fo.37.238. Britton, fol.106.b.

(m) Fleta, lib.2.c.55. Britton, fol.65.b. 11. *H.*6.48.

But a warranty in Law may bind the heir, although it never bound the Anceſtor, and may be created by a laſt Will and Teſtament: (n) As if a man deviſe Lands to a man for life or in tail, reſerving a Rent, the Deviſee for life or in tail ſhall take advantage of this warrantie in law, although they be not named. Alſo an expreſs Warranty cannot be created without Deed, and a will in writing is no Deed, and therefore an expreſs Warranty cannot be created by Will.

(n) 18.E.3.8.

## *Sect.* 735.

(A) Uxy un Garrantie ne poit aler ſolonq̃ la nature des tenements per le cuſtome, &c. mes tantſolement ſolonque le forme del Common ley. Car ſi le tenant en taile ſoit ſeiſie des Tenements en Burgh Engliſh, lou le cuſtome eſt, que touts les tenemẽts deins meſm̃ le Bourough devoyent diſcender a le fits puiſne, & il diſcontinua le tayle oue garrantie, &c. & ad iſſue deux fits, & mourust ſeiſie des autres terres ou Tenements en meſme le Burgh en fee ſimple a le value, ou pluis, de les Tenemẽts tailez, &c. uncore le puiſne fits avera un Formedon de les terres tailes, & ne ſerra my bar̃ per l'garrantie ſon pere, coment que aſſets a luy diſcendiſt en fee ſimple d meſme le pere, ſolonque

ALſo, a Warranty cannot go according to the nature of the Tenements by the cuſtome, *&c.* but only according to the forme of the Common Law. For if the Tenant in Tail be ſeiſed of Tenements in Borough Engliſh, where the cuſtome is, that all the Tenements within the ſame Borough ought to deſcend to the youngeſt ſonne, and he diſcontinueth the Taile with Warranty, *&c.* and hath iſſue two ſonnes, and dyeth ſeiſed of other Lands or Tenements in the ſame Borough in fee ſimple to the value, or more, of the Lands entailed, &c. yet the youngeſt ſonne ſhall have a *Formedon* of the Lands tailed, and ſhall not be barred by the warranty of his father, albeit aſſets deſcended to him in fee ſimple from his ſaid father

le cuſtome, &c. pur ceo que le garrantie diſcendiſt a ſon eigne frere que eſt in ploine vie, & nemy ſur le puiſne. Et en meſme le maner eſt de collateral garrantie fait de tiels Tenements, lou le garrantie diſcendiſt ſur leigne fits, &c. ceo ne barrera my le puiſne fits, &c.

according to the cuſtome, &c. becauſe the warranty deſcendeth upon his elder brother who is in full life, and not upon the youngeſt. And in the ſame manner it is of collateral warranty made of ſuch Tenements, where the warranty deſcendeth upon the eldeſt ſon, &c. this ſhall not bar the younger ſon, &c.

## Sect. 736.

¶ EN meſme le maner eſt de Tenements en le Countie de Kent, queux ſont appelles Gavelkind, les queux tenements ſont partibles enter les freres, &c. ſolonque la cuſtome, ſi alcun tiel garrantie ſoit fait per ſon aunceſter, tiel garrantie diſcendera tantſolement a l'heir que eſt heire al common ley, ceſt aſcavoir al eigne frere, ſolonque la conuſans del common ley, & nemy a touts les heires queux ſont heires de tiels tenements ſolonque le cuſtome.

IN the ſame manner it is of lands in the County of *Kent*, that are called Gavelkinde, which Lands are dividable between the brothers, &c. according to the cuſtome, if any ſuch warranty be made by his Anceſtor; ſuch warranty ſhall deſcend only to the heir, which is heir at the common Law, that is to ſay, to the elder brother, according to the Conuſance of the common Law, and not to all the heirs that are heirs of ſuch Tenements according to the cuſtome.

Vide Sect. 603.718. & 737.

¶ HEreupon a diverſity is to be obſerved between the Lien real, and the Lien perſonal. For the Lien real, as the Warranty, doth ever deſcend to the heir at the Common Law; (n) but in Lien perſonal doth bind the ſpecial heirs, as all the heirs in Gavelkind, and the heir on the part of the mother, as hath been ſaid.

(n) 11.E.3.Det.7.11. H.7.12.

(o) 17.E.3.Joint. 41. 16.H.7.13.29.E.3.46. 12.H.7.3.22.E.3.1. 17.E.3.8.30.E.3.40. 19.H.6.55.lib.3.fol. 14. Matthew Herberts caſe

(o) If two men make a feoffment in fee with a warrantie, and the one die, the feoffee cannot vouch the ſurvivor only, but the heir of him that is dead alſo; but otherwiſe if two joyntly bind themſelves in an Obligation, and the one die, the ſurvivor only ſhalbe charged.

## Sect. 737.

¶ ITem, ſi tenant en le taile ad iſſue deux files per diverſ venters, & morust, & les files entront, et un eſtrange eux diſſeiſt de meſmes les tenements, et lun de eux releſſa per ſon fait a le Diſſeiſor tout ſon droit, & oblige luy et ſes heires a garrantie, et morust ſans iſſue: en ceſt caſe la

ALſo, if tenant in tail hath iſſue two daughters by divers venters and dieth, and the daughters enter, and a ſtranger diſſeiſeth them of the ſame tenements, and one of them releaſeth by her deed to the Diſſeiſor all her right, and binde her and her heirs to warranty, and die without iſſue: In this caſe the

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soer que survelquist poit bien enter & ouster le Disseisor de touts les tenements, pur ceo que tiel garrantie nest pas Discontinuance, ne collateral garrantie a la soer que survelquist, pur ceo que ils sont de demy sanke, & lun ne poit estre heire a lauter, solonque le cours del Common Ley. Mes auterment est lou y sont tiles del tenant en taile per un mesme venter.

sister which surviveth may well enter, and oust the disseisor of all the Tenements, because such Warranty is no Discontinuance nor collateral Warranty to the sister that surviveth, for that they are of half blood, and the one cannot be heir to the other according to the course of the Common Law. But otherwise it is where there be daughters of Tenant in tail by one venter.

¶ The reason of this, is, in respect of the half blood, whereof sufficient hath been said in the first Book, in the Chapter of Fee simple.

Two brothers be by Demy venter; the eldest releaseth with warranty to the Disseisor of the Uncle, and dieth without issue; the Uncle dieth, the warranty is removed, and the younger Brother may enter into the Land.

## *Sect.* 738.

ITem, si Tenant en taile lessa le tenements a un home pur terme de vie, le remainder a un auter en Fee, & un Collateral Auncestor confirma le estate del tenant a term de vie, & oblige luy & ses heires a garrantie pur terme de vie del tenant a terme de vie & mozust, & le tenant en taile ad issue, & debie, ore lissue est barre a demander les tenements per Briefe de Formedon, durant le vie le tenant a terme de vie per cause del Collateral garrantie discendu sur le issue en le taile. Mes apres le decease de le

ALSO, if Tenant in tail letteth the Lands to a man for terme of life, the Remainder to another in Fee, and a Collateral Ancestor confirmeth the state of the Tenant for life, and bindeth him and his heires to warranty for terme of the life of the tenant for life, and dieth, and the Tenant in tail hath issue and dies; now the issue is barred to demand the Tenements by Writ of *Formedon* during the life of Tenant for life, because of the collateral Warranty descended upon the issue in taile. But after the decease of the Tenant for life,

¶ Here it appeareth, that a warranty may be raised by a Confirmation which transferreth neither Estate nor right; whereof sufficient hath been said before. Vide Sect. 733. & 708.

¶ *A Garrantie pur terme de vie, &c.* (p) This proveth that a warranty may be limitted, and that a man may warrant Lands afwel for term of life, or in tail, as in fee. (p) 38. E. 3. 14. 26. E. 3. Vouch. 87.

If tenant in fee simple that hath a Warranty for life either by an express warranty, or by Dedi. be impleaded and vouch, he shall recover a Fee-simple in value, albeit his Warranty were but for term of life, because the warranty extended in that case to the whole estate of the Vouchee in Fee simple; but in the case that Littleton here putteth, the tenant for life shall recover in value but an estate for life, because the warranty doth extend to that estate only.

¶ *Un Briefe de Formedon, &c.* Here is implyed that a collateral

warranty giveth no right, but ſhall bar only for life, and after the party is reſtored to his action.

tenant a term de vie, iſſue avera un Briefe de Formedon, &c.

the iſſue ſhall have a Writ of *Formedon, &c.*

It is alſo to be obſerved, That a Warrant may deſcend to the Heirs of him that made it during the life of another.

## Sect. 739.

¶ Et ſur ceo jeo aye oye un reaſon, que cel caſe prouera un auter caſe, ſ. ſi un home leſſa ſes terres a un auter, A aver & tener a luy & a ſes heires pur terme dauter vie, & le Leſſee moruſt vivant celuy a que vie, &c. & un Eſtrange enter en la Terre que le heire le Leſſee luy poit ouſter, &c. pur ceo que en le caſe prochein avantdit, entant que home poit obliger luy & ſes heires a Garrantie al Tenant a terme de vie tantſolement durant la vie le Tenant a terme de vie, & cel Garrantie diſcendiſt al heire celuy que fiſt le Garrantie, le quel Garrantie neſt pas Garrantie denheritance, mes tantſolement pur terme dauter vie: per meſme le reaſon lou Tenements ſont leſſes a un home, A aver et tener a luy et a ſes heires, pur terme dauter vie, ſi le Leſſee moruſt, vivant celuy a que vie, ſon heire avera les Tenements, vivant celuy a que vie, &c. Car ont dit, Que ſi hom grant un annuity a un auter, A aver & perceiver a luy & a ſes heires pur terme dauter vie, ſi le grantee moruſt, &c. que apres ſon mort ſon heire avera lannuitie durant la vie celuy a que vie, &c. Quære de iſta materia.

AND upon this I have heard a reaſon, That this Caſe will prove another Caſe, *viz.* If a man letteth his Lands to another, To have and to hold to him and to his heirs for term of anothers life, and the Leſſee dieth, living *Celuy a que vie, &c.* and a ſtranger entreth into the land, that the heir of the Leſſee may put him out, &c. becauſe in the caſe next aforeſaid, inaſmuch as a man may bind him and his heirs to warranty to Tenant for life only, during the life of the tenant for life; and this warranty deſcendeth to the heir of him which made the warranty, the which warranty is no warranty of inheritance, but only for term of anothers life. By the ſame reaſon where lands are let to a man, to have and to hold to him and his heirs for term of anothers life, if the Leſſee dye, living *Celuy a que vie*, his heirs ſhall have the lands, living *Celuy a que vie*, &c. For they have ſaid, That if a man grant an Annuity to another, To have and to take to him and his heirs for term of anothers life, if the Grantee die, &c. That after his death his heir ſhall have the Annuity during the life of *Celuy a que vie*, &c. *Quære de iſta materia.*

¶ Ieo

¶ *Eo ay oye un reason.* Here our Student is taught after the example of out Author, to observe every thing that is worthy the noting.

¶ *Si un home lessa terre a un auter,* &c. This case is without question; (q) That the Heir of the lessee shall have the land, to prevent an Occupant. And so it is (as Littleton here saith) in case of an Annuity, or of any other thing that lieth in Grant, whereof there can be no Occupant. And of this somewhat hath been said in the Chapter of Discents.

(q) 17.E.3.48.18.E.3.12. 11.H.4.42.7.H.5.46. 8.H.4 15.Dy.8.El.253. 18.H.8.3.27.E.8.21.H. 8.tit.Estat.Br.10.16.E. 3.tit.Accompt, 59.33. Ass.p.17.22.H.6.33.39. E.3.37. Vide Sect.387.

## *Sect.* 740.

¶ MEs lou tiel Leale ou Grant est fait a un hom & a les heires pur terme dās, en tiel Case l'heire le Lessée ou le grantée navera unquez aps la mort l'Lessée, ou le Grantée ceo que est issint lesse ou grant, pur ceo q̄ est Chattel real & chateux realx p l'common ley viendra al executors del Grantée, ou del Lessée, & nemy al heire.

But where such lease or Grant is made to a man and to his heirs for term of years; In this case the Heire of the lessee or the grantee shall not after the death of the Lessee or the grantee have that which is so lett or granted, because it is a chattel real; and Chattels reals by the common law shall come to the executors of the grantee, or of the Lessee, and not to the Heire.

¶ Here is a general rule, That Chattels reals, as well as chattels personals, shall go to the Executors or Administrators of the Lessee, and not to his heirs. For as estates of inheritance or freehold descendible shall go to the Heir; so Chattels, as well real as personal, shall go to the Executors or administrators. 11.E.3.tit.Ass.88. 11.Ass.21. 18.El. *Dyer* 279.

(r) But if the Kings tenant by knights service in capite be seised of a Mannor, whereunto an Advowson is appendant, and the Church become void, the Tenant dieth, his Heir within age, the King shall present to the Church, and not the executor or administrator: but if the land be holden of a common Person, in that case the executor shall present, and not the Gardian. (r) 24.E.3.26. F.N.B.34.b, F.N.B.34.a

(f) If a Bishop hath a ward fallen and dieth, the King shall not have the Ward, nor the Successor, but the Executor and the ward shall be Assets in his hands. So it is of Heriot, Relief, and the like. (r) But if a Church become void in the life of a Bishop, and so remain until after his decease, the King shall present thereunto, and not the Executor or Administrator, nothing can be taken for a presentment, and therefore it is no assets. (f) 40.E.3.14. (r) 9.H.6.58.11.H.4.7.

## *Sect.* 741.

¶ Item, en alcūs Cases il poit estre, que coment que un collateral Garrantie soit fait en Fée, &c. uncore tiel Garrantie poit estre defeat & anient. Sicome te-

Also, in some cases it may be, That albeit a collateral warranty be made in fee, &c. yet such a warranty may be defeated and taken away: As if Tenant in Taile discontinue the Taile

¶ ET *moruſt sans Issue,* &c. Here (as before in this Chapter hath been noted) the Collateral warranty doth descend upon the Issue in Taile before any right doth descend unto him, wherein this Diversity is to be observed: Where the right is in esse in any of the Ancestors of the Heir, at the time of the Discent Vide Sect. 707.

cent of the Collateral warrantie, there albeit the warranty descend first, & after the right doth descend, the Collateral warranty shall bind, as here in this Case of our Author expressly appeareth. But where the right is not in esse in the heir, or any of his ancestors, at the time of the fall of the warrantie, there it shall not bind.

nant en taile discontinue le taile en fee, & le discontinuee est disseisie, & le frere del tenant en le taile relessa per son fait a le Disseisor tout son droit, &c. oue garrantie en fee, & morust sans issue, & le tenant en l' taile ad issue & debie, ore lissue est barr de son action per force d' collateral garrantie discendue sur luy: mes si apres ceo le Discontinuee enter sur le disseisor, donqz poit l' heire en le taile aver bien son action de Formedon, &c. pur ceo que le garrantie est avientie & defeat, car quant garrantie est fait a un home sur estate que adonques il avoit, si lestate soit defeat le garrantie est defeat.

in Fee, and the Discontinuee is disseised, and the brother of the Tenant in Tail releaseth by his deed to the disseisor all his right, *&c.* with warranty in Fee, and dieth without issue, and the Tenant in tail hath issue and die; now the issue is barred of his action by force of the collateral Warranty descended upon him. But if afterwards discontinuee entreth upon the disseisor, then may the heir in tail have well his action of *Formedon &c.* because the warranty is taken away and defeated; for when a warranty is made to a man upon an estate which he then had, if the estate be defeated, the warranty is defeated.

(u) E.3.48.30.H.8.42.

(u) As if Lord and Tenant be, and the Tenant make a Feoffement in Fee with warranty, and after the Feoffee purchase the Seigniory, and after the Tenant cease, the Lord shall have a Cessavit; for a warranty doth extend to rights precedent, and never to any right that commenceth after the warranty, whereof more shall be said in this Section. Also a warranty shall never bar any estate that is in possession, reversion or remainder, that is not devested, displaced, or turned to a right before, or at the time of the fall of the warranty.

(w) Lib.1, fol.67. Archers case.

(w) If a Lease for life be made to the Father, the Remainder to his next heir; the Father is disseised and releaseth with warranty and dieth; this shall barre the Heire, Although the warrantie doth fall, and the remainder cometh in esse at one time.

(y) Temps E.1. Voucher 296. 31.Ass.13.22.Ass.36. 41.Ass 6.33.E.3.tit. Gar.74.lib.10.fol.97. E. Seymors case.

(y) If there be Father and Son, and Son hath Rent-service, Suit to a Mill, Rent-charge, Rent-seek, Common of pasture, or other profit apprender out of the Land of the Father, and the Father maketh a feoffment in fee with warranty, and dieth, this shall not bar the son of the Rent, Common, or other profit apprender, quamvis clausula specialis Warrantie vel Acquitancie in cartis tenentium inseratur, quia in tali casu transit terra cum onere; and he that is in seisin or possession need not to make any entry or claim: and albeit the Son after the feoffment with warranty, and before the death of the Father had been disseised, and so being out of possession, the warranty descended upon him; yet the warranty should not bind him, because at the time of the warranty made, the son was in possession. (*) So if my collateral ancestor release to my tenant for life; this shall not bind my Reversion or remainder, because that the Reversion or remainder continued in me. But if he that hath rent, common, or any profit out of the Land in tail, disseise the tenant of the land, and maketh a feoffment of the Land, and warrant the land to the feoffee and his heirs, (a) regularly the warrant doth extend to all things issuing out of the Land; that is to say, to warrant the land in such plight and manner, as it was at in the hand of the feoffor, at the time of the feoffment with warrantie, and the feoffee shall vouch, as of Lands discharged of the Rent, &c. at the time of the feoffment made.

(*) 45.E.3.31.2.1.H.7.11. Vide Sect.698.

(a) 28.E.4.26.21.H.7.9 3.H.7.4.7.H.4.17. 30.H.8 Dyer 42. 30.E.3.30.9.E.3.78. 45.E.3.Voucher 72. F.N.B.125.14.H.8 6.

A woman that hath a Rent-charge in fee entermarrieth with the tenant of the Land, an estranger releaseth to the tenant of the Land with warranty, he shall not take advantage of this warrantie either by voucher or Warrantia Cartæ, for the wife, if her husband die, or the Heir of the wife living, the husband cannot have an action for the Rent upon a Title before the

the warranty made, for if the Heir of the wife bring an Assise of Mordancester; this action is grounded after the Warranty, whereunto, as hath been said, the Warranty shall not extend.

So it is if the Grantee of the Rentgrant it to the Tenant of the Land upon condition, which maketh a feoffment of the Land with warranty; this warranty cannot extend to the Rent, albeit the feoffment was made of the Land discharged of the Rent; for if the condition be broken, and the Grantor be intituled to an action, this must of necessity be grounded after the Warranty made.

But in the case aforesaid, when the woman Grantee of the rent marrieth with the tenant, and the tenant maketh a feoffment in fee with warranty, and dieth; in a Cui in vita brought by the wife (as by Law she may) (b) the Feoffee shall vouch as of lands discharged at the time of the warranty made, for that her title is Paramount; so if tenant in tail of a Rent-charge purchase the Land, and make a feoffment with warranty, if the issue bring a Formedon of the Rent, the Tenant shall vouch Causa qua supra. (b) 7.H.4.17.

(*) But some do hold, that a man shall not vouch, &c. as of Land discharged of a Rent-Service. (*) 10.E.4.9.b.18.E.3. 55.54.E.3.19.

(c) Also no warranty doth extend unto meer and naked Titles, as by force of a condition with clause of Re-entry, Exchange, Mortmain, consent to the ravisher, and the like, because that for these no action doth lie; and if no action can be brought, there can be neither voucher, writ of Warrantia cartæ, nor Rebutter, and they continue in such plight and essence as they were by their original creation, and by no act can be displaced or devested out of their original essence, and therefore cannot be bound by any warranty. (c) Lib.10.fol.97. E. Stamores case. 22.Ass.31,31.Ass.p.13. 41.Ass.p.6.33.E.3. Gar. 74.

(d) And albeit a woman may have a writ of Dower to recover her Dower, yet because her title of dower cannot be devested out of the original essence, a collateral warranty of the ancestor of the woman shall not bar her. So it is of a feoffment Causa matrimonii prælocuti. (d) 34.E.3.tit.droit 72. 21.E.4.82.

(e) A warranty doth not extend to any lease, though it be for many thousand years, or to estates of Tenant by Statute and Staple, or Merchant, or Legit, or any other Chattle, but only to freehold or inheritances, as it appeareth in all Littletons cases, which he putteth in this Chapter. And this is the reason, that in all actions which Lesse for years may have, a warranty cannot be pleaded in Bar, as in an action of trespass, or upon the Statute of 5.R.2. and the like. But in those actions where the freehold or Inheritances do come in question, there the warranty may be pleaded. But in such actions which none but a tenant of the Freehold can have, as upon the Statute of 8.H.6. Assise, or the like, there a warranty may be pleaded in Bar. (e) 21.E.7.18.86.1.H.7. 12.22.11.H.7.15.66. 20.H.7.2.b. 14.H.7.22. 43.E.3.25.per Finch in quar.Imp.15.H.7 9.lib. 10.fol.97.

¶ *Quand Garrantie est fait a un home sur estate, que adonques il avoit, si lestate soit defeat, le Garranty est defeat.* Here it appeareth, that although a collateral warranty be descended, (f) yet if the state whereunto the warranty was annexed be defeated albeit it be by a meer Stranger, (as in this case that Littleton here puts by the Discontinuee) the warranty is defeated; and although the Discontinuance remain, and no Remitter wrought to the heir, yet the warranty is defeated, and bar removed; so as the issue in tail may have his Formedon, and recover the Land. Sublato principali tollitur adjunctum. (f) 3.H.7.9.b.16.E.3. tit.Continual Claim 10 9.H.4.8.Pl.Com.258.

## *Sect.* 742.

¶ EN meisme le manner est, si le discontinuee fait feoffement en fee, reservant a luy un certaine Rent, & pur default de payment un re-entry, &c. et un collateral Garrantie de ancester est fait a celuy feoffee que ad estate sur condition, &c. et moust sans issue, coment que cel Garrantie discendet sur l'issue en tail', uncore si apres le Rent soit aderet, et le

IN the same manner it is, if the discontinuee make a feoffment in fee, reserving to him a certain rent, and for default of payment a re-entry, *&c.* and a collateral Warranty of the Ancestor is made to the Feoffee that hath the estate upon condition, *&c.* and dieth without issue, albeit that this Warranty shall descend upon the issue in Taile, yet if after the rent be behinde, and the dis-

diſcontinuee entra en la terre, adonqz avera iſſue en taile ſon recovery p̄ brieſe de Formedon, pur ceo q̄ le collateral garranty eſt defeat. Et iſſint q̄ alcun tiel collateral garranty ſoit pled̄ envers liſſue en l' taile, en ſon action d̄ Formedon, il poit mẽer l'matter coꝰ eſt avandit, coment le garrantie eſt defeat, &c. & iſſint il poit bien maintainer ſon action, &c.

diſcontinuee enter into the Land, then ſhall the iſſue in tail have his recovery by writ of *Formedon*, becauſe the collateral Warranty is defeated. And ſo if any ſuch collateral warranty be pleaded againſt the iſſue in tail in his action of *Formedon*, he may ſhew the matter as is aforeſaid, how the warranty is defeated, *&c.* and ſo he may well maintain his action, *&c.*

HEre Littleton putteth another caſe upon the ſame ground and reaſon, viz. where the ſtate whereunto the warranty is annexed, is defeated, there the warranty it ſelf is defeated alſo, which is one of the maxims of the Common Law.

## *Sect.* 743.

ITem, q̄ Tenant en taile fait un feoffment a ſon uncle, & puis l' uncle fait un feoffment en fee od̄ ſque garrantie, &c. a un auter, & puis le feoffee del uncle enfeoffa areremaine l' uncle en fee, & puis l' uncle enfeoffa un eſtrange en fee ſans garrantie, & mozuſt ſauns iſſue, & le Tenant tayle mozuſt, q̄ iſſue en l' tayle voile pozt ſon br̄ de Formedon envers le ſtrange que fuit le darrein feoffee, & ceo per l' uncle, liſſue ne ſerra unque barre per le garrantie que fuit fait per le uncle al dit p̄imer feoffee, de ſon uncle, pur ceo que le dit garrantie fuit defeat & anient, pur ceo que le uncle a luy repꝛiſt cy grand eſtate de ſon p̄imer feoffee a qz le garrantie fuit fait, q̄come m̄ le feoffe avoit de luy. Et la cauſe pur que le garrantie eſt anient en ceo cas, eſt ceo, ꝑ qz q̄ le garrantie eſtoieroit en ſa force, donque le uncle garranteꝛa luy meſm̄, qz ne poit eſtre.

ALSO, if Tenant in tail make a feoffement to his Uncle, and after the uncle make a feoffement in fee with warranty, *&c.* to another, and after the feoffee of the Uncle doth re enfeoffe again the Uncle in fee, and after the Uncle enfeoffeth a ſtranger in fee without warranty, and dieth without iſſue, and the tenant in Talle dieth, if the iſſue in tail will bring his Writ of *Formedon* againſt the ſtranger that was the laſt feoffee, and that by the Uncle, the iſſue ſhall not be barred by the warranty that was made by the Uncle to the firſt feoffee of his Uncle, for that the ſaid warrantie was defeated and taken away, becauſe the Uncle took back to him as great an eſtate from his firſt feoffee, to whom the warranty was made, as the ſame feoffee had from him. And the cauſe why the warranty is defeated, is this, *viz.* that if the warranty ſhould ſtand in his force, then the Uncle ſhould warrant to himſelf, which cannot be.

Here

HEre Littleton putteth another case, where a Warranty may be defeated, as when the Uncle taketh back as large an estate, as he had made, the warranty is defeated, because he cannot warrant Land to himself. (g) And so it is if the Uncle had made the warranty to the Feoffee, his heirs and assigns, and taken back an estate in fee, and after infeoffed another; yet the warranty is defeated, for that he cannot be assignee to himself, and a man shall not regularly vouch himself as assignee of a fee simple, and the law will not suffer things inutile and unprofitable. (h) And yet if the father be infeoffed with warranty to him and his Heirs, the Father enfeoffeth his Heir apparent in fee and dieth, he (as it hath been said) shall vouch himself, and the heir in borrough English by reason of the act in law determined the warranty betwixt the father and the son.

(i) But if a man maketh feoffment in fee with warranty to the Feoffee, his heirs and assignes, and the Feoffee re-enfeoffeth the Feoffor and his wife, or the Feoffor and any other stranger, the warranty remaineth still, or if two do make a feoffment with warranty to one and his heirs and assignes, and the Feoffee re-enfeoffe one of the Feoffors, the warranty doth also remain.

(g) Temps E.1. Voucher 266. 40.E.3.14.43.E.3. 38.25.E.3.43.b.26.E.3. 68.14.E.3.Vouch.106. 16.E.3.Vouch.87.19.E. 3.Vouchee 122.17.E.3. 73.74.24.H.6.29.

(h) 40.E.3.14.2.41.E.3. 25. a.

(i) 11.H.4.20.42.17.E. 3.47.59.18.E.3.56.29. E.3.46.39.E.3.9.

## *Sect.* 744.

MEs si le feoffee feisoit estate al uncle p̄ term̄ de vie, ou en tail, sauant le reuersion &c. ou que il fait done en taile al Uncle, ou un leas pur term̄ de vie, le remainder ouster, &c. en cell cas le garrantie nest pas tout ousterment aniént, mes est mis en suspence durant lestate que l' Uncle ad. Car apres ceo que l' Uncle est mort sans issue, &c. donques celuy en le reuersion, ou celuy en le remainder barreroit issue en tayle en son briefe de Formedon per le collateral garranty en tiel cas, &c. Mes autrement est lou l'uncle avoit auxy graund estate en la terre de le Feoffee, a que l' Garranty fuit primerment fait.

BUT if the Feoffee had made an estate to his Uncle for term of life, or in tail, saving the reversion, *&c.* or a gift in tail to the Uncle, or a Lease for term of life, the Remainder over, *&c.* In this case the warranty is not altogether taken away, but is put in suspence during the estate that the Uncle hath. For after that, that the Uncle is dead without issue, *&c.* then he in the Reversion, or he in the Remainder shall bar the issue in tail in his Writ of *Formedon* by the collateral warranty in such case, &c. But otherwise it is where the Uncle hath as great estate in the Land of the Feoffee to whom the Warranty was made, as the Feoffee

¶ *Pur terme de vie, ou en taile.* Here it appeareth (k) that by taking (l) Lease for life, or a gift in tail, the warranty is suspended.

If a man enfeoffeth a woman with warranty, they intermarry and are impleaded upon the default of the husband the wife is received, she shall vouch her husband, &c. notwithstanding the warranty was put in suspence. (m) And so on the other side, if a woman infeoffe a man with warranty, and they intermarry, and are impleaded, the husband shal vouch himself and his wife by force of the said warranty.

(k) 16.E.3.Vouch.87. 44.E.3.38 26.E.3.56. 17.E.3.47.10.E.3.30. 12E.3.Counter plea de Vouch.42.14.E.3.ib.12.

(l) 6.E,2. Vouch.257. 3.E.3.ib.201.5.E.3.ib. 171.18.E.3 32.14.E.3. Vouch.109.31.E.3.ib.25 43.E.3.7.44.E.3.38. 32.E.3.Voucher 102.

(m) 4.E.2.Voucher 243 246.

(n) An infant en ventre sa mere may be vouched if God give him a birth, and if not, such a one heir to the warranty; but he cannot be vouched alone without the heir at the Common law; for Process shall be presently awarded against him.

(n) Temps E.1.Gard.1. 3.31.E.1. Brief 873 8.E 2.Vouch.2 37.11.E.3.9. ib.13.11.E 3.quar.imp. 358.38.E.3.7. & 29.41. E.3.in Dower 9 H.6.24 Pl.Com.Stowels case per Saunders & Brown.

¶ *Mes est mise en suspence.* (o) Tenant in tail maketh a feoffment in fee with warranty, and disseiseth the discontinuee, and dyeth seised, leaving assets to his issue. Some hold that in respect of this suspended warranty and assets, the

(o) 21.E.3.36. 2 & b. 38.E.3 21.44.E.3.26. 45.E.3. Title 32.44.E. 3.ibid.31.33.E. ibid.4.

issue

iſſue in taile ſhall not be remitted, but that the Diſcontinuee ſhall recover againſt the iſſue in tail, and he take advantage of his warranty, if any he hath, and after in a Formedon brought by the iſſue, the Diſcontinuee ſhall bar him in reſpect of the warranty and aſſets; and ſo every mans right ſaved.

rantie fuit fait, come le Feoffée avoit de luy, Causa patet.

hath himſelf. *Causa patet.*

## *Sect.* 745.

Sect.733.706.

¶ *OU releaſe fait per luy oue garranty.* Note, a warranty grounded upon a releaſe. Hereof you ſhall read before in this Chapter.

8.E.2. Voucher 237.

¶ *Soit attaint de felony, ou utlage, &c.* Note, according to Littleton here, there be two manner of Attainders; the one is after apparence, and that in three manners; by confeſſion, by Battel, or by verdict; the other upon Proceſs to be Outlawed, which is an attainder in Law. But (as hath been ſaid) there is a great diverſity, as to the forfeiture of Land, between an Attainder of felony by Outlawry upon an Appeal, and upon an Inditement; for in the caſe of an Appeal, The Defendant ſhall forfeit no lands, but ſuch as he had at the time of the outlawry pronounced; but in caſe of Inditement, ſuch as he had at the time of the felony committed; and the reaſon of this diverſity is evident, for that in the caſe of Appeal there is no time alledged in the writ when the felony was done; and therefore of neceſſity it muſt relate in that caſe only to the judgment of the Outlawry: but in the caſe of Inditement, there is a certain time alledged; and therefore in that caſe it ſhall relate to the time alledged in the Inditement when the felony was committed. But in the caſe of the Inditement there is alſo a diverſity to be obſerved; (o) for as hath been ſaid, it ſhall relate to the time alledged in the Inditement for avoiding of eſtates, charges, and incumbrances made by the Felon after the Felony committed; but for the mean profits of the Land it ſhall relate only to the judgment, aſwel in this caſe of outlawry, as in other caſes. And where Littleton ſaith (Attaint de felony) if a man be convicted of felony by verdict, and delivered to the Ordinary to make purgation (p) he cannot be vouched, for that the time of his Purgation (if any ſhould be) is uncertain, and the demandant cannot be delayed upon ſuch an uncertainty; but the Tenant is not without remedy, for he may have his Warrantia cartæ.

(o) 33.E.3. Forfeit.30. 38.E.3.31.3.E.4.25 19. E.4.2.Pl.Com.488.b.

(p) 8.E.2.Voucher 237. Vid.38.E.3.29.b.Simile

¶ *Attaint.* Of this word hath been ſpoken in the ſecond Book, in the Chapter of Utlainage.

Upon ſeveral Attainders of Felonies, there lie three ſeveral Writs of Eſcheat, viz. (*) Firſt, when he hath judgment to be hanged. Secondly, when he is Outlawed. Thirdly, when he abjureth the Realm.

(*) Dame Hales caſe in Pl.Com.fol.262.

(q) The Defendant in an appeal of Death did wage battel, and was ſlain in the field, yet judgement was given that he ſhould be hanged, and the Juſtices ſaid that it is altogether neceſſary, that ſuch a Judgment be given; for otherwiſe the Lord could not have a writ of Eſcheat. (r) And in Eire it hath been ſeen, that a man hath been attainted after his death, by preſentment, &c. The difference between a man attainted and convicted, is, that a man is ſaid convict before he hath judgement; as if a man be convict by Confeſſion, Verdict, or Recreancy. And when he hath his judgment upon the Verdict, Confeſſion, or Recreancy,

(q) 8.E.3. Judgm.225

(r) 15.E.3.Petition 2.

Recreancy, or upon the outlawry, or abjuration, then is he said to be attaint. And thus is the Law taken at this day notwithstanding (f) some diversitie of opinions in our books.

If a Felon be convicted by verdict, Confession, or recreancy, he doth forfeit his goods and Chattels, &c. presently, (t) For where a reason hath been yelded in our Books, that the praying of his Clergy, was a refusal of the judgement of the Law, and a slight in law, and for that cause he forfeited his goods and chattels, that doth not hold: for if a man be convict of petit Treason, or Murder, or any other crime, for which he cannot have his Clergie, yet by the very conviction he forfeiteth his goods and Chattels before attainder. And (u) Stanford (speaking of a Felon convict by verdict) saith, that he shall forfeit his goods, which he had at the time of the verdict given, which is the conviction in that case; and by the statute of 1.R.3.cap.3. no Sheriff, Bayliff, &c. shall seise the goods of a Felon before he be convicted. And the (x) old statute is worthy of noting. Provium est in curia nostra coram judiciariis nostris, quod de cetero nullus homo captus pro morte hominis vel alia felonia pro qua debet imprisonari, disseisitur de terris & tenementis vel catallis suis quousque convictus fuerit. So as by a conviction of a Felon, his goods and chattels are forfeited: but by attainder, that is by Judgment given, his Lands and Tenements are forfeited, and his blood corrupted, and not before.

(f) 40.3.12.3.E. Corone 65.8.H.2.ibid.293.21. H 7.

(t) Dame Hales case. Ubi supra 8.*H.*4.2.

(u) Stanf.Pl.cor.fol. 192.Lib.5.fol.110. Foxlies case vide 7.H.4. 11.1.R.3.cap.3.

(x) Statute de catallis felonum, ver. Magna Carta, fol.66.2.part.

(y) If the party upon his arraignment refuse to answer according to Law, or say nothing, he shall not be adjudged to be hanged; but for his contempt, to paine fort and dure, which work no attainder for the Felonie nor forfeiture of his lands or corruption of blood. But in case of high treason, if the party refuse to answer according to Law, or say nothing, he shall have such judgement by attainder, as if he had been convicted by verdict or confession.

(y) Stanf.Pl.Cor.135. 185.

¶ *Felony.* (*) Ex vi termini significat quodlibet capitale crimen felleo animo perpetratum, in which sence murder is said to be done per feloniam, and is so appropriated by law, as felonice cannot be expressed by any other word. (a) And in ancient times this word (felonice) was of so large an extent as it included high Treason; and therefore in our ancient Books, by the pardon of all Felonies, High Treason, or counterfeiting of the Great Seal, and of the Kings Come, &c. was pardoned. (b) But afterwards it was resolved, that in the Kings pardon or Charter, this word (Felonie) should only extend to common felonies, and that High treason should not be comprehended under the same, and therefore ought to be specially named, and yet that a pardon of all felonies should extend to petit Treason; wherefore by the Law at this day under the word Felony in Commissions, &c. is included petite Treason, murder, homicide, burning of houses, Burglary, Robbery, Rape, &c. Chance-medly, se defendendo, and petite Larceny. (c) For such of these crimes for the which any shall have this Judgement to be hanged by the neck till he be dead, he shall forfeit all his lands in Fee simple, and his goods and Chattels: for felony by Chance-medly, or se defendendo, or petite Larceny, he shall forfeit his goods & Chattels, and no lands of any estate of freehold or inheritance. And all Felonies punishable according to the course of the common Law, are either by the Common Law, or by statute. There is also a Felony punishable by the civil Law, because it is done upon the high Sea, as piracie, Robbery, or Murder, whereof the Common law did take no notice, because it could not be tried by twelve men. If this piracy be tried before the Lord Admiral in the court of the Admiralty, according to the civil Law, and the Delinquents there attainted, yet shall it work no corruption of blood, nor forfeiture of his Lands; otherwise it is, if he be attainted before commissioners by force of the Statute of (d) 28.H.8. By the expresse purview of that statute about the end of the reigne of Queen Elizab. certain English Pirates that had robbed on the Sea Merchants of Venice in amity with the Queen being not known, obtained a Coronation pardon, whereby amongst other things the King pardond them all Felonies. It was (e) resolved by all the Judges of England, upon conference & advisement, that this did not pardon the Piracie; for saing it was no Felony whereof the Common law took conusance, and tht statute of 28 *H.*8. did not alter the offence, but ordain a trial and inflict punishment, therefore it ought to be pardoned especially, or by words which tantamount, and not by the general name of Felony; and according to this resolution the Delinquents were attainted and executed.

(*) Glanvil lib.14.ca. 15.Malbr.ca.25.W.1. ca.15.

(a) 2.E.4.14.18.E 4.10. 23.Ass.49.1.E.3.13. Stanf.Pl. Cor.102.E.8. *H.*4.2.

(b) 22.Ass.49.

(c) Stanf.prær.45.b.16. E.3.Coron.115.& 3.E. 3.Coron.302.

(d) 28.H.8.cap.15.

(e) Hil.2.Jac.Regis. Vide Mich.7.& 8.Eliz. Dier 241. 14.Eliz.Dier.308.

Pyrat cometh of the word πειράτης, which signifieth a Rover at sea. Attainder of heresie, or Præmunire, worketh no corruption of blood, nor heresie, forfeiture of lands; but in case of præmunire, forfeiture of lands in fee simple, but not of lands intail, as formerly hath been said. (f) By some statutes it is said, Sur forfeiture de corps & de avoire, or Sub toris factura omnium quæ in potestate sua obtiner, or to be at the kings will, body, lands and goods, and the like, these are not extended to the losse of life or member, but to imprisonment, lands and goods. (g) But if an act of Parliament saith, Feit judgment de vie & member, or subeat judicium vitæ vel membrorum, in that case judgement of death shall be given, as in case of Felonie, viz. that he be

(f) Statute de Magna moneta, tempore E.1. 35.E.1.de Carliſſe.20. E.3.cap.4.

(g) W.2.c.34.Rot.Par. 25.E.1.1.E.2.de frang, priſonam.14.E 3.c.10. Stan.P.Coron.30,31.3. E.3.Coron.153. Brook tit.Coron.203 9.E.4. 26.

hanged by the neck till he be dead, and consequently his blood is corrupted (as our Author here saith) and shall forfeit as in case of Felony.

(h) There is also a Court of the Constable and Marshal, who have conusance of Contracts of Deeds of Arms, and of war out of the Realm, and also of things touching war within the Realm, which may not be determined or discussed by the Common law, and also all Appeals of offences done out of the Realm, and they proceed according to the Civil law: but these things more properly pertain to another kind of Treatise, and therefore I shall speak no more thereof in this place, but only for the satisfaction of the studious Reader, to quote some Authorities of Law touching the jurisdictions of that Court, that he may have some taste thereof.

(h) Bract. lib. 4. fol. 248. 48. E. 3. 3. 13. R. 2. c. 2. Rot. Par. 21. R. 2. nu. 19. 1. H. 4. c. 14. 13. H. 4. 4. & 5. 37 H. 6. 21. Rot. Parl. 8. R. 2 nu. 31. Fortesc. cap. 32. Rot. Parl. 2. H. 4. 74. 11. H. 4. 24 30. H. 6. 6. Stanf. Pl. cor. 65. Stat. de Assiguat 4. E. 1. Br. Cor. 196. Rot. Parl. 2. H. 6. nu. 9. Rot. Parl. 5. H. 4. nu. 39. Rot. Vasc. 9. H. 4. num. 14. 8. H. 6. num. 38. 21. E. 4. 17. b. Catesby. 10. H. 7. per Vavasor. 18. E. 2. Quar. im. 175. 6. E. 3. 41. Pasc. 14. F. 2. in Scac. le Count de Kents case 6. 39. E. 3. cor. Reg. Rot. 43. le Count de Lane case. Rot. Parl. 28. E. 3. nu. 8. Mortimers case Rot. Parl. 38. E. nu. 13. Le Count. de Arundels case.

¶ *Le ſanke eſt corrupt enter eux*, &c. * Aptly is a man said to be attainted, attinctus, for that by his attainder of treason or Felony his blood is so stained and corrupted, as first, his children cannot be heirs to him, nor to any other Ancestor, and therefore the warranty cannot binde, for thereby Heirs only are to be bound.

Secondly, If he were noble or gentle before, he and all his children and posterity are by this attainder made base and ignoble, in respect of any Nobility or Gentry which they had by their birth.

Thirdly, This corruption of blood is so high that regularly it cannot be absolutely salved but by Authority of Parliament: All which is implied in the same (&c.)

* Stanf. lib. 3. Pl. cor. 195. b. 27. E. 3. 27. 13. H. 4. 8. Vide Littl. lib. 1. in the Chap. of Dower.

## *Sect.* 746,747.

¶ *LE iſſue en Taile poit enter.* And the reason is, For that by the attainder of the Father, it is now in judgment of law but a release without warranty; for albeit the warranty at the time of the Release was effectual, yet it worketh no discontinuance unlesse it descendeth upon the issue in Taile, so as if it be defeated, extinct, or determined in the life of the tenant in tail, then no discontinuance is wrought: & so it is if Tenant in Taile hath issue, and releaseth to the Disseisor with warrantie, and after is attainted of felonie, and after obtaineth his pardon and dieth, the issue in taile may enter; * for the Pardon doth not restore the Blood, as to the warranty, nor maketh the issue in that case inheritable to the warrantie. But if the issue in Tail in that Case had been attainted of felony in the life of his Father, and obtained his Charter of pardon, and then his father had died, the issue cannot enter into the

¶ ITem, ũ Tenant en Taile ſoit diſſeiſie, & puis fait releaſe al diſſeiſor o- be Garrantie en fee, & puis le Tenant en Tayle eſt attaint, ou utlage de felony, & ad iſſue & morust, en ceſt caſe liſſue en tail poit enter ſur le diſſeiſor. Et la cauſe eſt, pur ceo que rien fait diſcontinuance en ceſt caſe forſque le Garrantie, & Garrantie ne poit diſcender al Iſſue in taile, pur ceo que le ſanke eſt corrupt perenter celuy que fiſt le Garrantie & iſſue en Taile.

ALſo, if Tenant in Tail be diſſeiſed, and after make a Releaſe to the Diſſeiſor with warrantie in fee, and after the tenant in Tail is attaint or outlawed of felonie, and had iſſue and dieth; In this caſe the iſſue in Tail may enter upon the Diſſeiſor: and the cauſe is, for this, that nothing maketh Diſcontinuance in this caſe but the warranty, and Warrantie may not deſcend to the iſſue in Tail, for this, that the blood is corrupt between him that made the Warrantie, and the iſſue in Taile.

* 27. E. 3. 77. 1. E. 2. 4. 6. E. 3. 55. 9. H. 5. 9. 31. E. 1. Diſcont. 17. 46. E. 3. Petit. 20. 26. Aſſ. 2. 49. Aſſ. 4. 29. Aſſ. 11. 13. H. 4. 8. 13. H. 7. 17. Pl. Com. in Walſinghams caſe. 3. E. 2. Diſcent Br. 64. Stanf. Pl. Cor. 195, 196. See in the Chap. of Tenant by the Courteſie, touching this matter.

## Sect. 747.

¶ CAr le Garrantie touts foits demurt a l' Common Ley, & la Common Ley eſt, Mue quant home eſt attaint ou outlage de Felonie, quel utlagarie eſt un attainder en Ley, q̃ le ſanke perenter luy & ſons fits, & touts auters queux ſerra dits ſes heires eſt corrupt, iſſent que riens per diſcent poit diſcender a alcun q̃ poit eſtre dit ſon hꝛe per le Common Ley. Et la Feme de tiel home que iſſint eſt attaint de Felonie, ne ſerra jammes endow de les Tenements ſa baron iſſent attaint. Et la cauſe eſt pur ceo que homes pluis eſchuerent de fait alcuns felonies. Mes liſſue en Tayle quant a les Tenements tailes neſt pas en tiel cas barre, pur ceo que eſt enherit̃ per force de le Statute, & nemy per le courſe de Common Ley, & pur ceo tiel attainder de ſon pier ou de ſon ancellor en le Tayle ne luy oultet̃ de ſon droit per force de le taile, &c.

FOr the Warrantie alwaies abideth at the Common Law; and the Common Law is ſuch, that when a man is attaint or outlaw'd of felony, which Outlawrie is an Attainder in Law, that the blood between him and his ſonne, and all others which ſhall be ſaid his Heires, is corrupt, ſo that nothing by diſcent may deſcend to any that may be ſaid his heire by the Common Law: And the wife of ſuch a man that is ſo attaint ſhall never be endowed of the Tenements of her husband ſo attainted. And the cauſe is, for that men ſhould more eſchew to commit Felonies. But the iſſue in Taile as to the Tenements tailed is not in ſuch caſe barred, becauſe he is inheritable by force of the Statute, and not by the courſe of the Common Law; And therefore ſuch attainder of his Father or of his Auncellour in the Taile ſhall not put him out of his Right by force of the Taile, &c.

land in reſpect of the corruption of blood upon the Attainder of himſelf. (h) And it is a general rule, That having reſpect to all thoſe whoſe blood was corrupted at the time of the attainder, the pardon doth not remove the corruption of blood neither upward nor downward. As if there be grandfather, father & ſon, & the Grandfather & father have divers other ſonnes, if the father be attainted of Felonie & pardoned, yet doth the blood remaine corrupted not only above him & about him, but alſo to all his children born at the time of his attainder. But in the caſe of Littleton, if Tenant in tail at the time of his attainder had no iſſue, & after the obtaining of his pardon had iſſue, that iſſue ſhould have been bound by the warranty; for by the pardon he was as a new creature, Tanquam filius terræ, whoſe blood upwards remains corrupted; but for the iſſue had after the Pardon, he is inheritable to his Father; and if his Father had iſſue before the pardon, and had iſſue alſo after and dieth, nothing can deſcend to the youngeſt, for that the eldeſt is living & diſabled. But if the eldeſt ſon had died in the life of the Father without iſſue, then the youngeſt ſhould inherit.

(h) Brac. Lib. 3. fol. 122. 133. 276. & lib. 5. 374. Brit. fol. 215. b. Flet. lib. 1. cap. 28.

¶ *Le Garrantie demurt al Common Ley.* The collateral Warrantie is not reſtrained by the ſtatute of Donis Conditionalibus; but a lineal warrantie is reſtrained by the ſtatute, unleſſe there be aſſets, as formerly at large hath been ſaid. Vide Sect. 711, 712.

¶ *Et la feme de tiel home que iſſint eſt attaint, &c. ne ſerra jammes endow. &c.* It is to be obſerved, that the judgement againſt a man for felonie, is, that he be hanged by the neck until he be dead, but implicative, (as hath been ſaid) he is puniſhed

punished first in his wife, That he shall lose her dower. Secondly, in his children. That they shall become base and ignoble, as hath been said. Thirdly, That he shall lose his posterity, for his blood is stained & corrupted, that they cannot inherit unto him or any other Ancestor. Fourthly, that he shall forfeit all his lands and tenements which he hath in fee, and which he hath in tails, for term of his life. And fifthly, All his goods and Chattels. And thus severe it was at the Common law, and the reason hereof was, that men should fear to commit Felonie, ut pœna ad paucos, metus ad omnes perveniat. And it is truely said, Et si meliores sunt quos ducit amor, tamen plures sunt quos corrigit timor. And so it is à fortiori in case of High Treason. But some acts of Parliament have altered the Common Law in some of these points: First, By the Statute of Donis Conditionalibus, lands intailed were not forfeited neither for Felony, nor for Treason, but for the life of Tenant in Tail: This act was made by King Edward the first, who (as our Books(i) speak) was the most sage King that ever was: (k) and the cause wherefore this statute was made, was to preserve the inheritance in the blood of them to whom the gift was made, notwithstanding any attainder of felony or Treason. And this act in historie is called Gentilitium municipale. For that by this act the families of many Noblemen and Gentlemen were continued & preserved to their posterities. And this law continued in force from the thirteenth year of King Edward the first, until the (l) twenty sixth year of King Henry the eight, when by act of Parliament Estates in Taile are forfeited by attainder of high Treason. But as to Felonies (whereof our Author here speaketh) the statute of Donis Conditionalibus doth yet remain in force, so as for attainder of felonie lands or tenements entailed are not forfeited, but only (as hath been said) during the life of Tenant in Tail, but the Inheritance is preserved for the Issues.

(i) 5.E.3.14.9.E.3.22.
(k) 7.H.4.32.H.6.71. See Lit.lib.4.cap.Dow. Sect.55.
(l) 26.H.8.cap.13.H. 33.H.8.cap.20.5.E.6. cap.11.

(m) Stanf.Pl.Com. 195.

(m) The wife of a man attainted of high Treason or petit Treason, shall not be received to demand dower, unlesse it be in certain cases specially provided for. But the wife of a person attainted of Misprision of Treason, Murther, or Felonie, is dowable since our Author wrote, (n) by the statute in that case made and provided, which is more favourable to the woman than the Common law was.

(n) 1.E.6.c.13.5.E.6. cap.11.5.El.cap.1.& 11.18.El.cap.1.12.H. 4.3. Vide Sect.55.

(o) If a Seignior be granted with warrantie and the Tenancie escheat, the Seignior whereunto the warrantie was annexed is extinct, and consequently the warranty defeated, and it shall not extend to the land, & sic in similibus.

(o) 6.H.4.1.45.E.3. Vouch.72.Pl.Com.292. 16.E.3 Age 46.18.H.3. Vouch 281.23.E.3. Garr.77. See in the Chapter of Villenage Sect.200.

If a collateral Ancestor release with warrantie, and enter into Religion, now the warrantie doth bind, but if after he be deraigned, now it is defeated.

## *Sect.* 748.

LIttleton having spoken in what Cases Warranties may be defeated and extinguished by matter in law, now he sheweth how a warrantie may be discharged or defeated by matter in Deed: and hereupon he putteth an example of a Release in three several matters:

Vide lib.8.fol.153. 154. Althams Cate. 46 E.3.2. 45.E.3.23. Vide before in the Chapter of Releases. Sect.508.

First, By a release of all warranties.

Secondly, By a release of all Covenants real.

And thirdly, By a release of all demands.

(q) 14.Ass.pl.2. 3.Eliz.Dyer 188. 9.E.4.52.b.

(q) If a man make a gift in taile with warrantie, this Warrantie is also intailed, therefore a release made by tenant in tail of the warrantie, shall not bar the issue, no more than his release shall bar the issue to bring an attaint upon a faile verdict, or a writ of error upon an erroneous

¶ Item, si Tenant en le Taile enfeoffa son Uncle, l' quel enfeoffa un auter en fee ove garr' &c. si apres l' feoffee p̄ s̄ fait releas a s̄ Uncle touts manners des garranties, ou touts manners de Covenants reall, ou touts manners de dŏes, p̄ tiel Release le Garrantie est extinct. Et si le Garrantie en tel case soit pleade envers le heire en taile, quepoyta son Briefe

Also if Tenant in Taile infeoffe his uncle, which infeoffes another in fee with warr', if after the feoffee by his deed release to his uncle all manner of warranties, or all manner of Covenants reals, or all manner of Demands, by such release the Warrantie is extinct. And if the warrantie in this case be pleaded against the Heire in Tail that bringeth his writ of *Forme*

de

de Formedon p̄ barrer le heire de ſon action, ſi l' heire avoit le dit releas, & ceo pledall, il defecera le plee barre, &c. Et mults autres cases & matters y ſont, per q̄ux home poit defeater garrantie, &c.

*don*, to barre the heire of his action, if the heire have and plead the ſaid releaſe, *&c.* he ſhall defeat the plea in bar, &c. and many other caſes and matters there be, whereby a man may defeat a Warrantie, *&c.*

judgement given againſt the father, nor his gift can barre the iſſue of the deed that creates the eſtate taile, nor of any other Deed neceſſary for defence of the title.

¶ *Après le ſeiſſe, &c. leſſa.* Littleton here putteth his caſe where one is bound to warrant: put the caſe (as) when that two make a feoffment in fee, and warrant the land to the feoffee and his heires, and (t)45.E.3.23.

the Feoffee releaſe to one of the Feoffors the warrantie, yet he ſhall vouche the other for the moitie. And ſo it is if one infeoffe two with warrantie, and the one releaſe the warranty, yet the other ſhall vouch for his moity.

¶ *Si le heire avoit le dit releaſe*, &c. Here it appeareth that the releaſe being made to the Uncle being his Anceſtor, the deed doeth after the deceaſe of the Uncle belong to him, and therefore he cannot plead it, unleſſe he ſheweth it forth.

¶ *Et mults autres caſes & matters y ſont per queux home poit defeater Garrantie*, &c. As namely by a Defeaſance as other things executorie may. Alſo a Warrantie may loſe his force by taking benefit of the ſame. In a Præcipe the Tenant vouched, and at the Sequitur ſub ſuo periculo, the Tenant and the Vouchee made default, whereupon the Demandant hath judgment againſt the Tenant. And afterwards the demandant brings a Scire facias againſt the tenant to have Execution, in this caſe the tenant may have a Warrantia Cartæ. And if in that caſe a ſtranger had brought a Præcipe againſt the Tenant, he might have vouched again, for by the judgment given againſt the tenant the warranty loſt not his force; but if the Tenant had judgment to recover in value againſt the vouchee, he ſhould never vouch again by reaſon of that warranty, becauſe he had taken advantage of the warrantie. And it is to be obſerved, that upon the proces of Summons ad warrantizandum, if the Sheriff return the Vouchee ſummoned, and he make default, the Tenant ſhall have a Capias ad valentiam; but if he return that the Vouchee had nothing, then after the Sicut alias & pluries a Sequatur ſub ſuo periculo ſhall iſſue, and there if the Vouchee make default, the Tenant ſhall not have Judgement to recover in value, for he was never ſummoned; and it appeareth of record that he hath nothing, but in the Capias ad valentiam it appeareth that he had aſſets, and he had been ſummoned before: but in ſome ſpecial caſes there ſhall be two recoveries in value upon one warranty. As if a diſſeiſor give lands to the husband and wife, and to the heires of the husband, the husband alieneth in fee with warrantie and dieth, the wife bringeth a Cui in vita, the Tenant vouch and recovereth in value, if after the death of the wife, the diſſeiſee bring a Præcipe againſt the alienee, he ſhall vouch and recover in value again. 43.E.3.17.Pl. Com. in Brownings caſe.

(l) So it is where the wife bringeth a writ of dower againſt the alienee, he ſhall recover in value, and after her death he ſhall recover in value again, upon the ſame warrantie. (l)45.E.3.Voucher 92.

In the ſame manner it is if a man be ſeiſed of a rent by a Defeaſible title, and releaſeth to the tenant of the land all his right in the land, and warranteth the land to him and his heirs, if he be impleaded for the Rent, he ſhall vouch and recover in value for the Rent; and if after he be impleaded for the Land, he ſhall vouch and recover in value again for the land: but in theſe and the like caſes, the reaſon is in reſpect of the ſeveral eſtates recovered, but for one and the ſame eſtate he ſhall never recover but once in value; and though the land recovered in value be evicted, yet ſhall he never take benefit of that warranty after. And as warranties may be defeated in the whole, ſo they may be defeated as to part of the benefit that may be taken of the ſame. (t) As he that hath a warrantie may make a defeaſance not to take any benefit by way of voucher: In the like manner that he ſhall take no advantage by way of Warrantia Cartæ, or by way of Rebutter. (t)H.6.43.13. Aſſ.8.13. E.3.Gar.24.25.37.22. 6-51.8.H.7.9.

## Sect. 749.

¶ Here Littleton sheweth, that in the same manner that a collateral warrantie may be defeated by matter in deed, or by matter in Law, so may to all intents and purposes a lineal warrantie, whereof he putteth an example of a lineal warrantie and assets.

¶ *Et un lineal Garrantie, &c. ousque ceo que Assets a luy discendist, &c.* Here it appeareth by Littleton, that a lineal warrantie and assets is a good plea in a Formedon in the discender. Wherein it is to be known, that if tenant in tail alieneth with warranty, and leave assets to descend, if the issue in tail doth alien the assets, and die, the issue of that issue shall recover the land, because the lineal warranty descendeth only to him without assets, for neither the pleading of the warranty without the assets, nor the assets without the warranty is any bar in the Formedon in the discender. But if the issue to whom the warranty and Assets descended had brought a Formedon, and by Judgement had been barred by reason of the warrantie & Assets: In that case albeit he alieneth the Assets, yet the estate taile is barred for ever: for a bar in a Formedon in the Discendor, which is a writ of the highest nature that an Issue in tail can have, is a good bar in any other Formedon in the Descendor, brought afterwards upon the same gift.

Temps E.1. Gar.89.34. E.1.ibid 88.11.E.2. ibid.83.4.E.3.24.5.E. 3.14.40.E.3.9.14.H.4. 39.24.H.8.tail Br.33.4. Mar.Dier.139.Lib.10. fol.37,38. in Mary Portingtons case.

¶ Et est assavoir, que en mesme le manner come garrantie collateral poit estre defeat per matter en fait, ou en ley, en mesme le manner poit lineal garrantie estre defeat, &c. Car si lheire en tail' porta briefe de Formedon, & un lineal garranty, de son ancestor enheritable per force de le Taile, soit plede envers luy, ove ceo que assets a luy discendist de fee simple, q̃ il ad per mesme launcestor que fist le garrantie, si lheire q̃ est demandant poit adnuller, & defeater le garrantie ceo suffist a luy. Car le discent des auters tenements de Fee simple ne fait riens p̃ barrer lheire sans le garrantie, &c.

And it is to be understood, that in the same Manner as the Collateral warrantie may be defeated, by matter in Deed, or in law; in the same manner may a lineal warrantie be defeated, *&c.* For if the heir in tail bringeth a writ of *Formedon*, and a lineal warrantie of his Ancestor inheritable by force of the taile be pleaded against him, with this that assets descended to him of fee simple, which he hath by the same Ancestor that made the warrantie, if the Heire that is demandant may adnul and defeat the warrantie, that sufficeth him: For the discent of other tenements of Fee simple maketh nothing to bar the Heir without the warrantie, *&c.*

¶ *A toy mon fitz, &c.* Here our author calleth (as many times in these Works he hath done) not only his son Richard, but every student of the law to be accounted his son, and worthily, for that seeing our Author had the honour to be in his time the father of the law, & all good students in the Law justly account themselves the sons of the Law (for otherwise they are not worthy of the profession) our Author, as a careful and provident father, as it hath manifestly appeared, gave excellent instructions in these his Books, both to his own Son, and to his adopted sons, to make them from age to age the more apt and able to understand the arguments and reasons of the Law.

¶ Ore jeo ay fait a toy mon fits trois livres.

Now I have made to thee my Son three Books.

¶ Le

¶ Le primer Liure es de Estates que homes ount en terres ou tenements: ceſtaſcauoir,

The firſt Book is of Eſtates which men have in Lands and tenements: That is to ſay,


De Tenant en Fee ſimple Cap. 1.
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De Fealtie 2
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¶ Et ceuſt deux petits liures jeo ay fait a toy, pur le melior entender de certain Chapters de le antienc Liure de Tenures.

And theſe two little Books I have made to thee, for the better underſtanding of certain Chapters of the ancient Book of Tenures.

¶ *Melior entender*, &c. And theſe Inſtitutes have I collated and publiſhed to the end that theſe three Books of our Author may be the better underſtood of the ſtudious Reader.

¶ *Ancient Liure des Tenures.* This Book may well be accounted ancient, for it was compoſed in the raign of King Edward the third, as Juſtice Fitzherbert ſaith) by a grave and diſcreet man. Fitz. in his preface to his N.B.

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## *Epilogus.*

¶ *Jeo ne voile enprender ne presumer*, &c. Here obserue the great modestie and mildnesse of our Author, which is worthy of imitation; for Nulla virtus, nulla scientia locum suum & dignitatem conservare potest sine modestia. And herein our Author followeth the example of Moses, who was a Judge, and the first writer of Law, for he was mitissimus omnium hominum qui fuerant in terris, as the holy History testifieth of him.

¶ *Les arguments & les reasons del Ley*, &c. Ratio est anima Legis; for then are we said to know the law, when we apprehend the reason of the Law, that is, when we bring the reason of the Law to our own reason, that we perfectly understand it as our own; and then and never before, we have such an excellent and inseparable propertie & ownership therein, as we can neither lose it, nor any man take it from us, and will direct us (the learning of the law is so chained together) in many other Cases. But if by your studie and industrie you make not the reason of the Law your own, it is not possible for you

¶ Et facches mon fits, Que jeo ne voil' que tu croeis, que tout ceo q̃ jeo ay dit en les dits liures soit Ley, car jeo ne ceo voile emprender ne presumer sz mon. Mes de tiels choses que ne sont pas Ley enquires, & apprendres de mes sages Masters apprises en la Ley. Nient meins comẽt que certaines choses, queux sont motes & specifies en les dit Liures, ne sont pas Ley, uncore tiel choses serra toy plus apt & able de entender & apprender les arguments, & les reasons del ley, &c. Car per les argument & les reasons en la Ley home pluis toſt auienda a le

And know my Son, that I would not have thee believe, that all which I have said in these Books is Law, for I will not presume to take this upon me: but of those things that are not Law, inquire and learn of my wise Masters learned in the Law; notwithstanding albeit that certaine things which are moved and specified in the said Books, are not altogether Law, yet such things shall make thee more apt, and able to understand and apprehend the Arguments and the reasons of the Law, *&c.* For by the Arguments and Reasons in the Law, a man more sooner shall come to the certain-

cer-

certaintie & a la connusans de la ley.

tie and knowledge of the law.

*Lex plus laudatur quando ratione probatur.*

long to retain it in your memorie. And well doth our author couple arguments and reasons together, Quia argumenta ignota & obscura ad lucem rationis proferuntur & reddunt splendida: and therefore argumentari & ratiocinari are many time taken for one: And that our Author may not speak any thing without authority (which in these institutes we have as we take it manifested) his opinion herein also agreeth with that of the learned and reverend Chief Justice of the Court of Common pleas, Sir Richard Hankford, (y) Home ne scavera de quel metal un campane est, si ne soit bien bate, ne le ley bien conus sans disputation. And another saith, (*) Jeo aye dispute cest matter pur la apprender la ley. Thus our author hath made a most excellent Epilogue or Conclusion, with a grave advice and counsel, together with the reason thereof; which all students are to know and follow, and with Scire and sequi I will conclude our Authors Epilogue.

(y) 11.H.4.37.
(*) 41.E.3.22. Kirton. Vide Sect. 377.

*Lex plus laudatur quando ratione probatur.*

This is the fourth time that our Author hath cited verses. Vide Sect. 384.443.550.

When I had finished this work of the first part of the Institutes, and looked back and considered the multitude of the conclusions in law, the manifold diversities between cases and points of learning, the varietie, almost infinite, of authorities, ancient, Constant, and concurrent withall their amiable & admirable consent in so many successions of ages, the many changes and alterations of the common law, & additions to the same, even since our author wrote, by many acts of Parliament; & that the like work of Institutes had not been attempted by any of our profession whom I might imitate; I thought it safe for me to follow the grave & prudent example of our worthy Author, not to take upon me, or presume that the reader thereto thinks, that all that I have said herein to be Law; yet this I may safely affirm, that there is nothing herein, but may either open some windowes of the Law, to let in more light to the Student by diligent search to see the secrets of the Law, or to move him to doubt, and withal to enable to him to inquire and learn of the Sages, what the law, together with the true reason thereof, in these cases is: Or lastly upon consideration had of our old Books, Laws, and Records, (which are full of venerable dignitie and antiquity) to find out where any alteration hath been, upon what ground the Law hath been since changed, knowing for certain, that the law is unknown to him that knoweth not the reason thereof, and that the known certainty of the Law is the safety of all. I had once intended for the ease of our Student to have made a Table to these Institutes, but when I considered that Tables and abridgments are most profitable to them that make them, I have left that work to every studious Reader. And for a farewel to our Jurisprudent, I wish unto him the gladsome light of Jurisprudence, the lovelinesse of temperance, the stability of Fortitude, and the solliditie of Justice.

FINIS.

# TO THE READER.

COurteous Reader, *although I have ever obſerved true, what our Honourable and Grave Author intimates in the concluſion of this Work*, That Tables and abridgements are moſt profitable to the makers, *which indeed firſt gave life to my endeavours in this taske, yet the confidence that they are not altogether unſerviceable to others, together with the undeniable importunity of ſome eſpecial friends, hath now wreſted that to the publike view which was intended for private uſe. I hope the largeneſſe of the Volume will Apologize for the length of the Table, and its language ſpeak ſomewhat in excuſe of its polixity. And becauſe of the ſmalneſſe of the Print, together with the much matter couched in every line, I have obſerved ſome notes or figures for your more ſpeedy direction, to what you are inquiſitive. Divide each page with your eye into three parts; and where you meet with this note (†) it directeth to the upper part, this note (*) to the middle part, and this (¶) inviteth you to the lower part of the page; ſo that you may eaſily at the firſt view find what you deſire, without the tedious reading over the whole page: and if you chance to miſſe what you ſeek for in the Comment, the Text will ſupply it unto you, or elſe the Printer ſhall be much to blame. Thus requeſting you to weigh theſe my labours in the even balance of your indifferent judgement, I ſubmit them to your cenſure, and take my leave.*

From the Inn. Temple.

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